

2016 IL App (1st) 140300-U
No. 1-14-0300
September 13, 2016

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 10 CR 6164
)	
FLETCHER DOGAN,)	The Honorable
)	Joan Margaret O'Brien,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Evidence that police arrested the defendant three blocks from the scene of a shooting with gunshot residue on his hands, less than a block from the location of the gun that fired the bullet that hit the shooting victim, at the spot where a police officer said he saw the defendant toss the gun, sufficed to prove the defendant guilty of aggravated battery with a firearm.

¶ 2 A jury found Fletcher Dogan guilty of aggravated battery with a firearm. The trial court sentenced him to 25 years in prison. In this appeal, Dogan argues that (1) the evidence does not prove him guilty; (2) prosecutorial misconduct in closing argument deprived him of a fair

trial; and (3) the trial court imposed an excessive sentence. We hold that the circumstantial evidence supports the conviction, the prosecutor's comments fell within the bounds of permissible response to defense counsel's argument, and Dogan's prior criminal history justified the lengthy sentence. Accordingly, we affirm the trial court's judgment.

¶ 3

BACKGROUND

¶ 4

Around 7:30 p.m. on December 21, 2009, Curtis Pittman drove a van to 90th Street and Union Avenue to see Art Bryant. As Pittman and Bryant walked from Bryant's home towards the van, a man ran up from behind them and knocked Bryant down. Pittman got into the van and tried to start it. The man, who wore a black face mask and a skull cap, came to the driver's side of the van and demanded money. Bryant got up and ran back to his home. Pittman refused to give the man money. The man tried to pull Pittman out of the van. Pittman kicked the man off and started the van. The man pulled out a gun and fired three or four shots. One hit Pittman's side.

¶ 5

Pittman drove to his sister's home a few miles away. Once he arrived, he collapsed. A bullet fell out of his jacket. His sister's family called police and protected the bullet, making sure no one touched it before police arrived. An ambulance took Pittman to a nearby hospital, where he underwent surgery.

¶ 6

Around 8 p.m. that night, police officers arrested Dogan on 93rd Street, about a block away from Union. Dogan wore a black skull cap and carried a black face mask at the time of the arrest. A sample of the surface of his hands showed traces of antimony, barium and lead, indicating that he had probably been near a gun when it discharged, shortly before the evidence technician swabbed the hand. A grand jury indicted Dogan for attempted murder,

attempted armed robbery, unlawful use of a weapon by a felon (UUWF), and aggravated battery with a firearm.

¶ 7 At the jury trial, Officer Adam Schur of the Chicago Police Department testified that in response to a call about the shooting, he drove to 90th and Union to canvas the area for witnesses. At 92nd and Union, he saw a man out on the street, walking towards a house on the corner. The man went to the door and tried the knob, but when the door did not open, he walked back toward the street. Schur identified Dogan in court as the man he saw near 92nd and Union. Schur testified that he rolled down his car's window and asked Dogan whether he had heard any shots fired. Dogan answered, "I just got out here." Dogan walked quickly past the police car. When Schur got out of the car, Dogan started to run. Schur said, "Stop. I want to talk to you." Dogan ran faster and Schur followed. Dogan ran through a gangway, and Schur ran through the gangway of the house next door, trying not to lose sight of Dogan. Schur encountered a fence between the gangway and the alley, and he started to climb.

¶ 8 Schur testified that as he climbed, he saw Dogan lob a handgun behind a garage, about 45 feet from Schur. Dogan then sprinted south to the end of the alley, and turned onto 93rd Street. Schur got over the fence, dropped into the alley and pursued Dogan. He found Dogan walking on 93rd Street, about a block off of Union. Schur took Dogan into custody. Schur directed other officers to the garage by the alley where he saw Dogan lob the gun.

¶ 9 Officer Samuel Lagunas testified that he found a black handgun with a brown handle by the garage to which Schur directed him. Lagunas identified in court a handgun as the gun he found. Schur identified the same gun as the gun he saw Dogan toss. Pittman identified the

same gun as the gun he saw in the hand of the man who shot him. A ballistics expert testified that the same gun discharged the bullet recovered from Pittman's jacket.

¶ 10 Schur identified a skull cap and face mask in court as the items he recovered from Dogan at the time of the arrest. Pittman identified the same mask and skull cap as the ones worn by the man who shot him.

¶ 11 Pittman admitted that he did not see the face of the robber because of the skull cap and mask. He viewed a lineup, but he made no identification, and in court he could not identify the robber. Pittman also admitted that when he spoke to police, he described the robber as about 5 feet 6 inches tall and about 160 to 180 pounds. According to the presentence investigation report, Dogan stood 5 feet 10 inches and weighed about 215 pounds.

¶ 12 The expert who tested the sample from Dogan's hands admitted that secondary transfer of the elements could also account for the findings from her tests. For example, if someone discharged a gun then put his hands on a table, and Dogan grabbed the same part of the same table shortly thereafter, Dogan could pick up significant amounts of antimony, barium and lead. The expert admitted that on the basis of her tests, she could not conclude with certainty that Dogan fired a gun.

¶ 13 The prosecution also presented evidence that the State conducted a thorough investigation. A fingerprint specialist found no fingerprints on the gun. A swab of the gun designed to find residual DNA recovered nothing to test. An investigator reported the steps he took to find Bryant. He spoke with several persons who knew Bryant, but the investigator could not find Bryant. The investigator testified that he spoke with the man who owned the

building where Bryant had lived in 2009, at the address nearest to the shooting. According to the investigator, the owner "said it was a crack house before he bought it."

¶ 14 In closing, defense counsel first argued:

"[I]t's all going to boil down to, beyond a reasonable doubt.

*** First thing, beyond, beyond, further than, not equal to, further than a reasonable doubt. Second thing, a, a, a reasonable doubt. The judge is not going to tell you more than seven reasonable doubts, more than ten reasonable doubts. The judge is going to tell you beyond a reasonable doubt. So if you look at the fingerprints and you got doubt, if you look at the DNA and you got a doubt, *** and that doubt is reasonable, our system of government requires that he goes home."

¶ 15 Defense counsel then summarized the evidence, starting with Pittman's testimony.

Counsel said:

"[Pittman] tells us, oh, I went *** to see my friend, Art, at a house that the State's own investigator says his investigation indicated that it was a crack house before 2011. That's their investigator who said that."

¶ 16 The prosecutor argued in rebuttal:

"[T]he burden of proof is not beyond all doubt. It is not a burden unique to Fletcher Dogan. This is a burden that every criminal prosecution in this county, in this state, in this country meets in a criminal case. It is not proof beyond all doubt."

¶ 17 The court overruled defense counsel's objection to the argument. Later, the prosecutor said:

"[C]ounsel *** talked to you a little bit about that being a crack house, the house where this incident occurred ***. What bearing that has on this case is really none. *** [T]he purpose of telling you that was to dirty up Mr. Pittman."

¶ 18 The court again overruled defense counsel's objection.

¶ 19 The jury found Dogan not guilty of attempted murder, but guilty of attempted armed robbery, UUWF, and aggravated battery with a firearm. Defense counsel filed a motion for judgment notwithstanding the verdict, but he filed no motion for a new trial, and he raised no issue concerning closing arguments in his posttrial motions. The trial court denied the motion for judgment notwithstanding the verdict.

¶ 20 At sentencing the State presented Pittman's victim impact statement and a presentence investigation report that showed that Dogan had ten prior felony convictions and seven misdemeanor convictions. Dogan's record included four convictions for possession of narcotics, three for retail theft, one for possession of a stolen motor vehicle in 1991, and one for a robbery in 1995. Defense counsel argued that the convictions did not involve violence, and most related to substance abuse and addiction. Dogan had earned a GED in 1997, and he worked in the Cook County Jail's job rehabilitation program.

¶ 21 The trial court noted that the courts for the prior convictions had imposed rather lenient sentences, including probation for the robbery conviction, giving Dogan "opportunity after opportunity to change how [he] ch[ose] to live [his] life." The trial court found that only the robbery counted as a prior crime of violence, but in view of the permanent pain Dogan

inflicted and his extensive criminal history, the court sentenced Dogan to 25 years in prison for aggravated battery with a firearm. The court imposed no sentence for UUWF and attempted armed robbery. The trial court denied Dogan's motion for reconsideration of the sentence. Dogan now appeals.

¶ 22

ANALYSIS

¶ 23

Dogan argues that the evidence did not prove him guilty, prosecutorial misconduct in closing argument warrants a new trial, and the trial court imposed an excessive sentence. The issues require separate standards of review.

¶ 24

Sufficiency of the Evidence

¶ 25

This court will not reverse a conviction for insufficient evidence "unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Dogan emphasizes that Pittman could not identify him as the assailant and described the assailant as someone much smaller than Dogan; Dogan wore only common, appropriate clothing for a cold December night, without any distinctive characteristics; and Schur's identification of him as the man he saw toss the gun lacks credibility, because that man had a long lead on Schur as Schur scaled the fence, and the man would have kept sprinting away, while Schur found Dogan calmly walking on 93rd Street. Dogan adds that the assailant would not have remained anywhere near 90th Street and Union Avenue 30 minutes after the shooting, when Schur found Dogan on 93rd Street, about 3 blocks from the crime scene.

¶ 26

Dogan wore a skull cap and carried a face mask at the time of the arrest; Pittman identified the skull cap and face mask as the ones worn by his assailant. At the time of the

arrest, police officers coincidentally found a gun not far from Dogan, in the spot to which Schur directed them, and ballistics tests showed that the gun fired the bullet that injured Pittman. Dogan's hands coincidentally had gunshot residue. A trier of fact could find that Dogan acted suspiciously when he first tried to enter a house for which he apparently had no key, and then when he ran from a police officer who had only asked for information about a nearby shooting. We find that the many coincidences (i) Dogan's arrest near the place Pittman was shot, (ii) thirty minutes after the shooting, (iii) with clothing similar to that of the shooter, (iv) with gunshot residue on his hands and (v) near the gun that fired the bullet that hit Pittman, together with Schur's testimony, sufficiently support the conviction for aggravated battery with a firearm. See *People v. Carter*, 197 Ill. App. 3d 1043, 1046-48 (1990) (coincidence of finding defendant near burglary scene with blood on his hands, like blood at burglary scene, and with stolen property, supported convictions for burglary); *People v. Hart*, 214 Ill. 2d 490, 518-19 (2005) (finding defendant near scene of robbery, wearing clothes like robbers and driving off when police ordered him to stop sufficiently supported conviction for robbery).

¶ 27

Closing Argument

¶ 28

Dogan next contends that two instances of prosecutorial misconduct in closing argument deprived him of a fair trial. First, the prosecutor commented on the burden of proof, and, second, the prosecutor accused defense counsel of trying to "dirty up" the victim. Dogan acknowledges that his counsel failed to preserve the objections in his posttrial motions, but he asks this court to review the issues either as plain error or as proof that he received ineffective assistance of counsel.

¶ 29 Our supreme court stated the applicable principles:

"Generally, prosecutors have wide latitude in the content of their closing arguments. [Citations.] Statements must be considered in the context of the closing arguments as a whole [citation], and counsel may comment upon defense characterizations of the evidence or case [citation]. Further, in the context of rebuttal argument, 'when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial.' *People v. Hudson*, 157 Ill. 2d 401, 445 *** (1993); [citations]. A reviewing court will find reversible error based upon improper comments during closing arguments only 'if a defendant can identify remarks of the prosecutor that were both improper and so prejudicial that "real justice [was] denied or that the verdict of the jury may have resulted from the error."' ' [*People v. Jones*, 156 Ill.2d [225,] 247-48, *** quoting *People v. Yates*, 98 Ill.2d 502, 533 *** (1983).]" *Evans*, 209 Ill. 2d at 225.

¶ 30 Defense counsel provided the relevant context for both of the remarks to which Dogan now objects. Defense counsel started his closing argument by emphasizing the difficulty of reaching proof "beyond, beyond, further than, not equal to, further than a reasonable doubt," and arguing that if jurors had "a, a, a reasonable doubt," they must acquit Dogan. The prosecutor argued, "[T]he burden of proof is not beyond all doubt. *** This is a burden that every criminal prosecution in this county, in this state, in this country meets in a criminal case." The argument did not go further than defense counsel's argument in the direction of defining reasonable doubt, and the prosecutor only responded to defense counsel's emphasis on "beyond" and "a" in the court's instruction on the burden of proof. The prosecutor's

argument addressed reasonable doubt in a manner much like that used in *People v. Harris*, 129 Ill. 2d 123, 161 (1989) and *People v. Kidd*, 175 Ill. 2d 1, 40 (1996). Our supreme court found the similar arguments in those cases permissible. We find that the trial court did not err when it overruled defense counsel's objection to the prosecutor's remarks concerning reasonable doubt.

¶ 31 Defense counsel started his summary of the testimony by noting that the prosecution's investigator went to the address where the shooting occurred, and the owner of the building said that until 2011 it had been a crack house. The prosecutor responded that the evidence concerning a crack house had no bearing on the issues before the jury, and defense counsel brought it up in closing argument only to "dirty up" Pittman. We agree with the prosecutor's observation that the evidence had no relevance, except as proof that the State conducted a thorough investigation of the crime. We agree with the prosecutor that defense counsel sought to use the evidence to sully the victim and perhaps make the jury see the victim's testimony as less credible. Because the prosecutor argued only a reasonable inference from the evidence and the arguments, we find that the trial court did not err when it overruled the objection to the prosecutor's comment that defense counsel sought to "dirty up" Pittman. See *People v. Jenkins*, 333 Ill. App. 3d 534, 540-42 (2002); *People v. Beler*, 327 Ill. App. 3d 829, 836 (2002).

¶ 32 Because we find no error, we also find neither plain error nor ineffective assistance of counsel in counsel's failure to raise the issue in his posttrial motions. Accordingly, we affirm the conviction for aggravated battery with a firearm.

¶ 33

Sentencing

¶ 34

Finally, Dogan argues that the court imposed too lengthy a sentence. We defer to the trial court's sentencing decisions, which we will reverse only if the trial court abused its discretion. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). The jury found Dogan guilty of aggravated battery with a firearm, which is a Class X felony with a sentencing range of 6 to 30 years in prison. 720 ILCS 5/12-4.2(a)(1), (b) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008). The trial court commented on Dogan's mitigating evidence and his record of mostly nonviolent crimes, but the court relied on the severity of the harm Pittman suffered and Dogan's extensive record of ten felony convictions and seven misdemeanor convictions. The trial court especially noted that other judges gave Dogan minimal sentences, but Dogan failed to find a way out of a life of crime. The trial court properly considered the extent of the harm, even though the aggravated battery conviction required proof of some injury. See *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986). We cannot say that the trial court abused its discretion when it imposed a sentence at the high end of the statutory range. See *People v. Lathon*, 317 Ill. App. 3d 573, 589 (2000) (extensive criminal history justified sentence at high end of statutory range); *People v. Wyatt*, 305 Ill. App. 3d 291, 298-99 (1999) (continuing criminal behavior after lenient sentencing justified lengthier sentence).

¶ 35

CONCLUSION

¶ 36

The circumstantial evidence, together with Schur's testimony that he saw Dogan toss the gun that later proved to have discharged the bullet that injured Pittman, sufficiently supports the conviction for aggravated battery with a firearm. The prosecutor's closing argument was not improper and it did not deny Dogan real justice. The trial court did not abuse its

No. 1-14-0300

discretion when it imposed a sentence within the statutory range, albeit at the high end of the statutory range for the class X felony. Accordingly, we affirm the trial court's judgment.

¶ 37 Affirmed.