2017 IL App (1st) 153237-U

No. 1-15-3237

Order filed December 13, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 17842
	)	
ALLEN WESLEY,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a controlled substance is affirmed over his contention that the State's witness was "incredible" and "unworthy of belief." The prosecutor's rebuttal comments during closing arguments were proper. Even if they were improper, the comments did not substantially prejudice defendant because the verdict would have been the same absent the comments.

¶ 2 Following a jury trial, defendant Allen Wesley was convicted of possession of a controlled substance (cocaine) (720 ILCS 570/402(c) (West 2014)) and sentenced to 42 months in prison. On appeal, defendant contends that the State did not prove him guilty beyond a

reasonable doubt because the testimony of the State's witness, Officer Collazo, was "incredible," "unworthy of belief," and "contrary to human experience." He also contends that the State engaged in misconduct during its closing argument. For the reasons below, we affirm defendant's conviction.

¶ 3 At trial, Chicago police officer Collazo testified that, at approximately 12 a.m., on June 27, 2014, he and his partner, Officer McGuire, were in a marked squad vehicle in the area of "38 North Lavergne," in the 15th District. Collazo described the area as residential, with a one-way southbound street. There were street lights and it was "well-lit."

¶ 4 As the officers travelled southbound on Lavergne, from about 75 feet away, Collazo saw defendant ride his bicycle on the sidewalk and then on the street, travelling northbound on Lavergne. Collazo and McGuire wanted to stop defendant to conduct a "field interview" to advise him that he was travelling the wrong way. When McGuire, the driver, stopped the vehicle, the headlights were on, and defendant was about five to eight feet in front of them. Collazo observed defendant "stop his bicycle, stand over his bicycle, and with his left hand throw an object to the ground." There was nothing obstructing Collazo's view of defendant. Collazo could not immediately tell what defendant had thrown.

¶ 5 Collazo exited the vehicle, went to the area where defendant threw the "objects," which was less than two feet away from defendant. He recovered two ziplock baggies containing a "white chunky rocklike substance," which he suspected was crack cocaine. He recovered the bags between defendant and a parked vehicle, "on the street a little more towards the west side," and "not near the curb." Collazo did not see any other individuals at that time. Collazo put the

two plastic bags in an inventory bag. At the police station, Collazo gave the recovered items to McGuire, who inventoried them.

¶ 6 The State showed Collazo People's Exhibits Nos. 1 through 5, and he testified that they were photographs, taken in the daylight, of 38 North Lavergne. Collazo testified that he had been an officer for three years, "encounter[ed] narcotics" every day, and saw crack cocaine "very often."

¶ 7 On cross-examination, Collazo testified that the 15th district was "a high narcotics area" and agreed that, "at times there can be debris and trash on the streets." Defense counsel asked Collazo about the amount of debris and trash depicted in People's Exhibits Nos. 1, 3, 4, and 5. He agreed that the photographs showed a certain amount of trash or debris on the street and sidewalk.

¶ 8 Collazo testified that, when he first saw defendant, he was the only person on Lavergne, and Collazo did not see any other traffic. When the officers stopped their squad vehicle, defendant stopped immediately on his own, did not run away, and never moved from the location where he was standing. When Collazo got out of his vehicle and approached defendant, Collazo did not immediately say anything to defendant and did not order him to stop. Collazo "briefly" lost sight of the items between the time defendant dropped them to the time he recovered them. There were no narcotics found on defendant's person.

¶ 9 On re-direct, Collazo testified that, before defendant stopped his bicycle, he looked in the direction of Collazo and McGuire. Collazo testified that he did not know if the photographs in People's Exhibit Nos. 1 through 5 were taken the same day or week as the incident. He testified

that there was no debris in the immediate vicinity of where he recovered the items. He did not recover the items by the curb or sidewalk.

¶ 10 Chicago police officer McGuire testified that he had been a police officer in the 15th District for about 13 years. At about 12:15 a.m., on June 27, 2014, when he and Collazo were working routine patrol in the area of 38 North Lavergne Avenue, in Chicago, he saw defendant on a bicycle riding northbound against the flow of traffic. McGuire stopped the officers' vehicle, and he and Collazo both exited. After the officers stopped, McGuire immediately observed Collazo bend down and begin collecting items from the street. Collazo "bagged" the items and placed them into his pocket. At the police station, Collazo gave McGuire the recovered items and McGuire inventoried them according to Chicago police procedures.

¶ 11 On cross-examination, McGuire testified that the 15th District was a "high crime" and "high narcotics" area. He testified that he was familiar with the streets and areas in the 15th district and it was common for there to be trash, broken bottles, grass, and "random parts of debris" in the streets. When he first saw defendant, he intended to conduct a field interview to educate defendant on the rules about "bicycle usage" and tips on riding bicycles on the street. McGuire testified that there was "significant traffic" when they stopped defendant, and, other than the cars, there was no one else outside on the street.

¶ 12 Martin Palomo, a forensic scientist from the Illinois State Police, testified that the gross weight of the two recovered bags was .360 grams, the weight of one of the bags was .111 grams, and, after performing tests on that one bag, it was his opinion that it contained cocaine.

¶ 13 The court read the jury instructions to the jury and the case proceeded to closing arguments. Defendant argued: "Why would you go towards - - if, in fact, [defendant] had drugs

in his hands, why would you go towards an officer to show them what you have and then to drop them right in the officer's path. It doesn't make any sense. That's not what happened." He argued that the bags were already on the ground, the area was a high narcotics area, and the photographs showed that there was "trash all along the curb, all along the street." Defense counsel also specifically argued:

> "And what happens here is [defendant] rode his bike past an area where there were some baggies on the ground. [Defendant] did not have *** these two baggies. They were on the ground already. *** It's possible those two baggies were already there, and if [defendant] did throw something on the ground, it's possible that it didn't land when [*sic*] the officer was looking."

In rebuttal, the State argued:

> "Defense counsel keeps talking about how the sidewalk and curb had all this debris and that these drugs were just immediately laying there immediately where the defendant stopped and they weren't his drugs and he wasn't holding them riding his bicycle after midnight in a high narcotics area, they were just left there.
>
> Drug addicts do not leave drugs laying on the street. If there were drugs there in this high narcotic [*sic*] area, any drug addict would have picked them up."

Defense counsel objected to this comment, which the court overruled.

¶ 14 Following argument, the jury found defendant guilty of possession of a controlled substance. The trial court denied defendant's motion for new trial, stating "[t]hey found the testimony of the officers credible." It sentenced him, based on his background, to an extended term sentence of 42 months in prison. This appeal followed.

¶ 15 Defendant first contends that the State did not prove him guilty beyond a reasonable doubt of possession of the cocaine. He argues that Collazo's testimony about the incident was unworthy of belief, incredible, and contrary to human experience. Defendant requests that we reverse his conviction.

¶ 16 When we review the sufficiency of the evidence on appeal, the question is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "The jury must evaluate the evidence and witnesses' credibility, resolve any conflicts therein and draw reasonable inferences therefrom." *People v. Sanchez*, 375 Ill. App. 3d 299, 301 (2007). We will not retry a defendant (*People v. Moser*, 356 Ill. App. 3d 900, 910 (2005)), or substitute our judgment for that of the fact finder (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). We will only reverse a conviction if the evidence or the credibility of the witnesses is so improbable that it raises a reasonable doubt of defendant's guilty. *People v. Mays*, 81 Ill. App. 3d 1090, 1099 (1980).

¶ 17 To prove defendant guilty of possession of the cocaine, the State had to prove that defendant had knowledge of the presence of cocaine and it was in his immediate and exclusive control. *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). The State may prove possession by establishing that the defendant had either actual or constructive possession of the controlled substance. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Actual possession exists when the defendant exercises "immediate and exclusive dominion or control over the illicit material," but does not require the defendant to be personally touching it. *Givens*, 237 Ill. 2d at 335. To prove constructive possession, the State must prove that the defendant had "intent and capability to

maintain control and dominion" over the substance. *Scott*, 367 Ill. App. 3d at 285. " 'Knowledge and possession are factual issues, and the trier of fact's findings on these questions will not be disturbed unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of the defendant's guilt.' " *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007) (quoting *People v. Brown*, 277 Ill. App. 3d 989, 998 (1996)).

¶ 18 Viewing the evidence in the light most favorable to the State, we conclude that any rational trier of fact could have found beyond a reasonable doubt that defendant had knowledge and possession of the cocaine. The police officers stopped their vehicle about five to eight feet in front of defendant. With an unobstructed view, Collazo saw defendant stop his bicycle, stand over it, and throw "an object to the ground" with his left hand. Although Collazo could not initially determine what the object was, Collazo looked in the area where defendant had thrown it, which was less than two feet away from defendant, and recovered two ziplock bags of suspect crack cocaine. Collazo's testimony, standing alone, was sufficient to support the jury's finding that defendant had knowledge and possession of the cocaine. *People v. Bradford*, 187 Ill. App. 3d 903, 918 (1989) ("The testimony of a single law enforcement officer is sufficient to support a conviction in a narcotics case.").

¶ 19 Defendant does not contend that Collazo's testimony, if true, was insufficient to support his conviction beyond a reasonable doubt. Rather, he asserts that Collazo's testimony was unworthy of belief, implausible, incredible, and contrary to human experience. Specifically, he asserts that it was implausible that defendant would, in the early morning hours, ride his bicycle in a "heavily trafficked, high crime area" with drugs "conspicuously" in his hand, and then, when faced with an interaction with the police, "conveniently" drop the drugs just feet away from the

approaching officer. Defendant asserts that Collazo's account constitutes a "dropsy story." See *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) ("A 'dropsy case' is one in which a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that the defendant dropped the narcotics in plain view (as opposed to the officer's discovering the narcotics in an illegal search).").

¶ 20 The jury heard Collazo's testimony and defendant's argument in closing argument that Collazo's account of the events did not "make any sense." Given the jury's guilty finding, it necessarily rejected defendant's argument and determined that Collazo's testimony was credible, which was "its prerogative in its role as the trier of fact." See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52. In requesting that we reverse defendant's conviction, he is requesting that we substitute our judgment for that of the fact finder, the jury. However, it was the jury's role to determine the weight given to Collazo's testimony and we will not disturb the jury's credibility determinations (see *Moody*, 2016 IL App (1st) 130071, ¶ 52)) or reverse defendant's conviction simply because he argues on appeal that Collazo was not credible (see *Moser*, 356 Ill. App. 3d at 911).

¶ 21 Furthermore, from our review of the record as a whole, we find no reason why the jury should have found Collazo's testimony about observing defendant throw the drugs on the ground when the officers approached him incredible, contrary to human experience, or a "dropsy story." See *People v. Henderson*, 33 Ill. 2d 225, 229 (1965) ("We see no reason to say the trial court should have disbelieved the arresting officers. *** it [is] a common behavior pattern for individuals having narcotics on their person to attempt to dispose of them when suddenly confronted by authorities."). Accordingly, we are unpersuaded that we should reverse

defendant's conviction because Collazo's account of the incident was so incredible, implausible, and a "dropsy story."

¶ 22 In sum, viewed in the light most favorable to the State, the evidence was sufficient for a rational trier of fact to conclude that defendant possessed the cocaine beyond a reasonable doubt.

¶ 23 Defendant's second contention on appeal is the prosecutor engaged in misconduct during closing arguments that substantially prejudiced him and denied him a fair trial.

¶ 24 Defendant challenges the prosecutor's statement made in rebuttal: "Drug addicts do not leave drugs laying on the street. If there were drugs there in this high narcotic [*sic*] area, any drug addict would have picked them up." Defendant asserts that these comments were not based on the evidence, invited the jury to speculate, and expressed a personal opinion. He claims that the evidence was close, and the prosecutor's statements likely impacted the jury's findings. Defendant requests that we reverse his conviction and remand for further proceedings.

¶ 25 The State asserts that the prosecutor's comments were provoked or invited by defense counsel's arguments. Specifically, the State asserts that defendant's argument in closing regarding how the bags of cocaine were already on the ground before defendant arrived was not based on any evidence presented at trial. The State therefore argues that the rebuttal comments defendant challenges were invited by his argument and based on a reasonable inference from the same evidence that defendant's theory was based upon, the fact that it was a high narcotics area.

¶ 26 Prosecutors are given "great latitude" in making closing arguments. *People v. Blue*, 189 Ill. 2d 99, 127 (2000). "A prosecutor may argue the evidence presented, or reasonable inferences therefrom, even if the inference is unfavorable to the defendant." *People v. Tolliver*, 347 Ill. App. 3d 203, 224-25 (2004). Prosecutors may also discuss common sense and common experience, as

"jurors do not leave their common sense behind when they enter court." *People v. Runge*, 234 Ill. 2d 68, 146 (2009). When we review a challenge to a prosecutor's statements made during closing arguments, we must review the comments in the context of the entire closing arguments of both parties. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008). A significant factor when determining whether an improper comment impacted a jury verdict is whether it was "brief and isolated in the context of lengthy closing arguments." *Runge*, 234 Ill. 2d at 142. We "will not reverse a jury's verdict based upon improper remarks made during closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction." *Gonzalez*, 388 Ill. App. 3d at 587.

¶ 27 Initially, we note that the parties disagree on the proper standard of review. Defendant asserts that our review is *de novo*, but the State argues that it is an abuse of discretion standard. The proper standard of review for reviewing comments made during closing arguments is unsettled. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. However, most recently, in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court has suggested that we review statements made by the prosecutor during closing argument *de novo*. *People v. Herndon*, 2015 IL App (1st) 123375, ¶ 37. Because our ruling is the same under both standards of review, we need not resolve this issue. See *Herndon*, 2015 IL App (1st) 123375, ¶ 37 (finding that the conclusion would be the same under either standard).

¶ 28 We conclude that the prosecutor's rebuttal comments were proper because they were based on a reasonable inference from the evidence. McGuire and Collazo testified that the area where Collazo observed defendant throw the drugs was a "high narcotics" area. Based upon this fact, the prosecutor made a fair and reasonable inference that, in a high narcotics area, drugs

would not be left in the street. *People v. Simmons*, 342 Ill. App. 3d 185, 189-90 (2003) ("Arguments and statements based upon the facts in evidence, or upon reasonable inferences drawn therefrom, are within the scope of proper argument."). Further, the prosecutor's rebuttal comments were proper because they were invited by defense counsel's comments. See *Gonzalez*, 388 Ill. App. 3d at 590 ("counsel may comment upon defense characterizations of the evidence or case and may respond in rebuttal to statements made by the defense counsel that clearly invite a response."). Defense counsel argued in closing that the area was a high narcotics area and it was "possible" that the two "baggies" of drugs were already on the ground. Thus, defense counsel's comments were based on the evidence that it was a high narcotics area and invited the prosecutor to respond and draw reasonable inferences from that same evidence. Accordingly, the prosecutor's comments were proper.

¶ 29 Nevertheless, even if we assume that the prosecutor's rebuttal comments were improper, the comments did not substantially prejudice defendant and were not a material factor in the jury's verdict.

¶ 30 The court cured any error caused by the comments because it properly instructed the jury, both orally and in writing, that closing arguments are not evidence, "should be confined to the evidence and to reasonable inferences to be drawn from the evidence," and "any statement or argument made by the attorney, which is not based on the evidence, should be disregarded." See *People v. Jackson*, 293 Ill. App. 3d 1009, 1016 (1997) ("improper prosecutorial comments can be cured by instruction to the jury to disregard argument not based on the evidence and to consider instead only the evidence presented to it."). We must presume that the jury followed the instructions, as defendant has not demonstrated that the jury did not follow the court's

instructions in reaching its verdict. See *People v. Crawford*, 2013 IL App (1st) 100310, ¶¶ 139, 141 ("we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict").

¶ 31 Furthermore, when reviewed in the context of the entire closing argument, the prosecutor's rebuttal comments were brief and isolated and therefore did not prejudice defendant or deny him a fair trial. See *Gonzalez*, 388 Ill. App. 3d at 590 (concluding that, even if the prosecutor made an improper comment, "the challenged remark was brief and isolated and therefore did not deny defendant a fair trial"). In addition, given the abundance of evidence previously discussed and that the prosecutor's comments were brief and isolated, we cannot conclude that the jury would have reached a different verdict if the prosecutor had not made the brief comments. See *People v. Perry*, 224 Ill. 2d 312, 347 (2007) (we will only find reversible error "if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error."); See *People v. Byron*, 164 Ill. 2d 279, 296 (1995) ("The prosecutor's remarks were brief, isolated, and came after the jury had already heard an abundance of evidence regarding the defendant's guilt.").

¶ 32 For the reasons explained above, the judgment of the circuit court is affirmed.

¶ 33 Affirmed.