2016 IL App (2d) 140963-U
No. 2-14-0963
Order filed November 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRYAN C. BURT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-246 Honorable Susan Clancy Boles, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Although the State's closing argument misleadingly attempted to put the strength of its evidence in mathematical terms, the evidence was indeed overwhelming, such that the State's argument was not a material factor in defendant's conviction. Assuming *arguendo* it was error, it was not prejudicial.

¶ 2 Following a jury trial in the circuit court of Kane County, defendant, Bryan C. Burt, was found guilty of retail theft (720 ILCS 5/16-25(a)(1) (West 2012)) and was sentenced to a 4½-year prison term. Defendant argues that his conviction must be reversed because the prosecutor improperly argued that the odds of defendant having been misidentified by eyewitnesses were astronomical. We affirm.

¶ 3 At trial, Betty Hoffman testified that she was a "member greeter" at the Sam's Club store in Elgin. It was her job to check customers' membership cards when they entered the store and to check receipts when they left. On January 3, 2013, shortly after 9 a.m., Hoffman encountered a man leaving the store with an Xbox videogame unit and a bag of chicken. The man also had a second Xbox in a Wal-Mart bag. The man handed Hoffman a two-month-old receipt that did not reflect the purchase of the items in question. Hoffman told the man that he had to pay for the items. The man walked to a self-checkout counter and Hoffman summoned the checkout supervisor, Jorge Gomez. The man returned with a receipt showing the purchase of only the chicken. Hoffman told Gomez that the man had not paid for the videogame units. Pursuant to store policy, Gomez did nothing with the Xbox in the Wal-Mart bag. He removed the other Xbox from the man's shopping cart. The man left with the chicken and with the Xbox in the Wal-Mart bag. Gomez identified defendant as the man who left the store with those items.

¶ 4 Rita Schneider, an asset protection manager at Sam's Club, testified that, on the morning of January 3, 2013, two Sam's Club employees alerted her to an "issue" with an individual who had tried to leave the store with merchandise. Schneider reviewed footage from a security camera showing a man trying to leave the store with two Xbox videogame units and a bag of chicken. From various security cameras, Schneider was able to locate footage tracking the man from the time he entered the store until he left, got into a vehicle in the parking lot, and drove off. Review of the security camera footage, along with records from the self-checkout counter, showed that the man purchased the chicken using a Sam's Club membership card issued to defendant. Schneider subsequently inventoried the store's Xboxes and discovered that one was missing.

¶ 5 On January 26, 2013, Schneider noticed an Xbox in a shopping cart in the electronics aisle. A man put a second Xbox in the cart. Schneider recognized him as the same man she had seen in the security camera footage from January 3, 2013. Schneider identified defendant in open court as the man she saw placing the Xbox in the cart. Defendant pushed the cart through one of the aisles. He stopped, pulled two plastic Wal-Mart bags out of his pockets, and put the Xboxes in the bags. Schneider notified two Sam's Club managers, requesting that they meet her near the front door. When defendant neared the front door, the two managers were waiting. The man then went back toward the electronics aisle, returned the two Xboxes to the sales floor, put the plastic Wal-Mart bags back in his pockets, and exited the building. Schneider followed defendant to the parking lot and called the police on her cell phone. Defendant yelled loudly at Schneider as she followed him. She observed defendant get into the passenger seat of a gold Pontiac Grand Am. It appeared to be the same vehicle that she had seen in the security camera footage from the January 3, 2013, incident.

¶ 6 Tim Marabillas, a detective with the Elgin police department, investigated the January 3, 2013, and January 26, 2013, incidents. Marabillas met with Hoffman on February 1, 2013. Marabillas asked Hoffman if she could identify the individual she encountered on January 3, 2013, from a photo lineup consisting of six photographs. She identified two photographs that looked "close to" the individual. One of the two photographs was of defendant. Marabillas met with Gomez on February 6, 2013. Gomez identified defendant from the photo lineup as the individual he encountered on January 3, 2013.

¶ 7 The defense presented the testimony of defendant's cousin, Eric Market. Market's mother lived in Chicago. Market and defendant attended a family gathering at her home on January 2, 2013. Market returned to his mother's home between 11:30 a.m. and noon on January

3, 2013, and was with him most of the day. Defendant took a Metra train to his own residence the following day. Market drove defendant to the Metra station.

¶ 8 During closing argument, defense counsel contended that defendant did not resemble the individual who appeared in the January 26, 2013, security camera footage. Defense counsel argued that Schneider assumed that the individual who purchased chicken on January 3, 2016, using defendant's membership card was in fact defendant, which assumption influenced her in-court identification of defendant as the individual she observed on January 26, 2013. Defense counsel also argued, *inter alia*, that Gomez's interaction with defendant on January 3, 2016, was too brief to facilitate a reliable identification.

¶ 9 On rebuttal, the prosecutor argued as follows:

> "Mathematically what are the chances when you have a lineup of six people of picking either [*sic*] one of them. Mathematically there's only a 16.66 percent chance that [Gomez] would pick the right guy out of [the security camera] video if he just—if he was just handed a lineup.
>
> If I handed this to you and had no idea what I was talking about and said pick the guy who was anywhere, anytime, you mathematically have a one in six chance.
>
> Mathematically Betty Hoffman, because she picked two, has a two in six chance, but she picked the right guy. She picked another guy that looked kinda [*sic*] like him. What's the chances [*sic*] that both of those people when given two six person lineups could pick the right guy? Much, much smaller than 16 percent because it's 16 percent that Jorge Gomez could pick the right guy.
>
> Look at the math. It's astronomical."

¶ 10 At another point in his rebuttal argument, the prosecutor returned to the subject of the photographic lineups:

> "You've got 16 percent that [Gomez] is going to pick the right person out of a lineup, multiply that by the 33 percent chance that randomly [Hoffman] could pick the right person out of a lineup, and then add that mathematically to the chances that the person who [Schneider] identifies 23 days later doing the exact same pattern, the exact same thievery, is going to get into the exact same car. It's astronomical."

Defense counsel objected to the remark, stating, "I don't believe there's any expert testimony about the astronomical statistical significance of those." The trial court overruled the objection.

¶ 11 It is well established that "[p]rosecutors are afforded wide latitude in closing argument; on appeal, the reviewing court asks whether or not the comments made at closing argument 'engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them.' " *People v. Scott*, 2015 IL App (1st) 131503, ¶ 43 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)). Reversal is warranted only if improper remarks constituted a material factor in the defendant's conviction. *Id.*

¶ 12 Defendant contends that the prosecutor, during his rebuttal argument, "attempted to employ a form of statistical analysis that had no basis in either the law or the evidence" to persuade the jury that the odds that the State's witnesses misidentified defendant were "astronomical." The essence of the prosecutor's argument was that, if both Gomez and Hoffman had chosen a photograph randomly from the lineup, there would be a one-in-six chance that Gomez would choose the photograph of "the right guy" (*i.e.*, defendant) and a two-in-six (*i.e.*, one-in-three) chance that Hoffman would choose defendant's photograph.[1] The prosecutor

[1] Hoffman chose two photographs. Had she chosen randomly, there would have been a

argued that the chances of *both* Gomez and Hoffman choosing defendant's photograph at random were "astronomical." Were that the case, the jury might be more inclined to discount the possibility that (1) Gomez misidentified defendant and (2) it was merely a coincidence that defendant's photograph was one of the two that Hoffman selected as resembling the perpetrator.

¶ 13 Initially, the prosecutor did not attempt to quantify the probability that, if Gomez and Hoffman chose randomly, they would both choose defendant's photograph. We note that " 'the probability of the joint occurrence of a number of *mutually independent* events is equal to the product of the individual probabilities that each of the events will occur.' " (Emphasis in original.) *People v. Stanley*, 246 Ill. App. 3d 393, 400 (1993) (quoting *People v. Collins*, 438 P.2d 33, 36 (Cal. 1968)). Here, multiplying the individual probabilities that Gomez and Hoffman would choose defendant's photograph (if they were choosing at random) results in a 1-in-18 chance that both Gomez and Hoffman would choose defendant's photograph. Defendant takes issue with "[t]he idea that photo array identification is comparable to a random guess." But the point of the State's argument was that the identification was *not* a random guess. Of course, that does not mean that the identification was correct. As defendant notes, factors other than chance could lead multiple witnesses to systematically misidentify a particular suspect. Furthermore, calling the 1-in-18 probability "astronomical" was not a fair comment on the evidence.

¶ 14 Defendant did not initially interpose any objection to this line of argument. As previously seen, however, defendant did object when the prosecutor later asked the jury to consider, in addition, what Schneider observed a little over three weeks after the January 3, 2013, incident:

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one-in-three chance that she would have chosen defendant's photograph.

> "You've got 16 percent that [Gomez] is going to pick the right person out of a lineup, multiply that by the 33 percent chance that randomly [Hoffman] could pick the right person out of a lineup, and then add that *mathematically* to the chances that the person who [Schneider] identifies 23 days later doing the exact same pattern, the exact same thievery, is going to get into the exact same car. *It's astronomical*." (Emphases added.)[2]

¶ 15 The thrust of this argument was that, in order to believe that defendant did not perpetrate the January 3, 2013, theft, the jury would have to accept three premises: (1) that Gomez misidentified defendant; (2) that Hoffman coincidentally selected defendant's photograph as one of two that resembled the perpetrator; and (3) either that Schneider misidentified defendant as the individual she saw on January 26, or that it was a coincidence that on that date defendant appeared to be attempting to commit a theft that was similar to the January 3, 2013, theft. In addition, as the prosecutor went on to argue after defendant's objection to the above statement, the jury would have to believe that a perpetrator who could be mistaken for defendant by multiple eyewitnesses had possession of defendant's Sam's Club membership card. It is not possible to quantify the likelihood that these premises were true, so it was misleading to frame the argument as a math problem that could be solved quantitatively. Indeed, the only probability that the prosecutor actually attempted to quantify was the chance of two witnesses randomly selecting the same photograph from a lineup. As seen, the probative value of that figure is limited. Yet, from a *qualitative* standpoint, the evidence of defendant's guilt. is highly compelling. It strains credulity to believe that someone other defendant committed the January

[2] We note that, due to rounding error, the product of 16% multiplied by 33% (roughly 1/19) is a poor approximation of the product of 1/6 multiplied by 1/3 (which is *exactly* 1/18).

3, 2013, theft using defendant's Sam's Club membership card; that, despite defendant's innocence, two eyewitnesses believed that defendant was, or at least resembled, the perpetrator; and that defendant either attempted essentially the same crime about three weeks later or was misidentified by yet another witness. The jury heard overwhelming evidence of defendant's guilt, and the prosecutorial remarks that defendant challenges could not have been a material factor in the jury's verdict.

¶ 16 Defendant attempts to analogize this case to *People v. Harbold*, 124 Ill. App. 3d 363 (1984). In *Harbold*, the defendant's murder conviction was based in part on testimony that his blood matched blood that presumably belonged to the killer. The *Harbold* court held that it was error to admit expert testimony that there was a 1-in-500 chance of an accidental match. However, as the State observes, since *Harbold* was decided, Illinois courts have repeatedly held that such evidence is admissible. See *People v. Pike*, 2016 IL App (1st) 122626, ¶ 73. Assuming *arguendo* it was error, it was not prejudicial.

¶ 17 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 18 Affirmed.