2017 IL App (1st) 150858-U

No. 1-15-0858

Order filed November 17, 2017

Sixth 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. 11 CR 5008
	)	
STEPHEN JOHNSON,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** The prosecutor's comments during closing arguments did not constitute reversible error. We affirm defendant's sentence over his contention that it was excessive. We correct the mittimus.

¶ 2 Following a jury trial, defendant Stephen Johnson was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010) (amended and re-codified at 720 ILCS 5/11-1.40(a)(1) (eff. Jan. 1, 2016)), and sentenced to 20 years' imprisonment. On appeal, defendant contends: (1) he did not receive a fair trial due to prosecutorial misconduct during

closing arguments; (2) his sentence is excessive; and (3) his mittimus does not reflect the proper amount of presentence incarceration credit. We affirm the judgment and sentence of the trial court and order the mittimus corrected to reflect the proper amount of presentence custody credit.

¶ 3 Defendant was charged with predatory criminal sexual assault of a child, the victim J.G. Before trial, the defense filed a motion *in limine* to exclude testimony that a photograph depicting a dark stain found on a shoe at the crime scene was blood because the stain had never been tested and analyzed. During a hearing on the motion, the prosecutor stated that the State did not intend to call any witnesses who would opine that the stain was blood. The trial court granted the motion.

¶ 4 The evidence at trial established that, around 7 p.m. on February 26, 2011, 11-year-old J.G. attended a birthday party for her friend Ashley Harris, at Harris's grandmother's house. The party was held in the basement of the home, where the children danced and ate food. J.G. was asked to spend the night, and her mother brought her overnight clothing to the party. Harris introduced J.G. to defendant, who was Harris's uncle, and co-defendant Daniel Rucker, defendant's friend.[1] Defendant and Rucker were responsible for playing music at the party. At some point, J.G. was in the basement near a washing machine. Rucker entered the area and touched J.G.'s legs and kissed her face and neck. J.G. backed away and was confused. She returned to the party. Around 10:30 p.m., the children went upstairs to the main floor of the house for cake. The children were thereafter sent to the attic to put on their pajamas for the sleepover.

¶ 5 When J.G. went to the attic, she realized she did not have her cell phone and returned to the basement to retrieve it. She did not find her phone in the open area of the basement where

[1] Rucker pled guilty and was sentenced to seven years' imprisonment. He is not a party to this appeal.

they had been dancing, so she went into a room off the open area. When she entered the room, Rucker followed her and pushed her onto the bed. Rucker called defendant into the room, stating that J.G. was "a feisty one," and had defendant hold her hands and mouth so she could not scream or push him off. Rucker pulled J.G.'s leggings down and inserted his penis into her vagina. After five minutes, Rucker ejaculated on J.G.'s back and she pulled her pants up and went upstairs. J.G. told Raven Gray, defendant's girlfriend and the mother of his children, that she had been raped. Gray yelled at defendant and Rucker, and then asked J.G. why she was in the basement. J.G. told her that she was looking for her phone, and Gray instructed her to go back to the basement to retrieve her phone and let her know if "it" happens again.

¶ 6 J.G. "did as [she] was told" and returned to the basement to look for her phone. She went to a room located near the laundry room and found her phone there. The room had a mattress in it. While she was inside the room, defendant entered and pushed her onto the bed, pulled her leggings down, and inserted his penis into her vagina for approximately 10 minutes. J.G. heard Harris's stepfather, but defendant covered her mouth with his hand, and she did not cry out. She heard Harris's stepfather return upstairs after a few moments. J.G. was menstruating, and when defendant stopped thrusting, he handed her a pillowcase and told her to wipe herself off and then return upstairs.

¶ 7 Upstairs, J.G. again told Gray what happened and Gray brought Gina Maye, Harris's mother and defendant's sister, into a bathroom with her and J.G. Defendant and Rucker were listening outside the bathroom. Maye opened the bathroom door, and asked defendant and Rucker what they did. The two men attempted to run, and Maye told her husband to get the other girls from the party to take them to her apartment located 15 minutes away in Indiana. J.G. spent the night in Maye's apartment separate from the other girls attending the sleepover.

¶ 8 The following morning, J.G. was crying during a performance at her church. Her aunt, Tameka Gatewood, followed her into a bathroom to find out why she was upset. J.G. described the occurrences from the prior night. Gatewood brought J.G. to the Lansing Police Department where she spoke with police and gave physical descriptions of defendant and Rucker. She described defendant has having a birthmark on his nose and a tattoo of lips on his neck. J.G. then went to a hospital for a sexual assault kit. A nurse swabbed her vaginal area, her fingers, and her mouth. J.G. later identified both defendant and co-defendant in a photographic array and physical lineup at the police station. She spoke with a doctor in a "victim sensitive interview" regarding the incident, and at trial denied telling the doctor that defendant raped her first and Rucker raped her second. Detective Wilson Pierce observed the victim-sensitive interview, and his notes indicated that J.G. had stated that Rucker was the second person to rape her.

¶ 9 Jessica Kauth, a physician's assistant at Community Hospital in Munster, Indiana, testified that, from the late evening to the early morning hours of February 27-28, 2011, she collected evidence for J.G.'s sexual assault kit with Sarah Perry, a registered nurse. Kauth stated that J.G. had "a lot of blood in her vaginal vault which [was] consistent with her being on her menstrual cycle." Neither Kauth nor Perry found signs of trauma, but Kauth said that menstrual blood may cloud signs of trauma, so it was not unusual to be unable to discern signs of trauma when the victim is menstruating. The sexual assault kit was sealed and turned over to the police.

¶ 10 Outside of the presence of the jury, defense counsel again addressed the motion *in limine* regarding photographs depicting blood stains at the crime scene. Following extensive argument, the court allowed the State to introduce the photographs and present testimony that the stains appeared to be blood, but not testimony that they were, in fact, blood.

¶ 11 Dana Tatgenhorst, a crime scene investigator for the Lansing Police Department, testified that he processed and photographed the house in question. There was a red stain on a mattress in the basement which, based on his training and experience, had the appearance of blood. There was also a substance on a pair of white tennis shoes that also, based on his training and experience, appeared to be consistent with blood. Tatenghorst collected the shoes. He cut and collected a portion of the mattress to be made available for testing the stains. He also took a buccal swab of defendant for DNA analysis.

¶ 12 Heather Wright, an expert in forensic DNA analysis, and Christopher Webb, an expert in forensic biology and DNA analysis, testified that they performed DNA analyses on the vaginal swabs from J.G.'s sexual assault kit, and compared them to buccal swabs from both defendant and Rucker and a sample of J.G.'s blood. Wright performed an autosomal DNA analysis, which examined at 15 different "locations" and a gender marker in the DNA extracted from the vaginal swabs. Wright identified 3 of 15 possible "locations" in the minor profile, which was consistent with having a limited amount of semen. Based on those three locations, Wright could conclude that Rucker could be excluded as a contributor to the minor profile, and defendant could not be excluded as a contributor. The statistical likelihood that defendant would be included as a donor of the minor profile was 1 in 230 unrelated black individuals.

¶ 13 Webb conducted a Y-chromosome short tandem repeat markers (YSTR) analysis, which does not identify a specific person but instead shows the Y chromosome present in related males. Defendant's buccal swab matched all 11 possible locations in the YSTR sample from the vaginal swabs. Thus, Webb concluded that the YSTR profile from the vaginal swabs matched defendant's YSTR profile and did not match Rucker's profile. The statistical likelihood that an individual would match the YSTR profile was 1 in 1500 unrelated black males. Neither Wright

nor Webb received a mattress or tennis shoes to test for evidence, but each acknowledged such testing was possible.

¶ 14 Dr. Ranjit Chakroborty, an expert in population genetics and DNA forensic statistics, testified that he combined the statistics from the autosomal DNA and YSTR analyses performed by Wright and Webb, respectively, using a mathematic equation generally accepted in the forensic science community. This analysis calculates the chance that a person has both the minor male profile from the autosomal markers and the Y chromosomal profile in the vaginal swabs. He opined that, if a random unrelated black male was selected, there would be a 1 in 291,870 chance of matching the evidence sample. Dr. Chakroborty also provided a "likelihood ratio," which calculates how many individuals would have to be sampled to find one whose DNA mixed with the DNA of the victim to match the DNA mixture present in the vaginal swab evidence sample. The likelihood ratio is also generally accepted within the scientific community. Based on the results of Wright's and Webb's DNA analyses, Dr. Chakroborty concluded that 1 out of 83 million black people could have contributed to the particular mixture obtained from the vaginal swab.

¶ 15 Defendant's expert in forensic DNA and biology, Dr. Karl Reich, agreed that the State's DNA experts' analyses were accurate, and the tests were widely used. However, Dr. Reich testified that his belief was that the DNA sample from the vaginal swab was too small to provide a suitable DNA profile for comparison, and the limited profile obtained from the autosomal DNA test was incomplete. Dr. Reich acknowledged that it is generally accepted to use a partial profile for comparison purposes. He disagreed with Dr. Chakroborty's use of the likelihood ratio, which he acknowledged was widely used, because it failed to take into account an error

rate. Dr. Reich further testified that it is possible to test for DNA from stains on fabric, such as mattresses and pillowcases.

¶ 16 Copies of both defendant's and J.G.'s birth certificates were introduced into evidence to establish that, at the time of the incident, defendant was 19 years old and J.G. was 11 years old.

¶ 17 During closing arguments, the State recited J.G.'s testimony, and then, over defendant's repeated objections based on the motion *in limine*, the court allowed the State to argue:

> "He knows his opportunity while the kids are still upstairs in the attic, still up where they're getting ready to go to sleep, and he's got her all to himself. He bends her over on that mattress, puts his penis into her vagina until he ejaculates inside of her causing her to bleed on the mattress and on his shoe.
>
> * * *
>
> You'll have the photographs of the area where [J.G.] was raped. And you've seen the photographs, both of the mattress and of the shoe.
>
> We have the photographs, we have the medical testimony of Jessica Kauth who observed that [J.G.] was actively menstruating. The red stains that you see are blood.
>
> * * *
>
> In our common, everyday, ordinary experience we know what dried blood looks like, we know what happens when it drips on objects, and we recognize it.
>
> * * *
>
> It's not just how it looks. It's where it was found. Because [J.G.] told you that she was bent over that mattress while the defendant raped her. And the location of those red stains at the edge of the mattress and on the shoe corroborate what she says happened, how it happened, and the position that the defendant put her in when it happened."

¶ 18 Defense counsel argued in closing that J.G.'s account of what occurred was not credible because the evidence contradicted her testimony. Counsel argued it was unbelievable that she returned to the basement after the first rape, and that she did not call her mother or the police the night of the party. Counsel additionally argued it was unbelievable that Gray and Maye would fail to act after J.G. told them what occurred. Further, counsel pointed out that a police officer testified that J.G. previously reported that defendant raped her first and Rucker raped her second, which was the opposite of what she testified to at trial. Defense counsel then argued that the State failed to test the red stains so there was no way to determine whether the stains were actually blood, and whether the blood belonged to J.G.

¶ 19 In its rebuttal closing argument, the prosecutor acknowledged that the State had the burden of proving defendant guilty beyond a reasonable doubt. The prosecutor went on to argue, over defense counsel's objections,

> "I'm not sure where the confusion has come from, but this is the People of the State of Illinois versus Steven [*sic*] Johnson (indicating) not [J.G.] At what point did she become the accused where she has to prove her innocence? *** At what point has the table turning [*sic*], she's forced to prove her mental stability and her ability to recall?"

¶ 20 Following deliberations, the jury found defendant guilty of predatory criminal sexual assault of a child. Defendant filed a motion for a new trial, which the court denied.

¶ 21 At the sentencing hearing, the court stated it reviewed defendant's presentence investigation report (PSI), as well as two victim impact statements submitted by both J.G. and her mother. The court also reviewed nine letters of leniency written by defendant's various friends and family members, including his mother. In aggravation, the State argued that defendant had a supportive family life but repeatedly displayed a "complete disregard" for the

law. The State further emphasized the "horrific" and "disgusting" facts of the case and argued that defendant left J.G. damaged "emotionally, mentally, and physically."

¶ 22 In mitigation, defense counsel argued defendant displayed rehabilitative potential by acting as a barber in jail, and noted that defendant had participated in giving haircuts to low-income children in his neighborhood. Defendant had been continuously employed. Defense counsel also pointed out that defendant had family support, but lost his father at a young age. Defendant gave a statement in allocution, and stated he provided for his children, but denied committing the crime in this case.

¶ 23 The court sentenced defendant to 20 years' imprisonment and 3 years of mandatory supervised release. In imposing sentence, the court extensively addressed the factors in aggravation and mitigation, in addition to considering the PSI, the various letters for leniency, and the victim impact statements. The court acknowledged that defendant demonstrated some rehabilitative potential, had a supportive family, and expressed sympathy that defendant lost his father. However, the court weighed the mitigating evidence against defendant's criminal history, which included a 2007 delinquency adjudication for mob action and robbery; subsequent convictions for battery in 2009, for which he received supervision; and felony theft in 2010, for which he received probation. The court noted defendant's criminal history indicated he was unable to abide by the law, and that he committed the offense while on probation for theft. The court also discussed the need to deter others from committing the offense. Defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 24 On appeal, defendant first contends that the State engaged in a pervasive pattern of prosecutorial misconduct during closing arguments, which cumulatively deprived him of his constitutional right to a fair trial.

¶ 25 Initially, we note that it is unclear whether the proper standard of review for prosecutorial misconduct in closing arguments is *de novo* or abuse of discretion. *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009) (comparing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."), with *People v. Blue*, 189 Ill. 2d 99, 132 (2000) ("[W]e conclude that the trial court abused its discretion" by allowing various prosecutorial remarks during closing argument)). Regardless, we need not resolve this issue at this time because the outcome here is the same under either standard. *Phillips*, 392 Ill. App. 3d at 275.

¶ 26 It is well established that prosecutors are afforded wide latitude during closing arguments. *Wheeler*, 226 Ill. 2d at 123. When reviewing closing arguments, we look at the arguments in their entirety and view challenged remarks in context. *Id.* at 122. The prosecutor may argue legitimate inferences derived from the evidence (*People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)), and may also respond to comments made by defense counsel (*People v. McGee*, 2015 IL App (1st) 130367, ¶ 56). However, he may not argue assumptions or facts not based on evidence in the record. *People v. Johnson*, 208 Ill. 2d 53, 115 (2003). Even if the prosecutor's comments exceeded the bounds of proper comment, we will not disturb the jury's verdict unless the remarks resulted in substantial prejudice. *People v. Barnes*, 117 Ill. App. 3d 965, 976 (1983). Substantial prejudice results only if the improper remarks constitute a material factor in the defendant's conviction. *Wheeler*, 266 Ill. 2d at 123. Thus, "comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 27 We first address defendant's contention that the State improperly argued that the stains found on the mattress and a shoe were J.G.'s blood, when it told the jury that defendant "bends her over on that mattress, puts his penis into her vagina until he ejaculates inside of her causing her to bleed on the mattress and on his shoe," and "We have the photographs, we have the medical testimony of Jessica Kauth who observed that [J.G.] was actively menstruating. The red stains that you see are blood." Defendant argues that the stains were never tested, and it was therefore improper for the State to assert that the stains were J.G.'s blood. He further asserts that the evidence against defendant was not strong, and therefore the improper comments deprived defendant of a fair trial. The State responds that the comments were reasonable inferences based on the record.

¶ 28 Although the State may have argued that it was a reasonable inference from the evidence that the stains were blood, the categorical statement that, "The red stains you see are [J.G.'s] blood," was arguably error as there was no definitive evidence that the stains were blood. However, even if the comments were error, in light of the substantial evidence against defendant, we do not find that they constitute reversible error. J.G., an 11-year-old, testified that, at her friend's birthday party, she was introduced to defendant, who later forcibly inserted his penis into her vagina. J.G. told Gray and Maye, defendant's girlfriend and his sister, who both yelled at defendant and Rucker. J.G. testified she was sad and confused, and her aunt testified that she was crying and upset the following day at church. The DNA evidence established that there was semen indicated on J.G.'s vaginal swab and defendant's buccal swab matched the YSTR profile from the minor profile on the vaginal swab. Although Dr. Reich, defendant's forensic expert, did not agree that the minor profile was large enough for a suitable comparison, he acknowledged that partial profiles are used for comparison purposes and he agreed that both

Wright's and Webb's analyses were accurate and without error. Moreover, the jury was instructed that closing arguments were not evidence, and defense counsel was able to argue that the State did not have the stains tested, despite all experts agreeing that it was possible to test for blood. Given the substantial testimonial and forensic evidence, we do not find that the State's improper remarks regarding the stains resulted in prejudice such that they constituted a material factor in the defendant's conviction.

¶ 29 We next address defendant's contention that the State attempted to shift the burden of proof when it stated in rebuttal, "[T]his is the People of the State of Illinois versus Steven [*sic*] Johnson (indicating) not [J.G.]. At what point did she become the accused where she has to prove her innocence? *** At what point has the table turn[ed], she's forced to prove her mental stability and her ability to recall?" Defendant argues these statements suggest that defendant was required to prove his innocence.

¶ 30 It is reversible error for the State to attempt to shift the burden of proof to the defendant. *People v. Ramos,* 396 Ill. App. 3d 869, 875 (2009). However, during rebuttal, prosecutors are entitled to respond to comments made by the defendant "which clearly invite a response." *People v. Kliner,* 185 Ill. 2d 81, 154 (1998). As with other challenges to closing argument, rebuttal must be considered in context with the entire argument, including defendant's. *Id.* at 154.

¶ 31 After a careful review of the record, we conclude that the State's rebuttal argument did not shift the burden to defendant. When reviewing the remark in context, as we must, we find that the State was responding to defense counsel's argument that J.G.'s testimony was contradicted, inconsistent, and not credible. The State went on to argue why J.G. was credible, noting that her reaction to the assault and her behavior afterward was explained by the fact that

she was 11 years old, had suffered a traumatic event, and was initially surrounded by unfamiliar people, namely, defendant's family members, who "essentially ignored" her initial outcry. In this context, we do not find the State's comments improper. Further, the State had prefaced the challenged statements by acknowledging that it had the "good and *** decent burden" to prove defendant guilty beyond a reasonable doubt. Accordingly, we do not find that defendant was deprived of a fair trial based on the State's comments during closing arguments.

¶ 32 Defendant next alleges that his 20-year sentence is excessive. He acknowledges that the sentence is within the statutory range, but contends it is excessive because the court overstated his criminal history and failed to adequately consider his rehabilitative potential.

¶ 33 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30. A sentence which falls within the statutory range is presumed proper, unless it is manifestly disproportionate to the nature of the offense. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36. In determining an appropriate sentence, the trial court considers such factors as "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment." *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001). Because the trial court, having observed the proceedings, is in the best position to weigh the relevant sentencing factors (*People v. Arze*, 2016 IL App (1st) 131959, ¶ 121), we do not substitute our judgment for that of the trial court simply because we would have balanced the appropriate sentencing factors differently (*People v. Alexander*, 239 Ill. 2d 205, 213 (2010)).

¶ 34 In this case, defendant was sentenced as a Class X offender to a term of 20 years for predatory criminal sexual assault of a child, which falls within the sentencing range of 6 to 30 years provided for this class of offense. 720 ILCS 5/12-14.1(b)(1) (West 2010) (predatory

criminal sexual assault of a child is a Class X offense); 730 ILCS 5/5-4.5-25(a) (West 2010). We therefore presume the sentence was proper, absent some indication that the court abused its discretion. *Burton*, 2015 IL (1st) 131600, ¶ 36.

¶ 35 The record shows that in reaching its sentencing determination, the court specifically relied on the PSI, the factors in aggravation and mitigation, the facts of the case, the victim impact statements, and defendant's criminal history and background, which were all proper sentencing considerations. See *Hernandez*, 319 Ill. App. 3d at 529. Significantly, the court explicitly acknowledged that defendant demonstrated some rehabilitative potential. Given the trial court's extensive consideration of the relevant sentencing factors on the record, we decline to reweigh those factors and independently conclude the sentence is excessive. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987) (noting that, where the trial court properly considered relevant sentencing factors, it is not the function of a reviewing court to rebalance those factors on appeal). While the 20-year sentence is at the higher end of the range of sentences that could have been imposed under Class X sentencing (730 ILCS 5/5-4.5-25(a) (West 2010)), we do not find that the sentence was disproportionate to the offense of sexually assaulting an 11-year-old. Further, while defendant argues that his criminal history was for minor infractions, defendant was not deterred by his previous, more lenient sentences, including several sentences of probation, and committed this offense while on probation for a prior conviction. Moreover, the court was well within its discretion to consider defendant's criminal history in imposing sentence (730 ILCS 5/5-5-3.2(a)(3) (West 2010) (listing the defendant's history of criminal activity as a factor for sentencing courts to consider in aggravation)), and we see nothing in the record to support defendant's contention that the court overly relied on his history. Accordingly, we find no abuse of discretion and therefore have no basis to disturb defendant's 20-year sentence.

¶ 36 Defendant finally claims, and the State concedes, that the trial court failed to award him the correct amount of presentence incarceration credit. We agree. Offenders shall be given credit "for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2010).

¶ 37 Defendant was in custody from February 28, 2011, until he was sentenced on March 17, 2015. Defendant's mittimus reflects 1,477 days of presentence credit, although he was actually entitled to 1,478 days of presentence credit. Accordingly, we correct defendant's mittimus to reflect 1,478 days of presentence incarceration credit. See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967)); see also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) (holding that remand to the circuit court is unnecessary because this court may directly order the circuit clerk to correct the mittimus).

¶ 38 Affirmed.