

No. 1-12-0453

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THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. M9284311
)	
ROGERS DAVIS,)	Honorable
)	Lionel Jean-Baptiste,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

- ¶ 1 *Held:* The prosecutor's comments in closing argument were highly prejudicial and warrant a new trial.
- ¶ 2 Following a jury trial, defendant Rogers Davis was convicted of reckless driving (625 ILCS 5/11-503 (West 2010)), failing to provide information or render aid (625 ILCS 5/11-403 (West 2010)), driving left of center (Chicago Municipal Code §9-40-030 (2012)) and failing to exercise due care to avoid hitting a pedestrian following a traffic accident (Chicago Municipal Code §9-40-160 (2012)). He was sentenced to 12 months' conditional discharge for reckless

driving and failure to give information to render aid and six months' conditional discharge for driving left of center and failure to give due care to a pedestrian. Defendant now appeals and argues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) his trial counsel was ineffective; (3) the trial court erred when it refused to instruct the jury on voluntariness; and (4) the prosecutor engaged in misconduct during closing argument by making statements that inflamed the jury. For the following reasons, we reverse and remand for a new trial.

¶ 3

BACKGROUND

¶ 4 At trial, Chicago Police Officer Michael Deneen, a traffic specialist since 2008, testified that on November 5, 2008, at approximately 6:15 p.m., he was assigned to investigate an accident that occurred between 81st and Cicero and 83rd and Cicero in Chicago. There were two separate crashes. One at 81st street and the other at 83rd street. Officer Deneen testified that there were six vehicles involved in the crash. One of the cars was defendant's 1978 brown Cadillac, which was facing south, and all the other cars in the accident were facing north. Officer Deneen testified that, later in his investigation, he learned that defendant was the driver of the brown Cadillac.

¶ 5 Officer Deneen's observations led him to conclude that defendant's Cadillac first hit a silver Toyota. The Toyota was pushed into a Saturn, sideswiping it. The Toyota kept moving backwards and hit a minivan. The Cadillac, after initially hitting the Toyota, went to the left and hit a car in the turn lane. The Cadillac eventually came to rest against a red Ford Explorer. Based on these observations, Officer Deneen determined that the brown Cadillac was driving south in the northbound lanes of Cicero Avenue when it initially struck the Toyota, causing the aforementioned chain of accidents. During defense counsel's cross-examination, Officer Deneen

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attempted to testify that defendant had a seizure during the accident; however, the State objected to this testimony. The testimony was not allowed because no witnesses would be called at trial that could verify defendant had a seizure.

¶ 6 Yolanda Elam testified that, on the day of the accident, she was driving her Buick SUV near the intersection of 79th Street and Cicero Avenue when defendant's brown Cadillac sideswiped her car. Elam further testified that after defendant struck her car, she saw defendant drive across the center lane divider and into the northbound side of traffic on Cicero Avenue. Elam testified that she maintained sight of defendant's car for an additional one to one-and-a-half blocks, and saw defendant's car strike a pedestrian in the road, near the 8100 block of Cicero Avenue. She saw the pedestrian "somersault" in the air and land on the concrete. She saw fluid leave the pedestrian's body as she was in the air. Finally, Elam testified that after the pedestrian was hit, she saw defendant's car continue to drive south in the northbound lanes, and ultimately collide with a Ford.

¶ 7 Upon approaching the scene at 83rd street, Elam testified that she was able to see clearly into defendant's vehicle and saw that defendant's eyes were open and that he was sitting straight up in the driver's seat. The tires on defendant's vehicle were still spinning even though it was resting against the other vehicle. Someone approached defendant's vehicle and turned it off.

¶ 8 Trinidad Gonzalez, a witness for the State, corroborated Elam's testimony. Specifically, Gonzalez testified that as she was driving south on Cicero waiting to make a left turn at 80th and Cicero, a car driving south in the northbound lane went past her on her left and hit a pedestrian. Gonzalez saw the pedestrian go "up in the air."

¶ 9 The State next called Robert Warlyn, who testified that, while stopped in the middle lane of the intersection at 83rd and Cicero traveling northbound, he observed a brown car traveling south in the northbound lanes of Cicero Avenue. Warlyn further testified that he then saw the brown car drive through the intersection and collide with a silver Toyota. Afterwards, Warlyn testified that the brown car grazed the left side of his car, and then struck a red Ford Explorer.

¶ 10 Tereso Jauregui testified that he was driving his Ford Explorer northbound on Cicero Avenue near the intersection of 83rd Street and Cicero Avenue when he observed that an accident had occurred in front of him at the intersection. Jauregui then testified that he saw a brown vehicle driven by defendant coming towards him, head on. Jauregui stated that he could see defendant's eyes were open, looking straight ahead at him. Finally, after the collision, Jauregui testified that defendant continued to accelerate his vehicle into Jauregui's until a bystander approached defendant and turned off his car.

¶ 11 Defendant testified on his own behalf that he has a seizure disorder and has taken medication for his seizures since 1990. Defendant made comments like, "I'm going to jail" and "I'm through" and "I did them wrong. I caused it."

¶ 12 Defendant testified that he has not had a seizure since 1991. When asked if he had a seizure on November 5, 2008, defendant responded, "No. I don't think so. I don't know." Defendant testified that, immediately before the accident, he was grocery shopping, and the last thing he remembers is loading his car with groceries. According to defendant, the next thing he remembered was being woken up by an officer at 83rd and Cicero and being taken to a hospital. Defendant was taken to the hospital where he believed he was given more medication.

Defendant testified that he was informed at the hospital that he had a seizure but the court instructed the jury to disregard that testimony after an objection from the State.

¶ 13 Defendant further testified that he was having problems with his seizure medication before the accident. Specifically, that he had been switched to a generic brand and was having lightning flashes, which his doctors were aware of. However, defendant testified that he was never told not to drive.

¶ 14 On cross-examination, the prosecutor asked defendant about an affidavit he prepared in which he prayed for forgiveness from God. The prosecutor asked, "[b]ecause you know you killed someone in this case; isn't that correct?" The court sustained defense counsel's objection based on the inflammatory nature of the question. Later, defendant denied seeking forgiveness from God because he knew he killed someone. When asked if he knew that someone died in this case, defendant stated that he did not recall, but later admitted that "[w]e all know somebody died."

¶ 15 In rebuttal, the State called Chicago Police Officer Roman Czygryn. Officer Czygryn testified that he was called to Christ Hospital to speak with defendant. Upon arrival, Officer Czygryn testified that defendant told him that, prior to the crash, he was driving south on Cicero after he had finished grocery shopping. Additionally, defendant told Office Czygryn that he remembered driving between 79th Street and 81st Street, but that he could not recall anything more. Finally, Czygryn testified that defendant told him that he was on generic seizure medication because Medicaid would no longer pay for the brand name. Since taking the generic version, he had been experiencing brain flashes. Defendant stated that he took his medication the morning of the incident and hadn't had any flashes on November 5, 2008.

¶ 16 The jury found defendant guilty on all four counts. The court denied defense counsel's oral motion for judgment notwithstanding the verdict, his written motion for judgment of acquittal and new trial and his supplemental motion for judgment of acquittal and new trial. The court sentenced defendant to 12 months' conditional discharge and 128 hours of community service. Defendant now appeals his conviction.

¶ 17 ANALYSIS

¶ 18 Defendant raises several issues in this case. However, we need not address all of the issues because we find that defendant's argument that the State engaged in prosecutorial misconduct during its closing argument when it made repeated inflammatory remarks about the pedestrian victim to be dispositive.

¶ 19 Generally, a prosecutor is given wide latitude in closing arguments. *People v. Page*, 156 Ill. 2d 258, 276 (1993). This includes commenting on the evidence and drawing any legitimate inferences from the facts in evidence, even if they are unfavorable to the defendant. *People v. Simms*, 192 Ill. 2d 348, 396 (2000). It is improper for a prosecutor to make comments irrelevant to the question of guilt or innocence and that only serve to inflame the jury's passions against the defendant. *People v. Blue*, 189 Ill. 2d 99 (2000). Prosecutorial misconduct warrants reversal only if it caused substantial prejudice to the defendant, taking into account the content and context of the comments, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial. *Id.* The trial court may cure any errors by giving the jury proper instructions on the law to be applied, informing the jury that arguments are not evidence or, sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark. *Id.*

¶ 20 There is a conflict regarding the correct standard for reviewing a prosecutor's remarks during argument. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. In *People v. Wheeler*, 226 Ill.2d 92, 121 (2007), and *Sims*, 192 Ill.2d at 615, our Illinois Supreme Court suggested that we should review issues of prosecutorial misconduct in closing argument *de novo*. In *People v. Hudson*, 157 Ill.2d 401, 441 (1993), however, the court suggested that we should review this issue for an abuse of discretion. We find these standards to be a distinction without a difference in this case as the result would be the same under either standard.

¶ 21 Prior to trial, defendant filed a motion *in limine* seeking to bar testimony or evidence regarding the pedestrian's death. At the hearing on the motion, defense counsel argued that the fact that defendant struck and killed a pedestrian was irrelevant to the charges. The State countered that such evidence was relevant because defendant was charged with failure to give aid where a death or injury occurred. The court found that because the State would have to establish that there was an injury or a fatality, the evidence was relevant and therefore admissible.

¶ 22 There was no dispute at trial that defendant hit a pedestrian. The State did not present evidence of the pedestrian's death in its case. During trial, Elam testified that a pedestrian hit by defendant was thrown in the air and had fluid coming out of her body before landing on the concrete. The first mention of the pedestrian's death was on cross-examination of the defendant. The evidence indicates the State emphasized injury rather than death to the pedestrian. Yet during closing argument, the prosecutor made over 25 comments about the pedestrian with repetitious emphasis on the death rather than the injury.

¶ 23 On the first page of closing argument transcript, the prosecutor stated three separate times that defendant "hit" a pedestrian. Shortly thereafter, the prosecutor stated "[a]fter that, didn't stop, through the intersection, runs down a pedestrian who's crossing the street. Keeps going as the pedestrian flies in the air, fluid coming out of her body." The prosecutor then stated that defendant caused "three separate crashes damaging multiple vehicles and killing a person." The prosecutor then asked the jury to hold defendant responsible "for those three crashes, for all that damage, and for a deceased pedestrian." When talking about the State's burden of proof for failure to give information or render aid, the prosecutor stated that one of the propositions it was required to prove was "injury or death of any person." The prosecutor then stated, "[w]e have a dead pedestrian" and "[t]he pedestrian was hit" by defendant's car. The prosecutor then argued with respect to the pedestrian that "Yolanda Turney saw this person fly in the air. She saw fluid coming from this person's body, and she saw this lifeless body land on the concrete." The prosecutor then remarked two separate times that defendant didn't stop when he hit the pedestrian. The prosecutor later said, "[a]nd you know that that pedestrian was dead as a result of him." She went on to say, "the brown Cadillac driven by him hit her at which time she flew in the air, came to a rest and he told you himself, she's dead now."

¶ 24 In his closing argument, defense counsel stated:

"Additionally, the injury or death and the failure to give information or render aid must occur as a result of the accident. We've heard no testimony about a death. We've heard a lot of assumptions. We've heard a lot of argument. We didn't have a single witness stand up here and tell us what happened to that person that was allegedly hit by [defendant]. We don't know. And we can't guess."

¶ 25 In rebuttal, the prosecutor argued, "[y]ou heard from two separate witnesses, Yolanda, and Trinidad Gonzalez who told you he saw him strike that pedestrian, didn't even slow down, went right through her, threw her into the air; and Yolanda told you about how she saw that fluid coming from the body. You heard from the Defendant that, you know, he killed her." After an objection, the prosecutor stated, "he killed the pedestrian and kept going." After another objection, the prosecutor was warned to "temper that" and the court instructed the jury to disregard "the relationship to the Defendant's killing." The prosecutor then argued that the State did not have to prove that "he purposely killed someone" and that "[i]f we had to prove to you motive, he'd be charged with murder." The court then instructed the prosecutor to "temper their comments on the issue of murder." The prosecutor then stated, "[y]ou never heard from the person that was hit by the Defendant at 81st Street because she's dead." She then stated to the jury that "you won't see an instruction that says we have to prove that the person was killed but that's the fact. That's why she's not here because she's –she can't be here." Later, the prosecutor referred to defendant's car as "a weapon that was used in this case when it struck a pedestrian." In conclusion, the prosecutor stated that the jury would get a map showing the accident scene and "[t]he path that led to the death of a pedestrian."

¶ 26 The State argues that given the testimony, "the statements made during the prosecutor's closing argument that a death occurred were reasonable inferences from the evidence. Additionally, they were relevant to the offense of failing to give aid where a death or injury occurs." Furthermore, the State suggests that the statements made in rebuttal closing were in response to defense counsel's closing argument.

¶ 27 The question here is whether the prosecution's closing statements exceeded the permissible boundaries and served solely to inflame the passions or fears of the jury. *People v. Terry*, 99 Ill. 2d 508, 517 (1984); *People v. Anderson*, 95 Ill. App. 3d 492, 496 (1981). We determine this from the totality of the circumstances surrounding the comments, including the language used and the relationship to the evidence in the case. *People v. Witted*, 79 Ill. App. 3d 156, 165 (1979). Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. *People v. Linscott*, 142 Ill.2d 22, 28 (1991). If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id.*

¶ 28 For clarity, defendant was not charged with murder or involuntary manslaughter in this case. He was charged with two misdemeanor counts: reckless driving and failing to provide information or render aid in violation of the Illinois Vehicle Code (625 ILCS 5/11-503 (West 2010); 625 ILCS 5/11-403 (West 2010)); and two petty offenses: driving left of center (Chicago Municipal Code §9-40-030 (2012)) and failing to exercise due care to avoid hitting a pedestrian following a traffic accident (Chicago Municipal Code §9-40-160 (2012)). Relevant to this discussion are the charges of failure to render aid or provide information after an accident and failing to exercise due care to a pedestrian.

¶ 29 With respect to the failure to render aid charge under section 11-403 of the Illinois Vehicle Code (Code), a defendant violates this section when he is involved in an accident resulting in injury or death of a person or damage to a vehicle and fails to: (1) provide his or her

name and address, registration number, and the name of the vehicle's owner, (2) display his or her driver's license to the victim upon request, and (3) render reasonable assistance to any injured individual. 625 ILCS 5/11-403 (West 2010); *People v. Digirolamo*, 179 Ill. 2d 24, 38 (1997).

To sustain a conviction for failing to exercise due care to a pedestrian, the State was required to prove that defendant failed to "exercise due care to avoid colliding with any pedestrian."

Chicago Municipal Code §9-40-160 (2012).

¶ 30 Although we do not disagree with the State that evidence of the pedestrian's injury was relevant to the charges of failing to render aid and failure to exercise due care to a pedestrian, we note that a defendant is entitled to have his guilt or innocence determined solely with reference to the crime with which he is charged. *People v. Gregory*, 22 Ill. 2d 601 (1961). The comments made by the prosecutor in this case went well beyond commenting on relevant evidence and only served to inflame the jury's passions against the defendant. *Blue*, 189 Ill. 2d at 99. Especially in this case where there was no dispute that the pedestrian was injured as a result of being struck by defendant's vehicle.

¶ 31 "Although the prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different." *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Improper comments by the prosecutor themselves will not warrant reversal unless those comments were a material factor in convicting the defendant. *Wheeler*, 226 Ill. 2d at 123. A significant factor in reviewing the impact of a prosecutor's allegedly improper comments on a jury verdict is whether the comments were

isolated and brief within the context of a lengthy closing argument. *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 32 The prosecutor's comments in this case regarding the pedestrian were neither isolated nor brief. The State established that a pedestrian was injured when struck by defendant's vehicle through the testimony of Elam and Gonzalez, thereby establishing elements of the offenses of failing to provide information or render aid and failing to exercise due care to a pedestrian, during its case in chief. There was no dispute that this happened. The defendant even admitted on direct examination that the pedestrian died. The defense was centered on defendant's history of a seizure disorder and his reaction to a new seizure medication. This defense was directed to the question of whether defendant acted voluntarily and whether he knowingly failed to provide the required aid and assistance. Nonetheless, the prosecutor in her zealotry to have the jury return a finding of guilty relentlessly focused on this fact and continuously highlighted it to the jury over 25 times. In addition, the prosecutor talked about defendant "killing" the pedestrian as if defendant did so knowingly and intentionally. The prosecutor made comments that defendant "killed the pedestrian and kept going." She also referred to defendant's car as a murder weapon, "a weapon that was used in this case when it struck a pedestrian." These intemperate comments were extremely inflammatory and highly prejudicial as they were irrelevant to the specific crime defendant was charged with and the evidence presented in the State's case. We cannot say that without the prosecutor's improper repeated reference to defendant's involvement in the pedestrian's death, the result of the trial would not have been different.

¶ 33 We similarly reject the State's argument that the prosecutor's comments during rebuttal closing were in response to defense counsel's closing argument. We note the prosecution may

respond in rebuttal to statements made by defense counsel that clearly invite a response. See *People v. Gonzalez*, 379 Ill. App. 3d 941, 954–55 (2008). Given defense counsel's closing argument in this case, the prosecution could have properly responded to defense counsel's statement that there was no testimony about what happened to the pedestrian in a temperate manner by reiterating defendant's testimony that the pedestrian died. However, the prosecutor went overboard in her rebuttal rant, as opposed to a rebuttal argument, when she depicted a murder and strayed so often from the proper line of argument that the cumulative effect was to deprive defendant of a fair trial. *People v. Abadia*, 328 Ill.App.3d 669, 684 (2001).

¶ 34 For the foregoing reasons, we reverse and remand for a new trial.

¶ 35 Reversed and remanded.