2013 IL App (1st) 112031-U

SECOND DIVISION
June 18, 2013

No. 1-11-2031

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. 08 CR 17647
	)	
THOMAS BRITTON,	)	Honorable
	)	Colleen McSweeney-Moore,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's claim that the prosecutor misstated the law of intent for aggravated battery with a firearm offense during closing argument rejected; evidence found sufficient for trier of fact to conclude that defendant was guilty beyond a reasonable doubt of aggravated battery with a firearm.

¶ 2 Following a jury trial, defendant Thomas Britton was found guilty of aggravated battery with a firearm and sentenced to natural life imprisonment as a habitual offender. On appeal, he contends that he was denied a fair trial where the prosecutor repeatedly misstated the law of intent during closing arguments and the trial court compounded that error when it refused to instruct the jury on the definitions of intent and knowledge. He also challenges the sufficiency of the evidence to prove him guilty of aggravated battery with a firearm beyond a reasonable doubt.

¶ 3 Defendant was charged with multiple counts of attempted first degree murder, aggravated discharge of a firearm, aggravated unlawful use of a weapon, unlawful use of a weapon by a felon, aggravated battery and aggravated battery with a firearm. Those charges arose out of an incident that occurred during the afternoon on July 6, 2008, in Summit, Illinois, when defendant fired a single gunshot which hit the victim, Dwan Powell, in his lower leg.

¶ 4 At trial, the victim, Dwan Powell, testified that on the evening of July 4, 2008, he was working as security for the nightclub, The Before and After Lounge, in Summit, when he had to remove an underage customer, who he knew as Creed, from the nightclub. Creed "swiped" at the victim's face, and the victim pushed Creed. The victim was then struck in the head by someone, and a brawl erupted. When the police arrived, they broke up the fight.

¶ 5 At noon on July 6, 2008, the victim was at the home of his brother, Darrel Powell, who lived at 7606 West 64th Street, in Summit. The victim was there with his brother and friends, Brandon Barry, Greg Tolbert, and Gary Morris drinking a few beers. At 4 p.m., he was told that the person who had hit him at the nightclub was nearby, and he went to find him to fight him. The victim saw three individuals, including defendant, run into a home at 7430 West 63rd Place. Defendant returned with a firearm, "aimed it towards the ground, and shot it by [the victim's] feet." When the victim was asked by the State if the gun was "pointed towards the front of your body," the victim responded, "I guess." When he was asked on cross-examination if defendant pointed the gun at the ground, he responded, "[y]es."

¶ 6 The victim further testified that defendant aimed the gun at Darrel and said, "do you want to die." Defendant then ran away, and the victim realized that he had been shot in the leg.

¶ 7 Darrel Powell testified that on July 4, 2008, he saw defendant hit the victim in the back of the head at the nightclub. Darrel then had a physical altercation with defendant. On July 6, 2008, while he was at his home with the victim, Barry, Tolbert, Morris, and his fiancé Jatan Glover, the victim decided to go look for defendant, and Darrel, Barry and Tolbert went with him. About a block from Darrel's home they found defendant sitting in front of an apartment

building at 7430 West 63rd Place. When defendant ran into the building, the victim decided to leave, but defendant immediately returned with a gun, and the victim and Darrel began to back up. Darrel testified that defendant said, "what's up," then aimed the gun "[b]elow [his] brother's waist." Darrel further testified that, "[w]hen [defendant] started to raise the gun he shot and *** I saw a puff of dirt behind my brother after the weapon was discharged." Defendant then pointed the gun at Darrel's chest and asked him if he wanted to die.

¶ 8 On cross-examination, Darrel was asked if the gun was pointed at the ground, and he responded that the gun "was pointed at my brother's leg" when it was fired. He then saw a "puff of dirt" behind the victim.

¶ 9 Brandon Barry testified that he was present for the incident on July 6, during which the victim encountered defendant, Sedrick, Tristian and Creed. As the victim and his group approached defendant, he ran into the building at 7430 West 63rd Place. Defendant then returned with a gun, and walked towards the victim, and said to the victim, "[y]ou think this is a joke." He then "raised the gun towards [the victim]," and "shot down towards [his] leg." After firing the gun, defendant pointed it at Darrel's chest, but then went back inside the building.

¶ 10 Barry further testified that on December 9, 2009, he received a call from defendant, who identified himself and told him that he would like to compensate Barry, and contact the victim to try and "squash this whole thing" and "make all this go away." Barry hung up the phone after telling defendant that he wanted no part in his bribery.

¶ 11 Gregory Tolbert testified that he was also present during the July 6 incident. Tolbert saw defendant run into the house and return less than a minute later with a gun. Defendant then asked the victim, "what's up now," and "lifted the gun up." As defendant was "raising [the gun] it went off." Tolbert thought the bullet went into the ground but saw that defendant had hit the victim in the leg. He then asked the victim's brother, Darrel, if he wanted to die, and ran back into the apartment building. On cross-examination, Tolbert testified that the gun was pointed at the ground when he heard the gunshot.

¶ 12 Summit lieutenant Michael Long testified that he interviewed the victim and his brother, Darrel. The victim told the officer that when defendant fired the gun, it was pointed at the ground. The lieutenant noted that his reports are summaries of what the witnesses told him and are not verbatim.

¶ 13 Cook County Sheriff's Department investigator Cody Lettier testified that he investigates criminal activity at Cook County jail. On April 28, 2009, he was monitoring the outgoing mail from the jail when he noticed two pieces of sealed outgoing mail that had the same address they were being sent to as the return address with no inmate return address on them. The inmates are required to put a return address with their identification number and the division they are in at the jail, and the mail is required to be unsealed.

¶ 14 Investigator Lettier further testified that he opened the two pieces of mail and saw that they were letters signed by defendant with one addressed to Trevon McDonald and the other to Lynn Britton. The letter addressed to McDonald asked him if he knew Barry and Tolbert who were witnesses against him along with the victim. Defendant stated in the letter that the victim refused to contact his lawyer and "[r]ight now nobody's helping me not get" natural life imprisonment. Defendant asked for "some more witnesses without any background to say they came -- they came to thirteen deep and was about to jump [] me." Defendant stated that he needs witnesses to testify that someone handed him the gun, or they saw them surround him, and then they heard a gunshot. Defendant stated that he thought the victim was going to say he did not do it, and asked does "[h]e want some cash or what? How much $ [*sic.*]? Let me know. I'm facing natural life, Famo. I would be there for you, so be there for me." He also stated that he needed some affidavits signed, and asked McDonald to talk to Barry and Tolbert for him.

¶ 15 In the letter addressed to Lynn Britton, defendant asked her to find out if Von can contact the victim, and if the victim wants some money. He asked her to see if she could get the victim's phone number so they could contact him personally.

¶ 16 The defense called Kennedy Jones, who was related to defendant. Jones testified that in the afternoon of July 6, 2008, the victim, Darrel, Tolbert, who had a stick in hand, and seven other individuals, four of whom had bottles in their hands, "charged at [defendant]," who ran into the apartment building at 7430 West 63rd Place. Defendant then returned with a gun, and "pointed the gun and told them to back up." They did not back up, so defendant "shot at the ground and then after that, everybody just, you know, walk away like nothing happened."

¶ 17 Cook County Public Defender's Office investigator Curtis Yonker testified that he interviewed Barry on August 21, 2009. Barry told him that defendant came out with the gun, "pointed it to the ground, and then he heard a shot."

¶ 18 During the jury instruction conference, the defense requested, without objection from the State, Illinois Pattern Jury Instruction, Criminal (IPI) No. 5.01 (4th ed. 2000) which defines recklessness. The defense also requested IPI No. 5.01A which defines intent and provides that a person acts intentionally to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct. The defense additionally requested IPI No. 5.01B which defines knowing and provides that a person acts knowingly with regard to the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist or knows the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct.

¶ 19 The defense explained that it was requesting the instructions defining recklessness, intent, and knowledge because it would be helpful to the jury to have a legal definition for the three different mental states. The State objected to IPI Nos. 5.01A, and B, maintaining that the jurors can use common sense in defining knowingly and intentionally; that the committee notes provide that the committee takes no position on whether these instructions should be given; and that they are only appropriate when asked for by the jury.

¶ 20 The court responded that the committee notes to IPI Nos. 5.01A, and B provide that the committee takes no position on these instructions, but that these definitions are within the common understanding of lay people. The court then told the parties that it believed the instructions were confusing, and based on its 30 years' experience in the criminal justice system, it found that most people understand the terms, intent, knowledge, and knowingly. The court stated it would give IPI Nos. 5.01A, and B only if the jury asked for definitions of those terms.

¶ 21 The court informed the jury, both before and after closing arguments, that the arguments are not evidence and that any argument not based on evidence should be disregarded. The jury subsequently found defendant guilty of aggravated battery with a firearm. This appeal follows.

¶ 22 In this court, defendant first contends that he was denied a fair trial where the prosecutor allegedly misstated the law of intent during closing arguments, and thereby distorted the burden of proof. He further maintains that this error was compounded by the court overruling his objections to the prosecutor's statements, and telling the jurors that it would instruct them on the law, but then refusing to provide instructions on the definitions of intent and knowledge. He asks this court to reverse his conviction and remand for a new trial.

¶ 23 A prosecutor is accorded wide latitude regarding the content of closing and rebuttal arguments, and may comment on evidence and any fair and reasonable inferences the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). When reviewing claims of prosecutorial misconduct during closing argument, we consider the entire closing argument of both parties to place the comments in context. *People v. Maldonado*, 402 Ill. App. 3d 411, 422 (2010). While a prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to defendant, such that absent those remarks the verdict would have been different. *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Thus, comments constitute reversible error only when they engender substantial prejudice against defendant such that it is impossible to say whether or not a verdict of guilt resulted from those remarks. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 24 We briefly note that due to a conflict between two supreme court cases, it is unclear whether we review this issue *de novo* or for an abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); *People v. Blue,* 189 Ill. 2d 99, 128 (2000). We, however, need not determine which is the proper standard of review because the result here is the same under either one. *People v. Woods*, 2011 IL App (1st) 091959, ¶38; *People v. Raymond*, 404 Ill. App. 3d 1028, 1060 (2010); *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009).

¶ 25 Defendant maintains that the following comments by the prosecutor during its opening closing argument misstated the law on intent: "[w]hen you do an act whatever your intent is in doing that act it follows that bullet." We observe that counsel objected to this comment, and was overruled, and the prosecutor then argued, "[e]ven if he fired that bullet to scare somebody, the intent of pulling the trigger follows it and whatever happens when that bullet flies is his responsibility." Counsel again objected, maintaining that this was a misstatement of the law, and the court responded by telling the jury that it would instruct it on the law and that it was proper for the attorneys to argue the evidence and reasonable inferences from the evidence. Defendant also maintains that the following comment made by the prosecutor during rebuttal was improper:

> "Even if you thought that the defendant was shooting at the ground, he's still guilty of Aggravated Battery with a Firearm. Because his intent does follow that bullet, wherever it goes. And doesn't that just makes sense, Folks?
>
> ***
>
> Now, of course, there is a chance that even if you were to believe that he was intentionally shooting at the ground at the group of people who were backing up *** [and] there's a chance that bullet is either going to bounce off the ground and hit someone or hit someone. Well, that is called Aggravated Battery With a Firearm. And you are guilty because your intent follows that bullet."

Defense counsel objected maintaining that this was a misstatement of the law, and the court overruled him noting that it would instruct the jurors on the law. Counsel also raised the propriety of the prosecutor's comments in his motion for a new trial, thereby preserving the issue for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). For the reasons that follow, we find no error in the prosecutor's comments.

¶ 26 Intent can rarely be proven by direct evidence because it is a mental state; instead, it may be proven by circumstantial evidence, in that it may be inferred from the surrounding circumstances (*People v. Witherspoon*, 379 Ill. App. 3d 298, 307 (2008)), and the character of defendant's acts (*People v. Foster*, 168 Ill. 2d 465, 484 (1995)). Reviewing the comments in this case in context (*Maldonado*, 402 Ill. App. 3d at 422), we observe that the prosecutor's complained-of comments were made in support of a circumstantial evidence of intent argument, which was proper (*Witherspoon*, 379 Ill. App. 3d at 307). Specifically, the prosecutor argued that the circumstantial evidence of defendant's intent included his actions of firing the gun, and his conduct after the shooting which included trying to bribe witnesses and asking them to claim that he was "jumped." Then, in rebuttal, the prosecutor, in stating that the intent follows the bullet, had further argued that there was a chance that the bullet would have bounced off the ground hitting someone, and that defendant's "own witnesses admit[ted] he was shooting the gun in front of that group of people." The prosecutor correctly noted that the circumstantial evidence from which the trier of fact could infer defendant's intent in this case included his actions of aiming the gun in the general direction of the victim, pulling the trigger, and hitting the victim, and the surrounding circumstances of defendant then immediately aiming the gun at Darrel and asking him if he wanted to die, and attempting to obtain false testimony and to bribe the witnesses. *People v. Jeter*, 247 Ill. App. 3d 120, 126 (1993).

¶ 27 Further, defendant is presumed to intend the natural and probable consequence of his actions (*People v. Terrell*, 132 Ill. 2d 178, 204 (1989)), which included him aiming the gun in the general direction of the victim and pulling the trigger. It was thus proper for the prosecutor to

argue that the intent followed the bullet as defendant most surely was either consciously aware or knew that if he fired the gun in the general direction of the victim, harm to the victim was practically certain as a natural and probable consequence of his deliberate act. *People v. Varnell*, 54 Ill. App. 3d 824, 827-28 (1977). We thus find no error in the prosecutor's comments.

¶ 28 In reaching this conclusion, we find this case factually inapposite to *People v. McCoy*, 378 Ill. App. 3d 954 (2008), cited by defendant. In *McCoy,* the prosecutor misstated the law of resisting a peace officer where he informed the jury that defendant is guilty even if she just questioned or argued with the officer, the error was not corrected by the jury instructions which did not define resisting, and the error was found to be plain error where the evidence was not closely balanced where it consisted of defendant testifying to one version of the events and the officer testifying to another. *McCoy*, 378 Ill. App. 3d at 965-66. Here, unlike *McCoy*, we find that the prosecutor's comments were proper, and that the jury instructions corrected any error where they cautioned that the closing arguments were not evidence.

¶ 29 Furthermore, even if there was error here, it was not reversible error because the verdict clearly did not result from the comments where there was ample evidence of defendant's guilt. *People v. Chavez*, 265 Ill. App. 3d 451, 460 (1994). Defendant concedes that he fired the shot that hit the victim, and the record shows that, on the date in question, after seeing the victim and his friends approaching, defendant entered the apartment building and returned with a gun. The victim testified that defendant fired the gun by his feet. The victim's brother, Darrel, testified that defendant aimed the gun at the victim. Though Barry initially told the investigator that defendant aimed at the ground, he testified under oath that defendant aimed at the victim's legs. Based on this evidence, it is clear that defendant intended to harm the victim when he fired his gun in the general direction of the victim, and hit him. *People v. Cannon*, 49 Ill. 2d 162, 166 (1971).

¶ 30 Further, and as previously noted, determination of defendant's mental state may also be inferred from the circumstantial evidence (*People v. Monroe*, 358 Ill. App. 3d 683, 688 (2005)), which showed that immediately after hitting the victim, defendant then pointed the gun directly

at Darrel and asked him if he wanted to die. Defendant subsequently attempted to bribe the victim and Barry and sought people to testify that he was attacked. *People v. Garcia*, 407 Ill. App. 3d 195, 201-02 (2011). These actions clearly show defendant's intent and consciousness of guilt. *People v. Gwinn*, 366 Ill. App. 3d 501, 517 (2006). Accordingly, we conclude that there was no reversible error from the State's comments on the law of intent in light of the ample evidence of defendant's guilt (*Chavez*, 265 Ill. App. 3d at 460), and where the court also cautioned the jurors that the arguments were not evidence (*People v. Howard*, 147 Ill. 2d 103, 150 (1991)).

¶ 31 Furthermore, the court's decision not to instruct the jury on the definitions of intent and knowledge did not compound any error where the plain meaning of knowledge and intent are within the common knowledge of the jurors (IPI No. 5.01A, B, Committee Note (4th ed. 2000)). *People v. Perry*, 2011 IL App (1st) 081228, ¶59). This is especially the case where, as here, there was no request by the jury for an instruction on the definitions. *Perry*, ¶60; *People v. Sanders*, 368 Ill. App. 3d 533, 537-38 (2006).

¶ 32 Defendant next contends that the evidence was insufficient to prove that he was guilty of aggravated battery with a firearm beyond a reasonable doubt. He maintains that there is no credible evidence from which a reasonable jury could have found that he intentionally or knowingly injured the victim where he was pointing the gun at the ground when he fired the shot that struck the victim's leg, and that the reasonable explanation for the bullet hitting the victim was that it was an accident that occurred from the gun "recoil[ing]," or the bullet "ricochet[ing] off the ground."

¶ 33 When defendant challenges the sufficiency of the evidence to sustain his conviction, our duty is to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proven beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995). A criminal conviction will be reversed only if the evidence is so

unsatisfactory or improbable that it leaves a reasonable doubt of defendant's guilt. *Wiley,* 165 Ill. 2d at 297. For the reasons that follow, we do not find this to be such a case.

¶ 34 To sustain a conviction for aggravated battery with a firearm, the State is required to prove beyond a reasonable doubt that defendant, in committing a battery, knowingly or intentionally, by means of discharging a firearm, caused injury to another person. 720 ILCS 5/12-4.2 (West 2010). Here, defendant maintains that the State failed to prove his intent, *i.e.*, that he acted with the conscious objective or purpose to cause injury, or that he was consciously aware that his conduct was practically certain to cause injury. We find, however, that the evidence was more than sufficient for the trier of fact to conclude that defendant had the required mental state and was thus guilty beyond a reasonable doubt of the offense of aggravated battery with a firearm.

¶ 35 The evidence included testimony from the victim that defendant fired near his feet, and Barry, and the victim's brother, Darrel, that defendant aimed at the victim. Defendant, however, maintains that Darrel's testimony was incredible based on his familial relationship with the victim, inconsistencies in his testimony regarding whether they were drinking on the day in question, and his bias against defendant based on their prior fight. This argument concerns the credibility of the witnesses, and here the trier of fact clearly found the State's witnesses credible in finding defendant guilty beyond a reasonable doubt. We have no basis for disturbing that determination. *People v. Campbell,* 146 Ill. 2d 363, 375 (1992). Further, minor inconsistencies in the testimony on collateral matters is not sufficient to create a reasonable doubt as to defendant's guilt. *People v. Myles*, 257 Ill. App. 3d 872, 884 (1994). Moreover, it is clear from the evidence that defendant intended to cause bodily harm to the victim where it showed that he went and retrieved the gun (*People v. Begay*, 377 Ill. App. 3d 417, 421-22 (2007)), then fired in the general direction of the victim (*Cannon*, 49 Ill. 2d at 166), and that his actions after the incident, which included pointing his gun at Darrel and asking him if he wanted to die, attempting to bribe the victim and Barry to not testify against him, and seeking witnesses to

testify that he was attacked, further showed his intent and consciousness of guilt (*Gwinn*, 366 Ill. App. 3d at 517). Accordingly, the evidence was sufficient for the trier of fact to conclude that defendant was guilty beyond a reasonable doubt of aggravated battery with a firearm. 720 ILCS 5/12-4.2 (West 2010).

¶ 36 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.