2019 IL App (2d) 170119-U
No. 2-17-0119
Order filed August 27, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LAURINDA M. AHRENS-LUPO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 16-CM-2736 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in admitting video evidence: although the video was taken shortly after the altercation at issue, it could support an inference of defendant's state of mind during the altercation, a relevant issue, and any undue prejudice was not particularly strong; (2) defendant showed no reversible error in the State's rebuttal argument: although the State erred in asserting that defense counsel did not believe defendant's testimony, the court's clear rejection of that line of argument and its instructions to the jury were sufficient to cure any prejudice under the circumstances.

¶ 2 Defendant, Laurinda M. Ahrens-Lupo, appeals from her convictions of battery (bodily harm, contact of an insulting or provoking nature) (720 ILCS 5/12-3(a) (West 2016)). She contends that her trial was unfair because (1) the court improperly admitted a prejudicial and

irrelevant video of her interaction with a police officer after the incident producing the charges had ended and (2) the State improperly argued that not even defense counsel believed her testimony. We hold that the court did not abuse its discretion in admitting the video and that the State's comment, although improper, does not warrant reversal. We therefore affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant by information with two counts of battery (bodily harm), one with Paul Butitta as the victim and the other with Valarie Ragan as the victim. It also charged her with two counts of battery (contact of an insulting or provoking nature), with one count relating to each of the two victims. All the charged instances of battery allegedly occurred on July 31, 2016.

¶ 5 The State filed motions *in limine* asking the court to admit, among other things, evidence that an officer who arrived on the scene observed that defendant was irate and refused to follow instructions; the court granted the motion. Defendant moved to exclude a dashboard video taken by the same officer, who arrived near the end of the altercation. The court allowed the State to play a portion ending just before the officer threatened to arrest defendant.

¶ 6 At defendant's jury trial, Ragan, a 25-year-old Apple Genius Bar technician and Northern Illinois University student, was the State's first witness. She testified that she had started dating Butitta, a colleague, in mid-July 2016. On July 31, 2016, at about 11:30 p.m., she and Butitta decided to drive from Butitta's home in Inverness to a Jewel in Barrington, the nearest Jewel that was open late. As they approached the Jewel, a vehicle started tailgating them; Butitta mentioned this to Ragan.

¶ 7 Butitta pulled his car into the lot at the Jewel, and the car that had been tailgating them pulled in nearby. Ragan told Butitta to ignore the other person and to avoid saying anything.

Ragan tried to exit the car, but discovered that the car's doors seemed to have locked. About then, a woman whom Ragan later identified as defendant got out of the other vehicle. Defendant approached Butitta and the two began "exchanging words." Ragan heard defendant say, " 'Do you have a problem?' " or, " 'You have a fucking problem?' " and Butitta say, " 'Yes, you drive like an asshole.' " Defendant closed the five feet between herself and Butitta and began hitting him on the head and upper body.

¶ 8 Ragan tried the car door again; this time it opened. Observing that defendant was now about 20 feet away, she started to get out, her phone in one hand. Defendant asked Ragan, " 'Do you want to fight?' " or " 'Do you want to fight bitch?' " Ragan responded, " '[N]o, thank you." Ragan was still seated with her feet outside the car when defendant approached, hit her in the head, and grabbed her by the hair. Ragan froze, and defendant pulled her out of the car such that her face hit the pavement and her glasses came off. Defendant dragged her a little way and the pavement left marks on her face.

¶ 9 Butitta testified that he was 26, lived in Inverness with his parents, and worked at the Apple store as a "genius." His testimony matched Ragan's concerning the drive to the Jewel. He "swerved" into the parking lot, drove past five rows, turned left at a stop sign, and parked near the door. The vehicle following him turned left one row before he did. He turned left into the parking spot and the other vehicle pulled right. The two vehicles were thus facing each other. However, the other car pulled through so that it was in the same row as Butitta's car. The driver of the other car—defendant—got out of her vehicle at about the same time he did. They began "verbally exchanging" before either started to walk toward the store: "The lady asked me if I had a problem. I said 'Yes, you drive like an asshole.' " Butitta described his response as being made in a "jokingly [*sic*] manner." They started "going back and forth at each other about

driving." She called him a "pussy." Defendant started walking toward the store, and Butitta followed a few steps behind. Defendant was still insulting him; he said, " '[K]eep walking, bitch.' " She turned and began to strike him, hitting him repeatedly on his arms and the back of his head and neck. Next, Ragan "exited the vehicle. [Defendant] yelled 'Do you want to fight, bitch?' [Ragan] said no, and [defendant] rushed towards [Ragan] and began to attack her." Butitta saw defendant grab Ragan's hair, "hit her a few times, [and] pull her down to the ground." Butitta "ran over" and tried to separate defendant and Ragan. He punched defendant in the face, but only "[a]fter she had decked [Ragan]." In the scuffle, he stepped on Ragan. Defendant then started striking Butitta again. Butitta sustained scratches to his neck and a sprained wrist from defendant's attack.

¶ 10 Joseph Flinton, a patrol officer with the Barrington Police Department and the State's final witness, testified that he was driving his patrol car near the Barrington Jewel when he noticed what appeared to be a fight in the Jewel parking lot. He turned on his car's emergency lights and pulled into the lot to investigate. He saw a woman—defendant—"approaching a male obviously agitated and aggressively moving towards him." Defendant's fists were clenched and she was yelling. A woman, whom he learned was Ragan, was on the ground. He acted immediately to separate the parties. Butitta and Ragan were cooperative, but defendant initially resisted returning to her vehicle as Flinton directed and had a "[v]ery hostile and irate" demeanor. Defendant said that she and Butitta had argued about her driving, and she admitted that she had initiated physical contact by shoving Butitta. Flinton authenticated the squad car video, and the court played 1 minute and 32 seconds of it for the jury. That portion of the recording, which is low resolution and has poor audio quality, shows Flinton getting out of the squad car and trying to get defendant, Butitta, and Ragan to go to their vehicles. Defendant

asked to get her keys first, but Flinton insisted that she go to her vehicle immediately. The voices became louder; the video does not entirely make clear how the situation escalated, but it appears clear that, as Flinton became louder in his demands that defendant return to her vehicle, defendant became more insistent that she needed her keys. Throughout much of the segment played, someone—apparently Ragan—can be heard crying.

¶ 11 Defendant was the sole defense witness. She drove to the Jewel to buy apple juice for her visiting granddaughter. She noticed nothing unusual about the traffic during her drive. She parked before the other vehicle, which parked while she was gathering her shoulder bag and keys. She was walking toward the store entrance when she heard the other driver—Butitta—shout, " 'You drive like a fucking asshole.' " His tone was "very agitated." She apologized. As she walked toward the Jewel, she heard him shout, " 'I will fucking kill you, bitch.' " This and the position of the man behind her frightened her. She turned and shoved Butitta away. He started punching her, causing a bloody nose and bruises on her arms, her ribs, and the side of her head. She had no idea when Ragan got out of Butitta's car; she knew only that, when she tried to pick up her phone and keys, "all of a sudden [she] was in a head lock," and then Ragan was "running at [her]." She thought that Butitta and Ragan might be planning to rob her and was concerned about defending herself against two people, so she threw Ragan to the ground by her hair. Flinton arrived while defendant was trying to collect her purse. Asked about her conduct with Flinton, defendant stated:

> "I was upset. I didn't have my purse, my keys. I did not have the phone. I was told to sit in the car. I wanted the windows down. It was July. It was warm. I know I just wanted my purse, my personal things. I did not know how my purse got over there. So I wanted to call home."

¶ 12 The State's main closing argument is not at issue here. We nevertheless note that, in response to an argument to which defense counsel objected as a misstatement of the evidence, the court told the jury, "[A]ny statements made by a lawyer that is not based upon the evidence should be disregarded by you." What is at issue is a portion of the rebuttal responding to defense counsel's argument that the testimony of the State's witnesses supported defendant's innocence. Defense counsel argued that defendant acted reasonably in self-defense by fighting back when an aggressive man followed her in a nighttime parking lot, especially when defendant was a small woman, about 5 feet 3 inches tall and about 115 pounds. Counsel argued that both Butitta and Ragan agreed that Butitta was angry about the tailgating. Further, the photographs showed that defendant picked a space near the store entrance, so that Butitta must have pulled up alongside her vehicle. Counsel contended that Ragan's testimony showed that she could not actually have seen some of the events to which she testified and that, when Butitta waved at Ragan, defendant could have formed the impression that he intended Ragan to help him fight her. Finally, counsel challenged the plausibility of Butitta and Ragan's testimony about how they received their injuries. Ragan's injury was more consistent with simply falling to the ground than being dragged.

¶ 13 In rebuttal, the State argued that defense counsel's attempt to rely on Butitta and Ragan's testimony showed that not even counsel believed defendant:

> "[THE STATE]: What is interesting I think from the fact that [defense counsel] basically adopted [Butitta's] version that this occurred as [defendant] was walking toward the Jewel. 'Keep walking bitch.' That's what happened. It's not close to what the defendant said happened. How interesting that defense counsel came up and did not

mention a word of defendant's own story. Why was that? Why was that? Because it was ridiculous.

* * *

And if you want to believe her story, she's walking to the Jewel. He's following her. She finally feels forced to turn around. Where should they be? Near [Butitta] or her car? No. Close to Jewel. The entrance. That is her story. That's where she should be. Then if [Ragan] gets out of the car and rushes towards her, where should they meet? Close to the Jewel entrance. Not much farther away. Well, it's amazing here defense counsel ignores the first part of the defendant's story because I don't think she believed it.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained to what counsel believed. Counsel should refrain from stating personal opinions or beliefs. You can argue the evidence and reasonable inferences to be drawn. You may proceed.

[THE STATE]: No mention of this portion of the argument, but then we want to adopt the defendant's version as pertains to [Ragan]? Right. No mention of this the way defendant depicted [Butitta], but, by the way, [Ragan] got out of the car. That part defendant said that was true. [Ragan] who you saw testify ran out of her car with venom and aggression, ran towards the defendant. It is incredible. It has no basis in fact. It has no basis in law. It is just not true."

¶ 14 The jury found defendant not guilty as to Butitta. It found her guilty of battery (bodily harm and insulting or provoking contact) as to Ragan.

¶ 15 Defendant filed a posttrial motion in which she asserted, among other things, that the court "erred in allowing the State to enter into evidence an irrelevant and highly prejudicial video," the squad car recording. Further, the State deprived defendant of a fair trial by arguing that not even defense counsel believed defendant's testimony. At the hearing, the State argued that that argument did "not rise to the level of any clear error." The court ruled that its sustaining the objection had been sufficient to prevent any unfairness:

> "I don't think that there was anything intentional or malicious about [the State's argument]. In fact, it was during rebuttal and could be argued, maybe invited, not in the way that it was done, but based upon the evidence, closing arguments as well, I'm not even concerned about the lighted [*sic*] error at this point, but having been here, watched the argument, watched the jury, heard the evidence, observed not just the words that were spoken but the manner in which it was done, the objection was timely.
>
> The objection was sustained very clearly for the jury, so while improper, the Court is more than satisfied in the context of this case that sustaining the objection especially in the way that the Court did it cured any error in that regard."

The court denied the motion and sentenced defendant to 18 months' probation. Defendant immediately filed a notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant raises two claims of error. First, she argues that the court erred in admitting the police video recording:

> "The squad car video from Officer Flinton's vehicle depicted a heated exchange between Officer Flinton and [defendant] which occurred immediately after the alleged batteries. The State used this evidence to portray [defendant] as a hostile, irrational

person who, in light of her demeanor, could not have been acting in self-defense prior to the officer's arrival. However, [defendant's] upset and agitated state immediately following a verbal altercation and fight with two people, one of whom was a twenty-six year old man who admitted to punching her in the face, did nothing to dispute her defense. As such, the video should not have been admitted because it was irrelevant to any issue of material fact."

¶ 18 Second, defendant argues that she was deprived of a fair trial by the State's assertion that even defense counsel did not believe that defendant was innocent:

"[The State's argument in] rebuttal was a two-fold violation. Not only did the prosecutor involve the defense counsel's personal beliefs, but he also improperly involved his own personal opinion in the process. *** His message was clear. If the prosecutor and defense counsel did not believe in [defendant's] innocence, then the jury should not believe in her innocence either."

¶ 19 The State rejects these arguments. First, it argues that the video evidence was relevant:

"Here, defendant's hostile and aggressive behavior at the tail end of the altercation and the ensuing minute or so was relevant to establish that she did not fear for her safety during the altercation. [Citation.] In 'light of logic' and 'accepted assumptions of human behavior,' one would expect that defendant, who had just believed she was the victim of a potential robbery, would have been more subdued and welcome to have the assistance of the police. [Citation.] Instead, defendant was openly hostile to the police from the moment they arrived. Thus, a reasonable jury could infer that defendant had been openly hostile and aggressive throughout the altercation, as opposed to becoming hostile and aggressive seconds after the altercation ended."

It further argues that, in any event, any error in admitting the video was harmless in that it was cumulative of Flinton's testimony—to which defendant made no objection.

¶ 20 Second, the State argues that the rebuttal comment at issue did not deprive defendant of a fair trial. It argues that "the State's argument, viewed in context, was a challenge to defendant's credibility and the defense theory of the case." It also argues that the court's comments in sustaining defendant's objection fully cured any prejudice and that the court's analysis of the likelihood of prejudice is entitled to weight.

¶ 21 Defendant has replied:

> "[T]he video shows *** [a] verbal altercation between [defendant] and the officer [that] was completely unrelated to *** the fight between [defendant] and the complainants. The video shows that the verbal altercation was actually about the officer refusing to allow [defendant] to collect her personal belongings. ***
>
> Moreover, the State contends that [defendant's] aggressive demeanor after the fight negated her claims of self-defense ***. However, the State again ignores that fights are heated situations in which 'logic' typically vanishes, especially where an older women [*sic*] is attacked and outnumbered by two younger individuals, one male and one female, in the middle of the night in an empty parking lot."

She further argues that the video included a great deal that was not in Flinton's testimony, including Ragan's "whimpering in the background."

¶ 22 Concerning the State's rebuttal argument, defendant replies that the court failed to correct the prejudice from those remarks. In particular, the court did not instruct the jury to disregard the remarks, and the State "continued to suggest the same improper inference: that defense counsel did not believe in [defendant's] innocence."

¶ 23 We hold that the court did not abuse its discretion in admitting the segment of video. The recording shows the moments just after the altercation ended. Defendant argues that, given her claim of self-defense, all that mattered was her state of mind in the moments before the altercation, so that the recording comes too late. We disagree.

¶ 24 "Evidence is considered 'relevant' if it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence." *People v. Illgen*, 145 Ill. 2d 353, 365-66 (1991). "All evidence must be relevant to be admissible." *People v. Dismuke*, 2017 IL App (2d) 141203, ¶ 63. "[E]vidence is inadmissible if it has little probative value due to its remoteness, uncertainty or the possibility that it will be unfairly prejudicial." *People v. Orange*, 168 Ill. 2d 138, 161 (1995). Whether evidence meets the relevancy requirement for admissibility is a matter for the trial court's discretion. *E.g.*, *Dismuke*, 2017 IL App (2d) 141203, ¶ 63. Here, the evidence suggests that the altercation was quite brief. Thus, the video is evidence of defendant's demeanor, and by inference her state of mind, within a minute or two of the critical time. It thus could support an inference of her state of mind during the altercation, which is plainly relevant to a determination of her guilt or innocence.

¶ 25 Further, it was within the court's discretion to conclude that the probative value of the evidence outweighed any unfair prejudicial effect. The recording is not graphic or, indeed, particularly clear. The most emotionally striking element is, as defendant suggests, the sobbing in the background, but overall the recording is not the kind of evidence likely to "overpersuade" the jury or encourage it to convict defendant solely based on her interaction with Flinton. See *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991) (other-crimes evidence can overpersuade a jury by encouraging it to convict a defendant as "a bad person deserving punishment" and not as the

person guilty of the charged offense). To be sure, the recording shows that defendant resisted complying with Flinton's orders. But her chief concern was that she not leave her purse unattended, which was consistent with someone who had recently feared that she was about to be robbed.

¶ 26 Turning to the rebuttal argument, we hold that no reversible error occurred. To be sure, the rebuttal argument was improper—distinctly so. Suggesting to a jury that defense counsel does not believe his or her client is inimical to the underpinnings of both the adversarial process and the right to counsel. However, defendant has not persuaded us that the State's comments were capable of doing the kind of damage that the court's proper instructions could not cure.

¶ 27 Whether argument is improper "depends *** on the nature and extent of the statements and whether they are probative of [the] defendant's guilt." *People v. Blue*, 189 Ill. 2d 99, 132 (2000).

> "Courts allow prosecutors great latitude in making closing arguments. [Citation.] In closing, the State may comment on the evidence and all inferences reasonably yielded by the evidence. [Citation.] However, argument that serves no purpose but to inflame the jury constitutes error. [Citations.] Closing arguments must be viewed in their entirety and the allegedly erroneous argument must be viewed contextually." *Blue*, 189 Ill. 2d at 127-28.

Comments are improper if they encourage the jury to focus, not on the evidence but on the person of defense counsel. See *People v. Emerson*, 97 Ill. 2d 487, 498 (1983) (comments are "improper[if they] shift the focus of attention from the evidence in the case to the objectives of trial counsel"). The comments here did not merely shift the focus from the evidence to defense counsel; they also asked the jury to consider counsel's supposed opinion in its deliberations.

¶ 28 The supreme court has described three conditions under which improper argument becomes reversible error. Those are, in order of strictest to loosest: (1) "if the improper remarks constituted a material factor in a defendant's conviction"; (2) "[i]f the jury could have reached a contrary verdict had the improper remarks not been made"; and (3) if "the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Illinois authority is unclear as to the standard of review that applies to the propriety of a prosecutor's closing remarks—abuse of discretion or *de novo*. See, *e.g.*, *People v. Burman*, 2013 IL App (2d) 110807, ¶ 26 (discussing the uncertainty). We will not resolve the issue here; we conclude that, under either standard, no reversible error occurred.

¶ 29 We conclude that, even under the loosest condition, defendant has not shown that the error here was a basis for reversal. That is, we *can* say that the prosecutor's improper remarks did not contribute to defendant's conviction.

¶ 30 First, we deem that the court adequately instructed the jury, thus protecting defendant from prejudice from the State's comment. A court's instruction to the jury that closing arguments are not evidence is protective against any prejudice that improper comments in closing arguments might otherwise cause. *People v. Boston*, 2018 IL App (1st) 140369, ¶ 103. Here, the court sustained defense counsel's objection and, with the jury present, warned the State to "refrain from stating personal opinions or beliefs," an admonition with which the State thereafter complied. We see no basis to conclude that the instructions here were insufficient to cure the prejudice.

¶ 31 Defendant suggests that the court's failure to admonish the jury directly that it should disregard the comment deprived the court's sustaining defendant's objection of its power to

protect her from the comment's prejudicial effects. We agree that such an admonition would have been preferable. However, we deem that the court's clear rejection of the State's line of argument, combined with the standard instruction that arguments are not evidence—an instruction that it reiterated mid-argument in response to an objection—was sufficient to remind the jury to follow the evidence. In attacking defendant's credibility, the State strayed from arguing the evidence to argue instead that the jury should pay attention to defense counsel's alleged disbelief of defendant. The instructions reminded the jury that it was the evidence that mattered. To be sure, instructions such as the court gave might not be enough to cure the prejudice from a particularly shocking improper argument. Some ideas, once suggested, take more to cure than an instruction to stick to the facts. Indeed, the most egregious improper arguments may force a mistrial. But the comment here was in no way of that sort. Rather, it was an overaggressive version of a proper prosecutor's argument, namely an attack on a defendant's credibility. Moreover, the State's suggestion that defense counsel's focus on the testimony of the State's witnesses suggested disbelief in defendant's testimony was facially unpersuasive; since the State's witnesses and defendant gave conflicting accounts, counsel's attack on the State's evidence was necessarily a defense of defendant. Thus, the court's instructions, although less than ideal, were sufficient to cure any prejudice here.

¶ 32 Defendant asserts that the prejudice from the comment was compounded by the prosecutor's "continu[ing] the same vein, challenging defense counsel's personal beliefs by remarking on counsel's argument." She points in particular to the State's remarks immediately after the court sustained defendant's objection to the comment:

> "No mention [by defense counsel] of this portion of the argument, but then we want to adopt the defendant's version as pertains to [Ragan]? Right. No mention of this

> the way defendant depicted [Butitta], but, by the way [Ragan] got out of the car. That part defendant said that was true. [Ragan] who you saw testify ran out of her car with venom and aggression, ran towards the defendant. It is incredible. It has no basis in fact. It has no basis in law. It is just not true."

We understand defendant to suggest not that these comments taken in isolation were improper, but instead that they echoed the improper comment in language not subject to an objection, thereby reinforcing the prejudice caused by the improper comment. We find this unpersuasive. To the extent the State's comments are coherent, they are simply a claim that defendant lacked any good argument against conviction. That claim is sufficiently distinct from the claim that defense counsel did not believe defendant to avoid reinforcing any prejudice from the improper comment. Thus, again, the instructions were sufficient to cure any prejudice.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm defendant's conviction.

¶ 35 Affirmed.