2014 IL App (1st) 121077-U

FOURTH DIVISION
February 13, 2014

No. 1-12-1077

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 15920
	)	
SHALIMAR SANTIAGO,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly refused to instruct the jury regarding reckless homicide. The State's comments during closing argument did not constitute prosecutorial misconduct. Defendant's sentence is not excessive.

¶ 2 Defendant Shalimar Santiago drove a minivan into a sport-utility vehicle (SUV), causing the latter to roll over. One of the SUV's occupants—Stephanie Herrera—died, and seven others—Joseph Penkala, Khanh Tran, Michael Vollman, Robert Thompson, Joseph Aroni, Cristina Monarrez, and Belinda Garcia—were injured. A jury convicted defendant on one count of first degree murder and seven counts of aggravated battery, and defendant was sentenced to a 49-year term of imprisonment, to run consecutively to seven concurrent 5-year terms of

imprisonment. Defendant argues on appeal that (1) the trial court should have instructed the jury regarding the lesser-included offense of reckless homicide; (2) the State misrepresented evidence during closing argument; and (3) his sentence is excessive. We affirm his conviction and sentence.

¶ 3 I. BACKGROUND

¶ 4 The SUV's surviving occupants testified at trial. Two could not recall the offense—Penkala because he suffered a head injury, Vollman because he was intoxicated. The others testified consistently that, on July 31, 2009, Penkala borrowed his roommate's black Lincoln Navigator and drove Tran, Vollman, Thompson, and Aroni to a Chicago club where they met Monarrez, Garcia, and Herrera. After visiting a second club, they entered the SUV to return to the western suburbs. As they drove along the freeway in the early morning hours of August 1, 2009, Garcia asked to use the restroom. Penkala exited the freeway and stopped at a gas station. Afterward, unable to locate a freeway entrance, Penkala attempted to find North Avenue, a street with which he was familiar.

¶ 5 As the SUV was stopped at a red light, a minivan drove slowly by in the opposite direction. Thompson testified that the driver made a sign with his hands. Moments later, the minivan struck the back of the SUV. Penkala ran the red light, but the minivan kept pace, sideswiping the SUV. As Penkala attempted a left turn, the minivan struck again, causing the SUV to roll over. The SUV's occupants suffered bruises, broken bones, a coma (in the case of Penkala), and death (in the case of Herrera). Tran and Garcia identified defendant as the minivan's driver.

¶ 6 Michael Timothy, a battalion chief with the Chicago Fire Department, testified that he was returning from a fire at approximately 4:25 a.m. on August 1, 2009, when he heard

screeching tires and the sound of metal on metal. He drove to the intersection of Augusta Boulevard and Central Park Avenue, where he saw a "reddish" minivan hit a black SUV at more than 30 miles per hour. The SUV rolled two or three times, striking a light pole and a building before landing upside down. Three occupants were ejected from the SUV, three were walking around, and two were trapped inside the vehicle. Timothy performed triage and called for backup.

¶ 7 Yossiris Soto, the minivan's owner, was riding in the minivan's front passenger seat that night. Soto testified that she could recall only parts of the evening, because she was drunk and high at the time. She could not remember her conversations with defendant while in the minivan, but did recall that defendant hit the SUV and the SUV rolled over. She also remembered giving a statement to police, but not the content of that statement. She testified that she was willing to lie in her statement, because detectives threatened to ruin the career of her brother, a police officer. She further testified that, one day prior to the offense, she, defendant, and a man named "Macho" were driving in her minivan when Macho was shot.

¶ 8 In her handwritten statement, Soto attested that she and defendant, a Latin King, drove to BeeFee's restaurant, where she saw a Hispanic male pumping the brakes of a black SUV. Defendant said, "those are them dragons," a reference to a rival gang. Later that night, she spotted a second black SUV while stopped at the red light at Homan Avenue and Augusta Boulevard. Defendant pointed to the SUV, saying, "they are trying to kill us." Defendant drove through a red light, positioned the minivan behind the SUV, and hit the SUV while moving at approximately 50 or 60 miles per hour. Soto asked defendant to stop, but he told her to shut up and hit the SUV a second time. The SUV rolled over. Defendant and Soto abandoned the minivan, running on foot until they were picked up by an acquaintance, who dropped them off at

BeeFee's. There, Soto called 911 and reported her minivan stolen. Soto filed a false police report and met defendant at a hotel later that day.

¶ 9 Detective Greg Jacobson testified that he met with Soto on August 1, 2009, outside of the O-Mi Motel. Soto told him that defendant had driven her minivan into an SUV, causing the latter to roll over. He informed other officers, who arrested defendant. Jacobson was present when Soto provided her handwritten statement and never observed anyone yelling at, threatening, or mistreating Soto.

¶ 10 Assistant State's Attorney Ruth Gudino testified that she spoke to Soto on August 2, 2009. Soto provided a handwritten statement and told Gudino that police had treated her well.

¶ 11 Assistant State's Attorney George Canellis testified that he met with Soto on August 3, 2009, for approximately 30 minutes prior to her grand jury testimony. Canellis also testified to the content of Soto's grand jury testimony, which was substantially similar to her handwritten statement.

¶ 12 Jose Rodriguez, the State's Attorney's gang investigation unit supervisor, was qualified as a street gangs expert and demonstrated Latin King gang signs and identified photographs of those signs. He further stated that, in 2009, the Latin Kings and Latin Dragons were "enemies."

¶ 13 Chicago firefighter Christine Lorna testified for the defense that, while tending to Penkala's injuires at the scene, she smelled alcohol on his breath. The parties stipulated that Penkala tested positive for opiates shortly after the incident.

¶ 14 Officer Steven Marchfield testified for the defense that he examined the crash site and concluded that the SUV's wheels and tires were not "stock." Rather, someone had installed extremely wide wheels and narrow tires.

¶ 15 The parties stipulated that defendant's fingerprints were found on the exterior driver's side of Soto's minivan. The parties further stipulated that a medical examiner determined that Herrera died of multiple injuries, and the manner of death was homicide.

¶ 16 During the jury instruction conference, defense counsel requested reckless homicide instructions, arguing that defendant merely bumped into the SUV. The State responded that defendant acted intentionally, hitting the SUV multiple times at high rates of speed. The trial court denied defendant's motion.

¶ 17 The jury found defendant guilty on one count of first degree murder and seven counts of aggravated battery. The trial court sentenced defendant to seven concurrent terms of five years' imprisonment for aggravated battery and one 49-year term for first degree murder, to run consecutively to the aggravated battery terms.

¶ 18 II. ANALYSIS

¶ 19 A. Jury Instruction

¶ 20 Defendant argues that the trial court erred in refusing to instruct the jury regarding the lesser-included offense of reckless homicide. The State responds that the evidence did not support that instruction. We turn first to the standard of review.

¶ 21 Citing *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008), defendant argues that whether the evidence is sufficient to support a jury instruction is a matter of law reviewed *de novo*. Citing *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998), the State argues that we should review this issue for an abuse of discretion. We agree with the State. With the exception of *Tijerina*, Illinois courts have consistently held that a trial court's decision regarding jury instructions is reviewed for an abuse of discretion. See, *e.g.*, *DiVincenzo*, 183 Ill. 2d at 249; *People v. Mohr*, 228 Ill. 2d 53, 66 (2009); *People v. Jones*, 175 Ill. 2d 126, 132 (1997); *People v.*

Castillo, 2012 IL App (1st) 110668, ¶ 50; *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 66. Even the *Tijerina* court, after suggesting a bifurcated standard of review, ultimately applied the abuse-of-discretion standard. See *Tijerina*, 381 Ill. App. 3d at 1031 ("We find that the trial court did not abuse its discretion in refusing to tender to the jury instructions on involuntary manslaughter and second degree murder based on provocation."). We therefore review this issue for an abuse of discretion.

¶ 22 We must determine whether the trial court abused its discretion in refusing to instruct the jury regarding the lesser-included offense of reckless homicide. Instructions guide juries in applying the law and reaching a verdict. *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009). Jury instructions are proper if there is some evidence in the record to justify them. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). A lesser-included offense instruction is proper only if the evidence would rationally permit a jury to find the defendant guilty of that offense. *People v. Parson*, 284 Ill. App. 3d 1049, 1060 (1996). Whether a reckless homicide instruction is warranted depends on the facts and circumstances of each case. *Castillo*, 2012 IL App (1st) 110668, ¶ 53 (citing *DiVincenzo*, 183 Ill. 2d at 251).

¶ 23 The primary difference between first degree murder and reckless homicide is the requisite mental state. *DiVincenzo*, 183 Ill. 2d at 249. To sustain a reckless homicide conviction, there must be evidence that the defendant acted recklessly. *Id.*; 720 ILCS 5/9-3(a) (West 2008). Recklessness is statutorily defined:

> "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the

standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2008).

"A defendant acts recklessly when he is aware that his conduct might result in death or great bodily harm, although that result is not substantially certain to occur." *DiVincenzo*, 183 Ill. 2d at 250. Reckless conduct requires a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *Id.*

¶ 24 Here, the trial court did not abuse its discretion in refusing to instruct the jury regarding reckless homicide. Defendant repeatedly drove a minivan into an SUV. Timothy testified that defendant struck the SUV at more than 30 miles per hour, while Soto, who was in the minivan, stated that defendant struck the SUV at 50 or 60 miles per hour. The SUV rolled multiple times and struck a pole and a building before coming to rest upside down. The State also presented evidence that defendant attacked this particular SUV in the mistaken belief that its passengers were members of a rival gang, the Latin Dragons. Given the multiple collisions, the speed at which defendant was traveling, and evidence that he was engaged in an ill-conceived act of vengeance against a rival gang, we cannot say that the trial court abused its discretion. The evidence presented does not indicate mere disregard for a substantial and unjustifiable risk or gross deviation from the standard of care. 720 ILCS 5/4-6 (West 2008). Rather, it shows that defendant *intended* to cause death or great bodily harm or, at the very least, *knew* that his conduct created a strong probability of death or great bodily harm. See 720 ILCS 5/9-1 (West 2008).

¶ 25 Illinois courts consider several factors in determining whether a defendant may have acted recklessly, warranting instruction on a lesser-included offense. These factors include the brutality and duration of the offense, the severity of the victim's injuries, the disparity in size

between the defendant and the victim, whether the defendant used a weapon, and whether the defendant struck multiple times. See *DiVincenzo*, 183 Ill. 2d at 251 (collecting cases discussing these factors). Here, the offense was brutal, and the victims' injuries severe. Herrera died, Penkala sustained a severe head injury that required an induced coma, and the others suffered a wide range of injuries, including broken bones, lacerations, and bruised lungs. While defendant did not wield a traditional weapon, he aimed the minivan at the SUV, striking it repeatedly. These facts indicate that defendant acted intentionally or knowingly rather than recklessly.

¶ 26 While we recognize that a different judge may have instructed the jury regarding reckless homicide, we cannot say that the trial judge's decision here was unreasonable. See *Castillo*, 2012 IL App (1st) 110668, ¶ 50 ("A trial court abuses its discretion when its decision is 'fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.' " (quoting *People v. Kladis*, 2011 IL 110920, ¶ 23)). Given the strong evidence that defendant acted either intentionally or knowingly, we hold that the trial court did not abuse its discretion in refusing to instruct the jury regarding reckless homicide.

¶ 27 B. Prosecutorial Misconduct

¶ 28 Defendant urges us to reverse his conviction and remand this cause for a new trial, where the State's closing argument was improper and rose to the level of prosecutorial misconduct. The parties disagree, once again, about the standard of review. As we observed in *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011), there appears to be a conflict among Illinois Supreme Court cases regarding the correct standard for reviewing improper remarks during closing argument. Citing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Sims*, 192 Ill. 2d 592, 615 (2000), defendant argues that we should review this issue *de novo*, because the prosecutor's statements are reflected in the transcripts and are therefore undisputed, leaving only a legal

question. The State, citing *People v. Hudson*, 157 Ill. 2d 401, 441 (1993), argues that the trial court is in a better position to rule on objections during closing argument, and the standard is therefore abuse of discretion. Because defendant's claim fails under either standard, we need not take a position in this case. See *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008) ("[W]e do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard.").

¶ 29 Prosecutors are allowed a great deal of latitude during closing argument and may comment upon and draw reasonable inferences from the evidence. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Prosecutors must refrain, however, from improper prejudicial arguments or comments. *Id.* In reviewing this issue, we must consider both parties' closing arguments to place the State's remarks in context. *Johnson*, 385 Ill. App. 3d at 604.

¶ 30 Defendant points to four comments the State made in closing. In the first instance, the State argued, "You drive this how-many-ton vehicle into another vehicle that is jammed with people like that." Defendant contends that the minivan's weight was a fact not in evidence, and the SUV was not "jammed" with people. Defendant is correct in one regard: the State never presented evidence of the minivan's precise weight. However, the State was not arguing the minivan's precise weight. Rather, it used the phrase "how-many-ton vehicle" to communicate that a minivan is a large vehicle. The State was not required to present evidence of the minivan's weight in order to make this argument. Rather, the prosecutor appealed to the jurors' common knowledge and common sense. Regardless of the vehicle's precise weight, the fact that a minivan is a large vehicle is not outside of the knowledge of most jurors. See *People v. Dat Tan Ngo*, 388 Ill. App. 3d 1048, 1055 (2008) (although attorneys generally may not argue facts not in

evidence, they may discuss subjects of general knowledge, common experience, or common sense in argument); *People v. Ligon*, 365 Ill. App. 3d 109, 123 (2006) (same).

¶ 31 Nor was the term "jammed" inaccurate. The word means, in pertinent part, an area "closely packed" with people or things. Webster's Third New International Dictionary 1208 (1986). Even a Lincoln Navigator may fairly be called "jammed" or "closely packed" when occupied by eight persons. Indeed, Garcia testified that Monarrez "kept moving forward and backwards" and "couldn't really sit down" because the SUV was "too crowded." The State's comments were not improper or inaccurate, much less did they rise to prosecutorial misconduct.

¶ 32 Defendant further contends that the State improperly argued that "[s]omeone has already been shot, now this guy shows disrespect to him, and what happens is he spots the wrong SUV, the wrong black SUV." He argues that there was "absolutely no evidence" that he was "seeking out a particular SUV, such that he could have stumbled upon the 'wrong SUV.' " Soto testified, however, that the day before the instant offense, she, defendant, and Macho were driving in her minivan when Macho was shot. On the night of the offense, she observed a black SUV by the BeeFee's restaurant, and defendant said, "those are them dragons." They later saw a Penkala's black SUV, and defendant stated, "they are trying to kill us." There was further testimony suggesting that defendant flashed gang signs upon seeing the SUV's passengers.

¶ 33 Based on this evidence, the State's theory at trial was that defendant, a Latin King, mistook the SUV's passengers for the Latin Dragons who shot Macho. According to the State's theory, defendant sought revenge by driving the minivan into an SUV. The State's argument was based on the evidence presented and reasonable inferences drawn therefrom. See *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008) (prosecution has wide latitude during closing

argument, so long as comments are based on the evidence or reasonable inferences drawn therefrom). The trial court therefore did not err in overruling defendant's objection.

¶ 34 Next, defendant claims that the State mischaracterized Tran's testimony during rebuttal. At trial, Tran testified that defendant "got next to us" and hit the SUV "[o]n the driver's side." When asked what happened next, Tran stated, "We looked out the other side and he side swiped us." When asked to clarify what direction the minivan was proceeding in when it sideswiped the SUV, Tran responded, "To the right." In closing, defense counsel referred to Tran's testimony, arguing that the minivan never actually sideswiped the SUV. The State addressed this argument in rebuttal:

> "Counsel got up here and said let's look at Khanh Tran and how the van sideswiped the SUV, and got up here and showed you the driver's side of the van. When did Khanh say that the driver's side of the van sideswiped that Navigator? He never said such thing when he testified in this courtroom."

Following defendant's objection, the State continued:

> "[Tran] said he was sitting in the captain's seat right behind the driver when from the opposite direction a van pulls right alongside of him driver's side to driver's side, and then he can see the driver. He didn't say the side swipe was there, he said the van just drives off."

The trial court overruled defendant's objection.

¶ 35 Defendant argues on appeal that the State's comment was improper, because Tran testified that the minivan sideswiped the SUV. The State responds that the prosecutor was clarifying which side of the SUV was sideswiped. Tran's testimony regarding how and where the minivan sideswiped the SUV was not entirely clear. Even on appeal, the parties are unclear

regarding which side of the SUV was sideswiped. Whether and where the minivan sideswiped the SUV was a factual question for the jury to determine. It appears from the transcripts that the State was simply trying to clarify how and when the sideswipe occurred. It is entirely proper for the State to draw reasonable inferences from the evidence presented. See *Gonzalez*, 388 Ill. App. 3d at 587 (prosecution has wide latitude during closing argument, so long as comments are based on the evidence or reasonable inferences drawn therefrom).

¶ 36 Defendant alleges one final error. The State argued in closing that Soto "could have said anything that she wanted while that court reporter was taking the words down. If she had a complaint, she could have said it and it would have been typed down." We see nothing wrong with the State articulating its theory that Soto's statement was credible and her subsequent claim that it was coerced was unbelievable. A prosecutor's assertion that a witness is lying is not improper if supported by the evidence. *People v. Johnson*, 114 Ill. 2d 170, 199 (1986). Defendant also had an opportunity to elicit Soto's testimony that she did not state that she was coerced because she was scared. This was an issue for the jury to decide, and the State did not overstep the bounds of proper closing argument. Accordingly, we find no merit in defendant's contention that the State's closing argument constituted prosecutorial misconduct.

¶ 37 C. Sentence

¶ 38 Defendant contends that his sentence was excessive in light of his nonviolent criminal background and potential for rehabilitation. The State responds that the trial court considered the factors in aggravation and mitigation and properly exercised its discretion in sentencing defendant.

¶ 39 Illinois Supreme Court Rule 615(b)(4) gives reviewing courts the power to reduce a defendant's sentence. Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967). However, a trial court's

sentencing decision is entitled to great deference. *People v. Stacey*, 103 Ill. 2d 203, 209 (2000). Trial courts are in a far better position to assess a defendant's credibility, demeanor, general moral character, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). A reviewing court must therefore not substitute its judgment for that of the trial court simply because it would have weighed the factors in aggravation and mitigation differently. *Id.* Further, a reviewing court may not alter a defendant's sentence absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The trial court abuses its discretion where the sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.*

¶ 40 Defendant argues that the trial court failed to consider evidence presented in mitigation. Defendant is the father of three children and four stepchildren. He also had a steady employment history, including installing tires and car audio systems and working at a warehouse, positions he held for several years each. Further, his criminal history consisted entirely of nonviolent drug offenses, and the longest sentence he had received prior to this case was two years' imprisonment. He also apologized during allocution.

¶ 41 We see no reason to disturb the sentence imposed by the trial court. Defendant does not dispute that his sentence falls within the statutory range. Prior to sentencing defendant, the trial court stated that it had considered the factors in aggravation and mitigation. The trial court was aware of defendant's employment history, familial ties, criminal history, and apology. Indeed, defendant's apology was as much a means of minimizing his guilt as an expression of responsibility and remorse:

> "I want to apologize for the family and friends. This was a car accident. It wasn't meant to be. I wasn't looking for nobody to kill. They make me seem like I was a

monster. I apologize to you. I'm sorry. I know I cannot bring her back, but I apologize. I apologize to the victims."

The court concluded during sentencing that defendant had had a "desire to injure the people in the car" and that this was "something far more nefarious than a traffic accident."

¶ 42 The trial court adequately considered the factors in aggravation and mitigation. Defendant's sentence is within the statutory range and neither greatly at variance with the spirit and purpose of the law nor manifestly disproportionate to the nature of the offense. Accordingly, we reject defendant's claim that his sentence is excessive.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 45 Affirmed.