2012 IL App (1st) 091103-U

THIRD DIVISION
March 30, 2012

No. 1-09-1103

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	))	APPEAL FROM THE CIRCUIT COURT OF
	)	COOK COUNTY
	)	
v.	)	No. 08 CR 10552
	)	
	)	HONORABLE
WILLIE PITCHFORD, Defendant-Appellant.	))	MATTHEW E. COGHLAN, JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was convicted of delivery of a controlled substance and sentenced to seven years' imprisonment. The State failed to prove intent to deliver. The appellate court reduces defendant's conviction to possession of a controlled substance, vacates his sentence, and remands the cause to the trial court for a new sentencing hearing.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Willie Pitchford was convicted of possession of a controlled substance with intent to deliver and sentenced to seven years in prison. On appeal, Pitchford challenges: (1) the sufficiency of the evidence against him;

(2) pretrial rulings *in limine* on the admissibility of the fact that his prior convictions resulted from guilty pleas; and (3) the State's closing arguments. We conclude the State failed to prove intent to deliver, reduce Pitchford's conviction to possession of a controlled substance, vacate his sentence, and remand the cause to the trial court for a new sentencing hearing.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. Prior to trial, the State moved *in limine* to allow the admission of Pitchford's three prior convictions for possession with intent to deliver as impeachment should Pitchford testify on his own behalf. The State also requested that Pitchford be barred from testifying he pleaded guilty to the prior convictions. Over defense objections, the trial court granted the motion regarding two of the prior convictions and ruled that Pitchford would not be allowed to testify that guilty pleas were involved.

¶ 5 At trial, Chicago police officer David McCray testified that on the evening of May 7, 2008, he and officers Keith Kalafut and Arturo Vega were involved in a plainclothes drug investigation in the city's 10th district. Following a conversation with someone, the police drove two blocks to the Royal, a small takeout restaurant at 3620 West 16th Street. Officer McCray stated he received service calls for this area once or twice daily concerning drugs or shootings.

¶ 6 Officer McCray testified that as the unmarked police car pulled up in front of the Royal, he saw Pitchford inside. Officer McCray got out of the car and entered the restaurant. Officer McCray stated that as he approached Pitchford, he saw Pitchford turn his head toward him, remove an item from his left pocket, and drop it to the ground. According to Officer McCray,

the item was a bag that contained six other baggies containing a white, chunky substance, which he believed to be narcotics based on his 13 years of police work and hundreds of drug arrests.

¶ 7 Officer McCray handcuffed Pitchford, picked up the bag containing the six other baggies, and put it in his pocket. There were four other African-American men in the Royal, two of whom were less than a foot from Pitchford, who were not questioned or arrested. However, according to Officer McCray, his partners conducted a pat-down search of the two men near Pitchford. There were also two employees behind the counter at the Royal, protected by a bulletproof glass.

¶ 8 Moreover, Officer McCray testified he arrested Pitchford, placed him in the squad car and transported him to the 10th district police station. Officer McCray turned the suspected narcotics over to Officer Kalafut at the police station. Officer McCray added that he did not request the baggies be tested for fingerprints or DNA evidence.

¶ 9 Officer Kalufut also testified, largely corroborating Officer McCray's testimony. Officer Kalafut entered the Royal seconds after Officer McCray, who already had Pitchford "on the wall" and was handcuffing him. Officer Kalafut did not see Pitchford drop anything, but he saw the bag on the ground. Officer Kalafut searched Pitchford and found $97 in his pocket. However, Officer Kalafut also testified he put the cash money back in Pitchford's pocket until they reached the police station. Officer Kalafut further testified that he inventoried the suspected drugs and money at the police station, explaining the procedure to the jury. According to Officer Kalafut, the suspected narcotics were sent to the forensics section of the Illinois State Police for testing.

¶ 10 Moses Boyd, Jr., a forensic examiner for the Illinois State Police, testified he received the inventoried items and tested the contents of one of the six small baggies. Boyd opined the substance tested positive for cocaine in the amount of 0.1 grams. Boyd did not test the other baggies, but stated their weight was 0.53 grams. According to Boyd, in the 50,000 cases he had tested, he had received requests for fingerprint evidence only once or twice in this type of case. Boyd had received at least 15 or 20 such requests in narcotics cases generally. Boyd had never seen a request for DNA evidence on narcotics.

¶ 11 The State rested. Pitchford rested without presenting testimony or evidence on his behalf. Following closing arguments, the jury deliberated and sent a note to the trial judge asking whether intent to deliver required an exchange of money. Over the defense's objection, the trial judge instructed the jury on the definition of intent. Following deliberations, the jury returned a guilty verdict against Pitchfork on the charge of possession with intent to deliver. Pitchford filed a posttrial motion, which the trial court denied before sentencing Pitchford to seven years in prison. This timely appeal followed.

¶ 12 DISCUSSION

¶ 13 I. Sufficiency of the Evidence

¶ 14 On appeal, Pitchford challenges the sufficiency of the evidence. When a court considers a challenge to a criminal conviction based on the sufficiency of the evidence, its function is not to retry the defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Rather, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

People v. Woods, 214 Ill. 2d 455, 470 (2005). A reviewing court will not overturn the fact-finder's verdict unless "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Maggette*, 195 Ill. 2d 336, 353 (2001).

¶ 15 To establish guilt of the offense of possession of a controlled substance with intent to deliver, the State must show the defendant: (1) had knowledge of the presence of narcotics; (2) had possession or control of the narcotics; and (3) intended to deliver the narcotics. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). Knowledge may be proved by showing that the defendant knew narcotics existed in the place where it was recovered. *People v. Smith*, 288 Ill. App. 3d 820, 824 (1997). Furthermore, evidence that the defendant was aware of and exercised control over the drugs can establish constructive possession. *People v. Jones*, 295 Ill. App. 3d 444, 453 (1998). "[W]here the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004).

¶ 16 In that vein, Pitchford argues that Officer McCray's "dropsy testimony" is inherently incredible. A "dropsy case" is one in which a police officer, to avoid the exclusion of evidence on fourth amendment grounds, falsely testifies that the defendant dropped the narcotics in plain view (as opposed to the officer discovering the narcotics in an illegal search). *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) (citing G. Chin & S. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L. Rev. 233, 248–49 (1998)). However, the Illinois Supreme Court has stated that "[f]ar from being contrary to human experience, cases which have come to this court show it to be a common behavior

pattern for individuals having narcotics on their person to attempt to dispose of them when suddenly confronted by authorities." *People v. Henderson*, 33 Ill. 2d 225, 229, 210 (1965).

¶ 17 Generally, it is the jury's function to assess the credibility of the witnesses, to determine the weight given to their testimony, and to draw inferences from the evidence. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). "Testimony may be found insufficient *** only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280. We cannot conclude that Officer McCray's testimony was inherently incredible. The record shows at least two other men were standing in close proximity to Pitchford, creating the possibility Pitchford dropped the item in an effort to disclaim possession, had Officer McCray not seen the item fall from Pitchford's hand. Pitchford also notes the lack of fingerprint testing on the baggie at issue, but the jury was entitled to believe that Officer McCray saw Pitchford holding the larger baggie.

¶ 18 In the alternative, Pitchford argues that this court should reduce his conviction to possession of a controlled substance because the evidence was insufficient to prove that he intended to deliver the cocaine in his possession. "Because direct evidence of intent to deliver is rare, such intent must usually be proven by circumstantial evidence." *Robinson*, 167 Ill. 2d at 408. Factors considered by Illinois courts as probative of intent to deliver include whether the quantity of controlled substance in the defendant's possession is too large to be viewed as being for personal consumption; the high purity of the drug confiscated; the possession of weapons; the possession of large amounts of cash; the possession of police scanners, beepers, or cellular telephones; the possession of drug paraphernalia; and the manner in which the substance is

packaged. *Id.* However, these factors are not exhaustive, but simply examples of the factors that courts may consider as probative of an intent to deliver. *People v. White*, 221 Ill. 2d 1, 17 (2006), *abrogated on other grounds*, *People v. Luedemann*, 222 Ill. 2d 530 (2006). For example, evidence that a defendant was witnessed selling items from a bag later found to contain narcotics may be sufficient proof of intent to deliver, even where the amount of drugs or cash recovered is small and no weapons are found. See *People v. Bush*, 214 Ill. 2d 318, 328 (2005). Evidence that a defendant was in an area where drug sales were common is also a factor to consider. *White*, 221 Ill. 2d at 19-20; *People v. Williams*, 358 Ill. App. 3d 1098, 1102 (2005); *People v. Jones*, 215 Ill. App. 3d 652, 656 (1991).

¶ 19 In *Robinson*, our supreme court noted "the quantity of controlled substance alone can be sufficient to prove an intent to deliver beyond a reasonable doubt." *Robinson*, 167 Ill. 2d at 410–11. Yet, that is the case "only where the amount of controlled substance could not reasonably be viewed as designed for personal consumption." *Id.* at 411. Further, as the quantity of controlled substance on the defendant's person decreases, the need for additional circumstantial evidence of intent to deliver increases. *Id.* at 413. In appropriate circumstances, packaging alone might be sufficient evidence of intent to deliver. *Id.* at 414. However, this court has also noted that when only a small quantity of drugs is found, the "minimum evidence" required to establish the intent to deliver is that "the drugs were packaged for sale, and at least one additional factor tending to show intent to deliver." *People v. Blakney*, 375 Ill. App. 3d 554, 559 (2007) (citing *People v. Beverly*, 278 Ill. App. 3d 794, 802 (1996)); see *People v. Ballard*, 346 Ill. App. 3d 532, 541 (2004); *People v. Delgado*, 256 Ill. App. 3d 119, 123 (1993). This

court has reduced convictions for possession with intent to deliver to possession of a controlled substance where the quantity of drugs was consistent with personal consumption and other factors were insufficient to prove intent to deliver, particularly where small sums of cash were recovered. *People v. Clinton*, 397 Ill. App. 3d 215, 226 (2009); *People v. Sherrod*, 394 Ill. App. 3d 863, 868 (2009).

¶ 20 In this case, the evidence proves Pitchford possessed 0.1 grams of suspected cocaine, an amount well below that deemed consistent with personal use in other cases. See *Sherrod*, 394 Ill. App. 3d at 866 (and cases cited therein). The State asserts that it is reasonable to infer that all six baggies contained rock cocaine, despite the lack of sufficient homogeneity of the samples and the potential for look-alike substances. See *People v. Jones*, 174 Ill. 2d 427, 430 (1996). However, even 0.6 grams is far below the amount deemed consistent with personal use under our case law. See, *e.g.*, *Sherrod*, 394 Ill. App. 3d at 866 (and cases cited therein). There was no evidence as to the purity of the drug confiscated. There was no evidence Pitchford possessed weapons, police scanners, beepers, cellular telephones, or drug paraphernalia. Additionally, there was no evidence the police observed suspected drug transactions or sales of any kind.

¶ 21 It is useful to compare this case to *White*, in which the defendant was arrested in a location where illegal drug activity took place on a continuing basis and possessed 12 individually packaged baggies of rock cocaine, totaling 1.8 grams, and $75 in cash; however, the defendant possessed no weapons or drug paraphernalia. *White*, 221 Ill. 2d at 17-18. Here, Pitchford possessed far less rock cocaine than the defendant in *White*. Consequently, the need for additional circumstantial evidence of intent to deliver increases accordingly. *Robinson*, 167

Ill. 2d at 413. Pitchford possessed only slightly more cash ($97) than the defendant in *White*. Pitchford was arrested in an area known for drug sales, but such areas will be necessarily frequented by drug purchasers as well as drug dealers. Construing the evidence and reasonable inferences therefrom in favor of the prosecution, we cannot conclude that a rational trier of fact could have found the evidence sufficient to prove that Pitchford possessed the cocaine with intent to deliver.

¶ 22 II. Impeachment by Prior Conviction

¶ 23 Next, Pitchford argues the trial judge erred ruling *in limine* that if Pitchford testified, he would not be allowed to testify that he pleaded guilty to two prior convictions for possession with intent to deliver, with those convictions being admissible impeachment. This court has held that where the State intends to impeach the testimony of a defendant with a prior conviction, the defendant should be allowed to show that the prior conviction was the product of his guilty plea and did not result from a trial and a finding of guilt. *People v. Buress*, 259 Ill. App. 3d 217, 222 (1994) (and cases cited therein). However, in most instances, a violation of that rule cannot be considered to have played a meaningful role in the defendant's conviction. *Id.* This court has reasoned that due to the wide usage of plea bargaining and the fact that a defendant's admission of guilt may have been due more to his or her recognition of the overwhelming evidence against him or her rather than any innate forthrightness or honesty, it was doubtful that the jury, if apprised of the earlier plea, would have found the defendant any more believable. *Id.*

¶ 24 The State responds that Pitchford forfeited the issue by failing to raise the claim in his posttrial motion and by failing to testify at trial. Pitchford replies that the issue is reviewable as plain error and he did not forfeit review of the issue by failing to testify at trial.

¶ 25 Generally, an error is not preserved for review unless the defendant objects at trial and includes the error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain error rule bypasses normal forfeiture principles and permits reviewing courts to consider unpreserved error in specific circumstances. *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009). The plain error doctrine applies when:

> "(1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 26 While the plain error rule may be applied to bypass forfeiture principles, the State argues the rule is inapplicable here because Pitchford's decision not to testify goes beyond normal forfeiture. The State relies on *People v. Averett*, 237 Ill. 2d 1, 18 (2010), and *People v. Patrick*, 233 Ill. 2d 62, 77 (2009), in which our supreme court held that a defendant fails to preserve the issue of the trial court's refusal to rule on the admissibility of his prior convictions for appeal when the defendant does not testify at trial:

> "While the plain-error rule may be applied to bypass normal forfeiture principles, it cannot be applied here because the defendants' decisions not to testify go beyond normal forfeiture. In *Patrick*, we explained that the effect of the defendant's choice against testifying was to render the issue unreviewable. *Patrick*, 233 Ill. 2d at 79. Without the defendant's actual testimony, reviewing courts would be forced to speculate on the substance of that testimony and the prosecution's questions on cross-examination. *Patrick*, 233 Ill. 2d at 78–79, quoting *People v. Whitehead*, 116 Ill. 2d 425, 443–44 (1987). In *Whitehead*, this court explained that the defendant must either call a witness and open the possibility of an erroneous decision subject to appellate review, or forgo calling the witness and adopt an alternative strategy favoring the defendant's chances at trial. *Patrick*, 233 Ill. 2d at 78-79, quoting *Whitehead*, 116 Ill. 2d at 443–44. The defendant could not, however, 'have it both ways' by altering his trial strategy to make the best of the trial court's decision and still maintain on appeal that the trial court's decision was erroneous. *Patrick*, 233 Ill. 2d at 79, quoting *Whitehead*, 116 Ill. 2d at 443-44. Defendants must testify and obtain a definitive ruling on their motions for the issue to be reviewable on appeal. *Patrick*, 233 Ill. 2d at 79." *Averett*, 237 Ill. 2d at 18-19.

Pitchford argues *Averett* and *Patrick* are distinguishable because the trial judge here did rule on the admissibility of his prior convictions and the inadmissibility of the fact they resulted from guilty pleas. Pitchford maintains this case is similar to *People v. Easley*, 148 Ill. 2d 281, 310 (1992), where our supreme court held the defendant did not have to testify to preserve review of the trial judge's pretrial ruling. However, *Easley* concerned a constitutional issue, not the

propriety of allowing impeachment by prior conviction, which was a key distinction expressed by our supreme court. *Id.*

¶ 27 In the context of impeachment by prior conviction, both *Easley* and *Patrick* cite *Luce v. United States*, 469 U.S. 38, 41-43 (1984), in which the Supreme Court held that a defendant who did not testify at trial was not entitled to a review of the trial court's denial of a motion *in limine* seeking to exclude his prior convictions. *Patrick*, 233 Ill. 2d at 77-78; *Easley*, 148 Ill. 2d at 310. The *Luce* court gave three reasons for its ruling. First, any possible harm flowing from a trial court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative, as the ruling is subject to change during trial. *Luce*, 469 U.S. at 41-42. Second, "[b]ecause an accused's decision whether to testify 'seldom turns on the resolution of one factor,' *New Jersey v. Portash*, 440 U.S. 450, 467 (1979) (Blackmun, J., dissenting), a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify." *Id.* at 42. Third, requiring that a defendant testify to preserve such claims enables reviewing courts to determine the impact any erroneous impeachment may have had in light of the record as a whole and discourages defendants from making such motions solely to "plant" reversible error in the event of conviction. *Id.*

¶ 28 *Averett*, *Patrick*, and *Luce* are all based primarily on the idea that the defendant's failure to testify makes the reviewing court's task a multi-level exercise in speculation. These cases are also grounded in the principle of discouraging defendants from attempting to have it both ways by declining to testify (or present witnesses) and adopt an alternative strategy favoring the defendant's chances at trial, while hoping for the option to attack the ruling *in limine* on appeal.

These concerns are valid regardless of whether the trial court rules or defers its ruling. Thus, we agree with the State that Pitchford has forfeited the issue on appeal by failing to testify at trial.

¶ 29 III.

¶ 30 Finally, Pitchford asserts that he was denied his right to a fair trial when the prosecutors made improper comments in closing arguments. The State correctly notes that Pitchford forfeited most of these objections by failing to include them in his posttrial motion. *Enoch*, 122 Ill. 2d at 186. The State also correctly notes that Pitchford forfeited plain error review by failing to make the appropriate arguments for such review in his appellate brief. *People v. Patel*, 366 Ill. App. 3d 255, 274 (2006). Accordingly, our consideration of Pitchford's claim is limited to those objections expressly raised in both his posttrial motion and appellate brief.

¶ 31 A State's closing will lead to reversal only if the prosecutor's remarks created "substantial prejudice." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007); *People v. Johnson*, 208 Ill. 2d 53, 64 (2003); *Easley*, 148 Ill. 2d at 332. Substantial prejudice occurs "if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *Wheeler*, 226 Ill. 2d at 122; *Johnson*, 208 Ill. 2d at 113. A prosecutor has wide latitude during closing argument. *Wheeler*, 226 Ill. 2d at 123; *People v. Blue*, 189 Ill. 2d 99, 127 (2000). "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields ***." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). "Statements will not be held improper if they were provoked or invited by the defense counsel's

argument." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). For example, in *Glasper*, defendant argued that the prosecutor had "shifted the burden of proof to defendant" when, in response to defendant's claim of a coerced confession, the prosecutor had stated in rebuttal: " 'Where's the evidence of that?' " *Glasper*, 234 Ill. 2d at 212. Our supreme court held that the comment did not shift the burden of proof to defendant but that it merely "pointed out that no evidence existed in this case to support defendant's theory" and that it was "invited by defense counsel's argument." *Id*.

¶ 32 It is not clear whether the appropriate standard of review for this issue is *de novo* or abuse of discretion, based on an apparent conflict between *Wheeler* and *Blue*. See *People v. Land*, 2011 IL App (1st) 101048, ¶¶ 148-49 (and cases cited therein). We need not address the conflict in detail, as Pitchford's objections fail under either standard.

¶ 33 A. Police Motive

¶ 34 First, Pitchford complains of the following rebuttal argument from the State:

> "But you have to ask yourself what's the motivation. What is the motivation. What is the motivation that the police would have to go about and somehow find these items of cocaine, package them in individual little Nike bags and go through this whole ordeal *** It's very easy to point fingers and say yeah, the police are lying, but use your common sense. Why. Why. What's the benefit."

Here, the prosecutor did not personally vouch for the credibility of the police witnesses (*People v. Zoph*, 381 Ill. App. 3d 435, 455-56 (2008)) or suggest that police witnesses are more credible due to their job or would risk their jobs by testifying falsely (*People v. Adams*, 2012 IL 111168,

¶¶ 19-20). The argument asking the jury to consider what motive the State's witness may have to lie was invited by the comments of defense counsel during closing argument, and thus do not exceed the bounds of proper rebuttal. *People v. Woods*, 2011 IL App (1st) 091959, ¶¶ 40, 43; *People v. Crowder*, 256 Ill. App. 3d 91, 101-02 (1993).

¶ 35 Pitchford also relies upon *People v. Wilson*, 199 Ill. App. 3d 792 (1990). There, the defendant was convicted of attempted criminal assault. The complainant admitted at trial that the defendant had not threatened, slapped or punched her, and neither party removed any clothing. The record indicated that complainant was not injured by defendant, and other than a self-inflicted wound, she had no bruises or other marks of a struggle. *Id*. at 793-94. The record further disclosed that the principal witness for the prosecution had a motive to lie about the assault. This court found that the evidence, while sufficient to prove guilt, was not overwhelming. *Id*. at 794-95. In closing argument, the prosecutor stated:

> "Is it curious to anyone the defense would have you believe everybody in this case is guilty except the Defendant? [State's witness] Kondal committed perjury. The State's Attorney is guilty of trying to frame someone. [The victim] is guilty." *Id.* at 796.

We held that the prosecutor misstated the law by incorrectly suggesting what the jury must find to reach a certain verdict and remanded the case for a new trial. *Id.* at 797. In this case, the comments, when read in context, do not tell the jury what it must find to reach a particular verdict, but ask the jury to consider what motivation the police, *i.e.*, Officer McCray, would have to testify falsely. The argument was made in response to Pitchford's primary closing argument,

which was that Officer McCaray's testimony was incredible. For the reasons stated earlier, the argument did not exceed the bounds of proper rebuttal.

¶ 36 B. Fingerprint and DNA Evidence

¶ 37 Pitchford next contends the State misstated the law by arguing to the jury that fingerprint and DNA evidence was not required to convict him. The prosecution asserted:

> "Fingerprint and DNA testing is when identification is an issue. Here the identification of the person having the drugs is defendant. Willie Pitchford. Because [O]fficer McCray saw him.
>
> ***
>
> And the instructions my partner read to you and you will get again to read them in the back. There's no instruction that says in order to find this guy guilty of possession of controlled substance with intent, you have to have fingerprints and you have to have DNA. First off that's a whole other issue. If this was a rape case, and DNA was at issue, yeah, DNA.
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> THE COURT: Overruled.
>
> [THE STATE]: This is not one of those cases."

Read in context (see *Wheeler*, 226 Ill. 2d at 122), the State's argument did not mislead the jury into believing the State was not required to prove Pitchford possessed the cocaine. Rather, the State argued that it was not required to prove possession with fingerprint or DNA evidence because Officer McCary witnessed Pitchford in possession of the drugs.

¶ 38 Pitchford claims the argument improperly reflected the prosecutor's personal experience with the criminal justice system and denigrated the importance of his case. See *People v. Lee*, 229 Ill. App. 3d 254, 260 (1992). However, in this case, Boyd testified that in the 50,000 cases he had tested, he had received requests for fingerprint evidence only once or twice in this type of case and had never seen a request for DNA evidence on narcotics. The State's argument merely commented on this evidence. *Nicholas*, 218 Ill. 2d at 121.

¶ 39 Lastly, Pitchford claims the State improperly aroused and inflamed the passions of the jury during rebuttal argument with these comments:

> "The defendant possessed cocaine on May 7, 2008. You are in a position to tell him and hold him responsible for that and tell him by finding him guilty. Because if it's not you, then who. And if it's not now then when."

It is entirely proper for the prosecutor to dwell upon the evil results of crime and to urge the fearless administration of the law. *People v. Harris*, 129 Ill. 2d 123, 159 (1989). Indeed, in *Harris*:

> "[T]he prosecutors argued that the jurors enjoyed 'a unique opportunity *** to do something about crime.' Whereas in daily life 'We listen to it on the news, in the newspaper ***. Everybody hears about crime. Nobody does anything about it. You have a unique opportunity to actually do something about crime on your streets.' Embellishing upon this theme, the prosecutor concluded, 'You are the only ones that sit between this man, this ticking bomb, and that door.' " *Id.*

The *Harris* court found such argument proper. *Id.* The argument here did not improperly challenge the jury to "send a message" to anyone else by its verdict, incite the jury to act out of undifferentiated passion and outrage, or seek to engender an “us-versus-them” mentality as subsequently condemned by the court. See *People v. Johnson*, 208 Ill. 2d 53, 78-80 (2003). Thus, the State's argument here did not exceed the bounds of proper rebuttal.

¶ 40 Accordingly, we conclude Pitchford has failed to show he was denied a fair trial due to the State's closing arguments.

¶ 41 CONCLUSION

¶ 42 In short, we conclude the evidence against Pitchford was sufficient to prove him guilty of possession of a controlled substance, but not sufficient to prove him guilty of intent to deliver. Thus, pursuant to Illinois Supreme Court Rule 615(b)(3) (eff. Aug. 27, 1999), we reduce Pitchford's conviction to possession of a controlled substance, vacate his sentence, and remand the cause to the trial court for a new sentencing hearing. See *Sherrod*, 394 Ill. App. 3d at 868. We also conclude that Pitchford forfeited his objection to the trial court's rulings *in limine* regarding the admissibility of his prior convictions and the fact they resulted from guilty pleas by failing to testify at trial. Lastly, we conclude Pitchford has failed to show he was denied a fair trial based upon certain comments in the State's closing arguments.

¶ 43 Affirmed in part; cause remanded.