2018 IL App (1st) 153252-U

SIXTH DIVISION
DECEMBER 21, 2018

No. 1-15-3252

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. 14 CR 13279
	)	
MARIO JOHNSON,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not prejudiced by the State's misstatements of law during closing arguments and his defense counsel did not render ineffective assistance by failing to request additional jury instructions; the defendant's mittimus is corrected to reflect a single count of burglary.

¶ 2 Following a jury trial, the defendant-appellant, Mario Johnson, was convicted of burglary 720 ILCS 5/19-1(a) (West 2014) and sentenced to nine years' imprisonment. On appeal, he argues that he was prejudiced by several misstatements of law made by the State during closing arguments and that his defense counsel rendered ineffective assistance for failing to request additional jury instructions. He also requests that his mittimus be corrected to reflect a single

count of burglary. For the following reasons, we affirm the judgment of the circuit court of Cook County and we order that the defendant's mittimus be corrected to reflect a single count of burglary.

¶ 3 BACKGROUND

¶ 4 The defendant was charged with two counts of burglary arising out of an incident that occurred on June 28, 2014. Prior to trial, the State *nolle prossed* one of the counts. A jury trial commenced on a single count of burglary, and the following evidence was presented.

¶ 5 In the early morning of June 28, 2014, Rachel Hall was sleeping at her house that she shared with her husband, Miguel Zarate, and their two children. The house was located at 719 South Humphrey Avenue in Oak Park, Illinois and had an unattached three-car garage. Before going to sleep on the evening of June 27, 2014, Hall activated the house's alarm system, which included an alarm on the side service door of the garage (the side garage door). Once the alarm was set, it would go off if the side garage door was opened, regardless of whether the door was locked or not.[1] Hall could not remember if she locked the side garage door on the evening of June 27, 2014 before going to bed. Zarate was out of the country on a business trip at the time.

¶ 6 On June 28, 2014, Oak Park police officer Verge was on patrol, and at 3:30 a.m. he received a dispatch "for a garage burglar alarm" at 719 South Humphrey Avenue. He drove to the address and parked outside the rear of the garage. The main overhead garage door was closed, but the side garage door was ajar. While still standing outside of the garage, Officer Verge announced his office. A couple of seconds later, Officer Verge heard the side garage door close in a slow, controlled manner. He then approached the side garage door and discovered it

[1] It is unclear from the record, but it appears then when the alarm went off, it would not sound an alarm but would instead send a signal to the police.

was now closed and locked. There were no pry marks on the door, broken windows, or tools lying outside the garage.

¶ 7 Officer Dugan and Sergeant Thomas then arrived at the scene. The officers tried to enter the garage, but were unsuccessful because of the locked door. They then called Hall to wake her up and request her keys to the garage. Officers Verge and Dugan used Hall's keys to unlock the side garage door and enter the garage. Once inside, they turned on the lights, announced their office, and searched the entire garage.

¶ 8 Hall's Toyota RAV4 and Zarate's Ford sedan were parked inside the garage at the time. The officers discovered the defendant lying on his stomach underneath Hall's Toyota RAV4. Officer Verge ordered the defendant to come out from underneath the vehicle with his hands visible. The defendant complied. Officer Verge also saw a jacket underneath Hall's Toyota RAV4, next to where the defendant had been lying, and removed it. The officers found several items wrapped up inside the jacket: a flashlight, several credit cards in the name of Miguel Zarate, two pairs of sunglasses, a tire gauge, a grip strengthener, an Oak Park vehicle sticker, a car wash card, an oil change card, and two hair cut cards.

¶ 9 Officer Verge took the defendant outside of the garage and asked Hall if she had given him permission to enter the garage or the vehicles. She responded that she did not. Hall then went into the garage. She did not notice anything missing or misplaced, except for a blue tin sitting on the floor, which previously had been inside Zarate's Ford sedan. Officer Verge then showed her all the items found inside the jacket. She identified everything as items that belonged

to Zarate, which he kept inside his Ford sedan.[2] The officers then placed the defendant under arrest.

¶ 10 At trial, the defendant did not present any witnesses or evidence. His sole argument throughout the trial was that he lacked the intent to commit a theft *prior* to entering the garage, which the jury was required to find in order to find him guilty of burglary.

¶ 11 Prior to the closing arguments, the court told the jury: "[w]hat the lawyers say during the [closing] arguments is not evidence and should not be considered by you as evidence. After you have heard the arguments, I will instruct you on the law."

¶ 12 During the closing arguments, defense counsel stated: "If you can find two or more *** reasons why [the defendant] would have entered that garage that day, ladies and gentlemen, that's doubt. That's reasonable doubt. And if you find that, then you must find him not guilty." In the following rebuttal closing arguments, the State responded: "The defense's biggest argument is that we have not proven intent, [but] we have proved intent through circumstantial evidence. *** [The defendant] doesn't have to form intent prior to entering the garage." Defense counsel then objected, arguing that the State was misstating the law regarding intent. The court responded by telling the jury "I will instruct you as to what the law is in this case" and ordered the State to move on with its argument. The State then stated: "The defendant could have entered the garage for a million different reasons, but once he started taking stuff out of Mr. Zarate's car, he commit[ted] the offense of burglary." Defense counsel objected to that statement, again arguing that it misstated the law. The court responded "Again, ladies and gentlemen, I will instruct you as to the law."

[2] After Zarate returned from his business trip, he went to the police station and indentified all the items found inside the jacket as his possessions. He had last seen all of the items inside his Ford sedan. He explained that the jacket was not his, however.

¶ 13 The court then provided the jury with the following jury instructions, both verbally and in writing:

> "A person commits the offense of burglary when he, without authority, knowingly enters a building with intent to commit therein the offense of theft. To sustain the charge of burglary by unauthorized entry, the State must prove the following propositions:
>
> First: that the defendant knowingly entered a building; and
>
> Second: that the defendant did so without authority; and
>
> Third: that the defendant did so with intent to commit therein the offense of theft."

¶ 14 Following deliberations, the jury found the defendant guilty. The defendant filed a motion for a new trial arguing, *inter alia*, that the court erred in not properly instructing the jury to disregard the misstatements of law regarding intent made by the State in its rebuttal closing argument. The court denied the motion, stating that the evidence supported a finding of guilty and that the jury was instructed that arguments are not evidence. The court stated:

> "Again, with regard to intent, which both -- which you argued during your close -- the defense attorneys argued during their close, intent -- other than the defendant saying, yeah, I went in there and I was going to take items, we don't have a statement in this case. The only way a jury could reasonably find the defendant guilty is by assessing his actions here. And so there are reasonable inferences that they are instructed they are allowed to make based on what the testimony was. And I believe that they took into

> consideration the defendant's actions, where he was found, where -- - what was near him to come to the conclusion that the defendant did, in fact, commit the burglary as alleged in the count of the indictment."

¶ 15 The defendant was then sentenced to 9 years' imprisonment as a Class X offender based upon his criminal history. This appeal followed.

¶ 16 ANALYSIS

¶ 17 We note that we have jurisdiction to review the trial court's judgment, as the defendant filed a timely notice of appeal. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. July 1, 2017).

¶ 18 The defendant makes three arguments on appeal: (1) that the State made two misstatements of law regarding the requisite intent, which prejudiced him; (2) that his defense counsel rendered ineffective assistance by failing to request an additional instruction to the jury clarifying the requisite intent; and (3) that his mittimus should be corrected to reflect only a single count of burglary. We take each argument in turn.

¶ 19 The defendant first argues that the State made two misstatements of law regarding intent, which prejudiced him. He specifically takes issue with two statements the State made during its rebuttal closing argument: (1) "[the defendant] doesn't have to form intent prior to entering the garage;" and (2) "[t]he defendant could have entered the garage for a million different reasons, but once he started taking stuff out of Mr. Zarate's car, he commit[ted] the offense of burglary." The defendant claims that these two statements misstated the law because a trier of fact must find that a defendant possessed intent to commit a theft *prior* to entering the unauthorized premises in order to convict him of burglary. He argues that the court's admonishments to the jury that it would be instructed on the law did not cure the improper statements, and neither did the jury

instructions because they did not clarify the requisite intent. The defendant avers that this deprived him of a fair trial, particularly where his defense was that he lacked the requisite intent. He asks us to reverse his conviction and remand for a new trial.

¶ 20 During opening statements and closing arguments, prosecutors have a great deal of latitude and may comment upon and draw reasonable inferences from the evidence presented. *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 36. However, comments intending only to arouse the prejudice of the jury are improper. *People v. Harris*, 2017 IL App (1st) 140777, ¶ 59, *appeal denied.* Improper remarks by a prosecutor warrant a new trial when they were a material factor in the conviction. *Deramus*, 2014 IL App (1st) 130995, ¶ 36. In other words, we will find reversible error "only if *** the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). We must view the alleged improper remarks in their entirety and in context. *Deramus*, 2014 IL App (1st) 130995, ¶ 36. "Generally, where an improper comment is brief, isolated, and occurs in the context of proper arguments, it will not be deemed prejudicial." *Id*.

¶ 21 The State claims that there is a conflict in this court as to whether we review a prosecutor's remarks *de novo* or under the abuse of discretion standard. However, this court recently clarified that the appropriate standard of review is *de* novo:

> "This court has remarked multiple times that a conflict exists concerning whether a reviewing court should apply an abuse of discretion analysis or *de novo* review to allegations challenging a prosecutor's remarks during closing argument. *** However, a careful review of supreme court precedent establishes that no such conflict exists. Specifically, supreme court decisions have applied

> the two standards of review separately to the appropriate issue addressed on appeal. *** Whereas a reviewing court applies an abuse of discretion analysis to determinations about the propriety of a prosecutor's remarks during argument, a court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial." (Internal citations omitted.) *People v. Cook*, 2018 IL App (1st) 142134, ¶ 63-64.

Accordingly, we review whether the State made prejudicial misstatements of law warranting a new trial *de novo*.

¶ 22 Comparing the statements at issue (that the defendant did not have to form the intent to commit a theft prior to entering the garage) with the law on burglary (that a defendant must enter an authorized building with the intent to commit a theft), it is clear that the State misstated the law regarding intent. We need not engage in an extensive analysis on this issue. The State even concedes that, in isolation, these remarks appear "inartfully stated." However, we find these improper statements were harmless because they did not prejudice the defendant.

¶ 23 First, it is clear from the record that the jury received proper instructions from the court on the requisite intent. Prior to the closing arguments and the State's misstatements of law, the court explained to the jury that the counsels' arguments were not evidence and that the court would be providing them with instructions on the correct law. Then, after each misstatement by the State, the court admonished the jurors that it would instruct them with the correct law. The court then provided the jury with the proper instructions, both verbally and in writing. And it is well-settled that the jury is presumed to follow the instructions given by the court. *People v.*

Carrilalez, 2012 IL App (1st) 102687, ¶ 49. While the State's remarks were improper, they were simply arguments made by counsel, not the instructions given by the court. And jury instructions from the court carry more weight than arguments by counsel. *People v. Lawler*, 142 Ill. 2d 548, 564 (1991) (quoting *Boyde v. California*, 494 U.S. 370 (1990)). Moreover, when viewing all of the closing arguments in their entirety, the two improper remarks were too brief and isolated to prejudice the defendant, especially considering that his defense counsel's closing argument focused solely on his lack of intent to commit a theft *prior* to entering the garage.

¶ 24 Second, the evidence of the defendant's guilt was overwhelming. The defendant argued that he lacked the intent to commit a theft *prior* to entering the garage. But the jury heard testimony from the officers who found the defendant lying underneath Hall's Toyota RAV4 with a jacket full of items from Zarate's Ford sedan. It was 3:30 a.m. and Hall had not given him permission to enter either the garage or the vehicles. Although there were no pry marks on the door or any broken windows, Hall could not remember if she had locked the side garage door before going to sleep. The jury could infer from this circumstantial evidence that the defendant *did* intend to commit a theft *prior* to entering the garage. See *People v. Williams*, 165 Ill. 2d 51, 64 (1995) (where intent is not admitted by a defendant, the jury may infer intent from circumstantial evidence). Given the strong evidence demonstrating the defendant's guilt, we cannot say that the jury would have reached a contrary verdict had the State not made the improper remarks.

¶ 25 In support of his argument, the defendant directs us to *People v. Carbajal*, 2013 IL App (2d) 111018. In *Carbajal*, the defendant argued that he lacked the requisite intent to steal money before he illegally entered a school with a friend. *Id.*, ¶ 31. This court found that the State made prejudicial misstatements when it advised the jury that the defense's theory, that his friend was

the only one with the intent to steal before entering the school, could not absolve the defendant. *Id*., ¶ 46. This court stated: "the State essentially advised the jury that, even if it believed defendant's version of events, it did not matter; he would still be guilty of burglary." *Id*. However, in *Carbajal*, this court identified *five* misstatements of law made by the State, including two that shifted the burden to the defendant by arguing that he had not proved his innocence. *Id*. We noted that when viewing each misstatement in context of the others, it "perpetuated a theme of misstating the law." *Id.*, ¶ 37. We find *Carbajal* to be distinguishable, not only because of the amount of misstatements made in that case, but also because the court admonished the jury only after three of the five misstatements. *Id*. ¶ 48. There was also much less circumstantial evidence from which the jury could infer the defendant's intent. *Id*. ¶ 43. Thus, we are not persuaded by the defendant's argument that *Carbajal* is applicable to this case.

¶ 26 When measured against the jury instructions provided by the court and the evidence of the defendant's guilt, the State's misstatements of law did not prejudice the defendant or deprive him of a fair trial. Accordingly, we reject this argument by the defendant.

¶ 27 The defendant next argues that his defense counsel rendered ineffective assistance by failing to request additional instructions. He claims that the parties agreed to the jury instructions during the jury instruction conference that occurred *before* the State's misstatements made during closing arguments, and therefore his defense counsel should have requested the court to provide the jury with additional instructions clarifying the requisite intent once the improper statements had been made.

¶ 28 Claims of ineffective assistance of counsel are reviewed through a two-part test that was announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and was adopted by our supreme court. *People v. Burrows*, 148 Ill. 2d 196, 232 (1992).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's substandard representation so prejudiced the defense as to deny the defendant a fair trial. *Id*. Prejudice is a reasonable probability of a different result from the proceeding absent counsel's deficiency, and a reasonable probability is probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Veach*, 2017 IL 120649, ¶ 30. When a reviewing court addresses an ineffective assistance of counsel claim, it need not apply the two-part test in numerical order. *Burrows*, 148 Ill. 2d 196, 232. We review claims of ineffective assistance of counsel *de novo*. *People v. Demus*, 2016 IL App (1st) 140420, ¶ 21.

¶ 29 The defendant essentially argues that without an additional jury instruction clarifying the requisite intent, the jury could have found him guilty of burglary even if they did not believe that he had the intent to commit a theft prior to entering the garage. This argument, when carefully analyzed, is meritless. Even though jury instructions are a matter of trial strategy (*People v. Sims*, 374 Ill. App. 3d 231, 267 (2007)), we need not parse whether defense counsel's performance was substandard, because we find that the defendant was not prejudiced by the lack of additional jury instructions. The jury *did* receive clear instructions from the court regarding the requisite intent specifically that the State had to prove: that the defendant knowingly entered a building, without authority to do so, and that he did so *with the intent* to commit a theft. We cannot imagine what additional jury instructions would be, let alone how their absence prejudiced the defendant.

¶ 30 Moreover, as discussed *supra*, the evidence of the defendant's intent to commit a theft prior to entering the garage was overwhelming. We cannot say that had defense counsel requested additional jury instructions, the jury would have reached a different verdict.

Accordingly, we find that defense counsel did not render ineffective assistance and we affirm the defendant's conviction.

¶ 31 Finally, the defendant argues that his mittimus should be corrected. He points out that he was convicted of a single count of burglary because the State *nolle prossed* the other count prior to the trial, yet his mittimus currently reflects two counts of burglary. The State agrees that the defendant's mittimus should be corrected. A reviewing court may amend an inaccurate mittimus by remanding an order to the clerk of the circuit to correct it. *People v. Blakney*, 375 Ill. App. 3d 554, 560 (2007). Accordingly, we order that an amended mittimus be issued reflecting that the defendant was found guilty of one count of burglary pursuant to 720 ILCS 5/19-1(a) (West 2014).

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County. We also order that the mittimus be corrected to reflect that the defendant was found guilty of a single count of burglary.

¶ 34 Affirmed; mittimus corrected.