2017 IL App (1st) 140881-U

FOURTH DIVISION
January 26, 2017

No. 1-14-0881

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 18993
	)	
STEVEN ROBERSON,	)	Honorable
	)	Noreen Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for aggravated battery of a child affirmed over his contention that the State engaged in prosecutorial misconduct during closing arguments.

¶ 2 Following a jury trial, defendant Steven Roberson was convicted of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008) (re-codified as 720 ILCS 5/12-3.05(b)) and sentenced to 14 years' imprisonment and 3 years of mandatory supervised release (MSR). On appeal, defendant contends he was deprived of his constitutional right to a fair and impartial trial where the State committed prosecutorial misconduct during closing arguments. For the following reasons, we affirm.

¶ 3 The State charged defendant with two counts of aggravated battery of a child for the victim Nathaniel Roberson's broken femur and immersion burns on his feet. At trial, the victim's mother, Serita Gibson testified that she met defendant in October 2008 and shortly thereafter became pregnant. Defendant is the victim's father, and he moved in with Gibson and her aunt, Peggy Wheeler, after learning of the pregnancy. The victim was born prematurely, at 31 weeks, on June 5, 2009. He remained in the hospital for a month after his birth and was released on July 5, 2009. Both Gibson and defendant were responsible for taking care of the victim. No one smoked in the house around the victim, but defendant was a smoker.

¶ 4 On July 12, 2009, Gibson noticed the victim had black marks on the bottom of his right foot, which were circular and in a diagonal pattern. When Gibson asked defendant about the marks, he responded that he thought they were bug bites. The victim was in defendant's care before Gibson discovered the marks. A few days later, on July 16, 2009, Gibson observed blood and two blisters on the last two toes of the victim's left foot. Upon inquiry, defendant told Gibson that he gave the victim a bath in the kitchen sink and the victim's foot either got in a stream of hot water or his foot might have gotten into a cup of hot water where defendant was warming his

bottle. Defendant never specifically told Gibson what happened to cause the victim's burns. The injuries looked superficial so Gibson put Vaseline on the victim's toes and wrapped them with gauze. Wheeler, an anesthesiologist, also looked at the burns and put ointment on them.

¶ 5 On July 20, 2009, Gibson contacted the victim's pediatrician, Dr. Natalie Parker Renfroe, because the victim was having difficulty feeding, was constipated, and Gibson was concerned about the burns and marks on the victim's feet. On July 21, 2009, Gibson took the victim to the pediatrician, who instructed her to take him to the emergency room. Prior to going to the emergency room, Gibson returned home and informed defendant that she had to take the victim to the hospital. Defendant declined to go to the hospital, and instead asked Gibson to take him to his mother's house. At the hospital, staff assessed the victim, and a social worker interviewed Gibson. An X ray revealed the victim had a broken femur. A few hours later, defendant arrived at the hospital.

¶ 6 With the help of an Oak Park Police Department detective, Gibson compiled a list of all of the people that came into contact with the victim in the two weeks after his release from the hospital. She also made a calendar of what occurred during those two weeks.

¶ 7 On cross-examination, Gibson acknowledged that Wheeler babysat the victim several times prior to discovering the burns, and 14 other people, including church members and defendant's family members, had supervised contact with the victim after he was released from the hospital on July 5, 2009. She also acknowledged that she did not take the victim to the hospital sooner because the injuries to his feet initially appeared superficial.

¶ 8 Dr. Natalie Parker Renfroe, the victim's pediatrician, testified that she saw the victim on July 6, 2009, the day after he was released from the hospital, and his skin was normal. When Gibson returned with the victim on July 21, 2009, however, the victim's feet were swollen and his right foot had black markings on it, so she advised Gibson to take him to the emergency room. Dr. Parker Renfroe acknowledged that Gibson also brought the victim to see her because he was crankier than usual and had a hernia.

¶ 9 Gail Brodkey, the emergency room social worker at Lurie Children's Hospital, testified that she saw the six-week-old victim on July 21, 2009. An emergency room physician asked Brodkey to talk to the victim's family because the physician was unsure about how the victim sustained his foot injuries. Brodkey interviewed Gibson, who was calm, but concerned about the victim. Defendant arrived at the hospital after the interview with Gibson. Brodkey also interviewed defendant. Defendant told Brodkey that he did not tell Gibson about the black marks on the victim's right foot because initially they were red spots, and he did not know what they were. He believed that the victim sustained burns to his feet when he bathed the victim a week prior. Defendant stated that when he bathed the victim, he was holding the victim in one hand and preparing a bottle with his other hand. In order to prepare the bottle, defendant warmed a teacup with hot water, and he believed the victim either kicked the teacup over or put his foot in the teacup. At the time, he did not tell Gibson about the burns because he did not realize the victim was burned.

¶ 10 Brodkey was present when the parents found out about the victim's broken femur. Defendant had "a very flat affect and didn't really react to anything," although he did cry at one

point. After speaking with the parents and the physicians, Brodkey called the Oak Park Police Department and the Department of Children and Family Services (DCFS).

¶ 11 Dr. Emalee Flaherty, the State's expert in pediatric child abuse, testified that she is the head of the Division of Child Abuse Pediatrics and the medical director of the Protective Services Team at Lurie Children's Hosptial. The Protective Services Team evaluates children brought into Lurie Children's Hospital to help determine whether a child's injuries are a result of child maltreatment. Dr. Flaherty supervised the fellow, Dr. Sarah Monahan Estes, who evaluated the victim on July 21, 2009. Dr. Monahan saw the victim, interviewed the family, and discussed her findings with Dr. Flaherty. In addition to supervising Dr. Monahan throughout the process, Dr. Flaherty also reviewed the victim's medical records, X rays, pictures, lab tests, interview notes, and any other available information. She did not personally see the victim, which was normal for her position within the Protective Services Team. The two doctors co-authored a report with their conclusions regarding the victim's injuries.

¶ 12 Upon reviewing the victim's X rays, Dr. Flaherty determined he had a spiral femur fracture, which is a fracture that curves around the bone. Spiral fractures are caused by twisting the bone and require an abnormal movement. Dr. Flaherty stated that she "expects" that a baby with a spiral fracture would be in a lot of pain, but acknowledged that her report stated that the parents did not report any change in behavior or fussiness in the victim.

¶ 13 Dr. Flaherty also reviewed pictures of the victim's feet and observed burns on both feet and his left leg, as well as four scabs on the sole of his right foot. Dr. Flaherty's report stated that defendant's explanation of the burns on the victim's left foot was inconsistent with the physical

exam. She stated to a reasonable degree of medical certainty that the burns to the victim's left leg and foot were immersion burns that were caused by holding his foot and leg in very hot liquid for long enough for a partial thickness, or second-degree, burn to occur, and that the injuries were nonaccidental. She knew it was an immersion burn because it covered the surface of the victim's foot and had a clear line of demarcation between the burned skin and normal skin. Because there was some spared skin that was not burned in the folds of the victim's foot and the bottom of the foot, Dr. Flaherty concluded that the foot, at a 90-degree angle to his leg, was placed into a hot fluid and onto a bottom surface. The bottom surface was cooler than the hot fluid, which prevented it from burning like the rest of the foot. The toes on the victim's left foot also had second-degree burns with blistering. While Dr. Flaherty did not know the temperature of the water in this case, she stated that 113-degree water is "painfully hot" but would not cause skin to burn, 120-degree water would cause second-degree burns within approximately 5 minutes, and 140-degree water would cause second-degree burns in seconds. She noted that in some of the photographs of the victim's injuries, the skin appeared rough because it was healing. When defense counsel asked if the skin turned "dark and crusty looking" as part of the healing process, Dr. Flaherty responded affirmatively.

¶ 14 Further, the scabs and the burns on the victim's right foot were also second-degree burns. Dr. Flaherty's report stated that the parents' statements regarding the black marks on the victim's right foot were inconsistent with the physical findings. The four marks looked oval in certain pictures and were similar shapes, but different sizes. Although Dr. Flaherty was unsure of their cause, her report indicated that "a differential includes burns that are chemical or thermal." Her

"best medical opinion" was that they were a result of child abuse because a newborn infant could not sustain that type of injury on his own.

¶ 15 The parties stipulated that Shana Kutok, a detective with the Oak Park Police Department, would testify that on July 22, 2009, she tested the water temperature at the Wheeler residence where defendant, Gibson, and the victim were living. Detective Kutok ran the water in the kitchen sink for five minutes and found it to be 114 degrees. The trial court admitted into evidence photographs of the victim's injuries, as well as Gibson's list of people who came into contact with the victim, and the calendar of what occurred in the two weeks after the victim was released from the hospital on July 5, 2009.

¶ 16 Dr. Christopher Sullivan, the defense expert in pediatric orthopedics, testified that he reviewed the victim's medical records, police reports, photographs, and the file from DCFS. Dr. Sullivan stated that premature infants are more susceptible to injuries. He stated to a reasonable degree of medical certainty that the femur fracture was mostly likely the result of an "accidental mechanism," but later acknowledged he could not say with certainty whether or not the fracture was an accident. The victim suffered an oblique fracture, rather than a spiral fracture, in his left femur. The victim's injury was likely caused by twisting his leg, which could have resulted from positioning him in a chair or changing his clothes. Dr. Sullivan acknowledged that nothing indicated the victim's femur was fractured by changing his clothes or positioning him in a chair, but that the cause was unknown and those were possible causes. It would have been difficult for the parents to ascertain that the victim's leg was broken because there would not have been swelling.

¶ 17 Peggy Wheeler, Serita Gibson's aunt, testified as a defense witness that in 2009 Gibson, the victim, and defendant lived in her house in Oak Park. When she found out about the victim's burns, she checked her water heater to adjust its temperature. The water heater was set to "high" so Wheeler adjusted it to "medium." It was initially set on high because the water took several minutes to heat up, although steam was visible after running the water for four to five minutes. On July 22, 2009, Oak Park Police Department detectives tested the water in her kitchen sink. At that point, Wheeler had already adjusted the setting on the water heater to medium. The detectives' test revealed that after running the kitchen sink for a few minutes, the water was 114 degrees.

¶ 18 Defendant testified that the victim's birth was the proudest day of his life, and he was excited to have the victim. The victim was in the neonatal intensive care unit (NICU) after he was born prematurely. Defendant was with the victim in the NICU most of the time, but occasionally returned home to Wheeler's house to "freshen up" and child-proof the house. He took care of the baby while Gibson was healing from her cesarean section surgery. Defendant clarified that the black scabs depicted in the photographs on the victim's right foot were initially pink bumps that resembled mosquito bites. He first observed the pink bumps on the victim's foot a few days prior to the bath incident.

¶ 19 Defendant bathed the victim once in the kitchen sink. He held the victim in one hand, and prepared a bottle with his other hand. Defendant put the bottle in a "traveling thermal mug" and ran hot water into the mug, while still holding the victim. After undressing the victim, defendant sat him on one side of the double sink and gave him a sponge bath. While the victim was on one

side of the sink, the water was overflowing out of the mug on the other side of the sink. Defendant left the room for a minute and when he returned, the mug was knocked over, the sink was still running, and the victim was crying. He noticed the last two toes on the victim's left foot were red and blistering so he put ice on the victim's toes before putting him down to sleep. When Gibson asked defendant about the victim's toes later that day, he responded that the victim got into the water while defendant was bathing him. Defendant did not treat the burns because he did not know how.

¶ 20 Gibson took the victim to the pediatrician because he was constipated and having trouble feeding, but defendant did not think the situation was serious enough for him to go as well. Gibson told defendant she had to take the victim to the hospital for a hernia, and defendant did not accompany them to the hospital because he had a hernia as a child and did not think it was serious. Although he asked Gibson to take him to his mother's house, defendant took a cab to the hospital as soon as he found out the victim's femur was broken and had burns on his feet. At the hospital, defendant told the social worker that the burns must have happened when he bathed the victim, but was not positive about what caused them. He acknowledged that he felt responsible for the burns but denied breaking the victim's leg or holding him in water to burn him. After spending the night at the hospital, defendant answered more questions the following morning until Oak Park police arrived and took him to the police station for questioning. Defendant stated that Wheeler took care of the victim when he and Gibson left the house, and that numerous other people saw the victim.

¶ 21 As discussed in more detail below, during its closing argument, the State argued that defendant intentionally caused the injuries to the victim's feet and femur. The prosecutor noted that the victim's left foot was "charred" "like if you are barbecuing and you burn a steak." When discussing the victim's injuries, the prosecutor referred to the victim as a "poor baby." At the end of its closing, the State told the jury that defendant was responsible for the victim's injuries. Defense counsel argued that the victim's injuries were accidental, not intentional, and theorized that the black marks on the victim's foot were possibly splash marks caused by hot water. On rebuttal, the State argued that the four black marks on the bottom of the victim's foot were from an unknown cause, but they could have been caused by a cigarette and defendant smokes.

¶ 22 After closing arguments, the court advised the jury that closing arguments are not evidence, and that any statement or argument made by the attorneys which is not based on the evidence, should be disregarded. Further, the jury was instructed that the indictment was merely a charging document and not evidence of defendant's guilt. The jury found defendant not guilty of aggravated battery of a child for the victim's femur injury and guilty of aggravated battery of a child for the burns on the victim's feet. The trial court sentenced defendant to 14 years' imprisonment and 3 years of MSR.

¶ 23 Defendant filed a posttrial motion for a new trial raising various errors, including prosecutorial misconduct during closing and rebuttal arguments. The court denied the motion, and this appeal followed.

¶ 24 On appeal, defendant 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. In particular, he argues that the State (1) inflamed juror's passions and evoked sympathy for the victim by referring to the victim as "poor baby" and stating the victim's skin was "charred" "like if you are barbecuing and you burn a steak"; (2) diminished defendant's presumption of innocence; and (3) argued facts not in evidence by arguing that the burn marks on the victim's foot could be from a cigarette. Defendant preserved his allegations of error regarding the charred skin comments and the remark arguing that a cigarette could have caused some of the victim's burns. However, he concedes that he did not preserve his allegations of error regarding the "poor baby" remark or the comment on his presumption of innocence and asks that we review those comments for plain error. Defendant further contends that his trial counsel was ineffective for failing to object to the unpreserved allegations of prosecutorial misconduct.

¶ 25 We first 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 arguments 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)). Nevertheless, we need not resolve this issue at this time because the outcome 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 prosecution 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). Even if the prosecutor's comments exceeded the bounds of proper comment, we still would 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 Turning first to the preserved contentions, defendant argues that the State's reference to the victim's "charred" skin that looks "like if you are barbecuing and you burn a steak" was inflammatory and evoked the jury's sympathy. The comments were based on photographs admitted into evidence, which depicted the victim's second-degree burns. Further, Dr. Flaherty testified that the victim's skin looked rough because it was healing, and that the burns were "deep partial thickness burns," indicating the severity of the injury. While the State's choice of words was graphic, the testimonial and photographic evidence indicates that the victim's burns were deep and severe. Given the context of the comments and the evidence on which they were based, we cannot say that the State's comments were improper. See *People v. Trotter*, 2015 IL App (1st) 131096, ¶50 ("During closing argument, the prosecutor may properly comment on the evidence presented.")

¶ 28 Next, defendant argues that the State improperly argued facts not in evidence when it stated during its rebuttal argument, "And do you absolutely know how [the black marks] are caused? No, they could be caused by cigarettes." After defense counsel objected, the trial court overruled the objection, stating that the prosecutor could argue her theory of the case. Here, we conclude that the State's remark during its rebuttal argument that the black marks on the victim's foot could have been made by a cigarette was not improper. The State presented photographs of the scabs on the victim's right foot, and the testimonial evidence revealed that defendant was a smoker and that the scabs were round, second-degree burns. Thus, the State's remark was a legitimate inference based on the evidence. See *Nicholas*, 218 Ill. 2d at 121. Moreover, the indictment reveals that defendant was charged only with the immersion burns to the victim's left foot, and not the marks on his right foot from an unknown cause. Thus, the State's comment during its rebuttal argument regarding the separate and distinct injury to the victim's other foot was simply a reasonable inference from evidence that was relevant to show intent or absence of mistake for the immersion burn. See *People v. Burgess*, 176 Ill. 2d 289, 308 (1997). Furthermore, the remark was responsive to defense counsel's argument that the black marks were accidental injuries from hot water splashing on the victim. Because defense counsel argued its theory of what caused the marks, the State was entitled to respond with its own theory of the cause of the injuries. See *People v. Hall*, 194 Ill. 2d 305, 346 (2000) (noting that prosecutors may respond when defense comments during closing arguments "clearly invite a response")

¶ 29 We review the "poor baby" and presumption of innocence remarks for plain error. The plain-error doctrine permits a reviewing court to consider unpreserved errors when " '(1) the

evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). Prior to addressing plain error, however, we must first determine whether any error occurred. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 30 As to the first unpreserved remark, in this case, we find that in context stating "poor baby," did not inflame the jurors' passions or evoke sympathy for the victim, but was instead based on the evidence. The record reveals it was merely a comment on the victim's injuries, which were depicted in photographs introduced at trial, and offered to demonstrate that the victim, as an infant, was unable to sustain the injuries himself. Although the prosecution stated that the victim was an infant multiple times in its closing argument, the victim's age was an element of the offense and was therefore properly referenced. 720 ILCS 5/12-4.3(a) (West 2008) (re-codified as 720 ILCS 5/12-3.05(b)(1) ("A person *** commits aggravated battery when ***he or she knowingly *** causes great bodily harm *** *to any child under the age of the 13 years*") (Emphasis added.)) Moreover, the prosecution's "poor baby" remark in this case was markedly different than references to age that have been previously determined improper. See, *e.g.*, *People v. Liner*, 356 Ill. App. 3d 284, 297–98 (2005) (concluding that it was improper for the prosecutor to present closing argument that evoked sympathy for the victim based on her age *and* urged the jury to convict the defendant to protect other children in the county); *People v. Wood*, 341 Ill. App. 3d 599, 614 (2003) (finding that it was improper for the State to remark during closing argument that the jury place itself in the shoes of the child victim). Based on our

review of the record as a whole, we do not find that the State's "poor baby" remark improperly inflamed the jury or evoked sympathy for the victim. We therefore conclude the remark did not constitute prosecutorial misconduct, and accordingly was not plain error. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007) (without error, there is no plain error).

¶ 31 We next consider defendant's contention that the State committed prosecutorial misconduct by improperly "mock[ing] the presumption of innocence." Defendant claims that the State argued that the indictment was proof of his guilt by stating,

> "[The victim] endured the great bodily harm inflicted upon him by the defendant more than once. *And it's because of that that the defendant sits before you charged as he is.* The defendant, not Peggy Wheeler, not Serita Gibson, not the people who held [the victim] at church for a blink, none of the people who visited are the ones who inflicted the horrible injuries to [the victim]. *It's all on him, and that's why he is here, and that's why we are asking that you find him guilty as charged.*" (Emphasis added.)

Further, defendant contends these remarks were especially prejudicial because his defense was that someone else was responsible for the victim's injuries.

¶ 32 When a prosecutor misstates the law during closing arguments, it may be grounds for reversal. *People v. Moody*, 2016 IL App (1st) 130071, ¶ 68. Here, we cannot say that the State eroded defendant's presumption of innocence, nor can we say that the State's remarks even constituted a comment on defendant's presumption of innocence. In context, the remarks were made after the State commented on the evidence presented and the elements of the offenses charged. Thus, the State's comments reflect the State's position that defendant was guilty based

on the evidence that it had just argued. See *Nicholas*, 218 Ill. 2d at 121 (stating that the prosecution may argue legitimate inferences derived from the evidence). Moreover, the court instructed the jury that the indictment was merely a charging document and not evidence against defendant. We further note that defendant's reliance on *People v. Keene*, 169 Ill. 2d 1 (1995) is misplaced. In *Keene*, our supreme court concluded that the prosecution's statement that defendant's "presumed 'cloak of innocence' was 'shredded and ripped and pulled [off]' to reveal guilt" was a misstatement of the law. *Id.* at 24-26. In this case, by contrast, the prosecution did not mention defendant's presumption of innocence at all and instead argued defendant's guilt based on the evidence presented. Therefore, we find that the State's comments were not improper. Because there was no error, plain error is inapplicable. See *Spicer*, 379 Ill. App. 3d at 449.

¶ 33 Further, defendant's contention that the cumulative effect of the prosecutor's misconduct warrants a new trial is unpersuasive. Where, as here, "the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error." *People v. Moore*, 358 Ill. App. 3d 683, 695 (2005).

¶ 34 Finally, defendant argues that his trial counsel was ineffective for failing to preserve his closing argument claims of error. To demonstrate ineffective assistance of counsel, defendant must show that (1) his attorney's performance was deficient, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either

prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 35 In this case, we do not find that counsel was ineffective because the record indicates that counsel made reasonable objections to the potentially improper statements made by the State during closing and rebuttal arguments. Furthermore, because there was no error, counsel's alleged deficient performance could not have resulted in a reasonable probability that the outcome of the proceeding would have been different. We therefore conclude that the defendant's ineffective assistance claim fails under *Strickland*'s second prong.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.