2019 IL App (1st) 162298-U

No. 1-16-2298

Order filed May 14, 2019

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 16173
	)	
L.C. ARCHER,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Mason and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The State's closing argument did not improperly draw attention to defendant's decision not to testify. Remanded with instructions to correct the mittimus.

¶ 2 Following a jury trial, defendant L.C. Archer was found guilty of delivery of a controlled substance and sentenced to 12 years in prison. He appeals, arguing that the State's closing argument improperly drew attention to his election not to testify, thereby depriving him of a fair trial. Defendant also contends that the mittimus should be corrected to reflect the proper number

of days he spent in presentence custody. We affirm the conviction, but remand to the trial court to correct the mittimus.

¶ 3 Defendant was charged by indictment with one count of delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2012)) in connection with an incident in which he allegedly sold between 1 and 15 grams of heroin.

¶ 4 The case proceeded to a jury trial, where Chicago police officer Ugarte[1] testified that, at approximately 3:50 p.m. on July 31, 2013, he was working undercover with a team of narcotics officers. He was driving an unmarked vehicle near the intersection of Grenshaw Street and Independence Boulevard, looking to make a controlled narcotics purchase. He described the neighborhood as a "[r]egular, ordinary residential [a]rea" known for narcotics sales. Ugarte saw defendant, whom he identified in court, standing on the sidewalk by 3719 Grenshaw. Defendant was wearing a black hat, a gray T-shirt, black pants, and black shoes. There was nobody else near him on the street, and nobody else in the area who matched his description. Ugarte pulled up next to defendant, held a $20 bill and a $10 bill between his thumb and pointer finger, and raised the three other fingers on his hand. Ugarte explained that the gesture was a common way to signify that he sought to purchase three bags of narcotics. Defendant approached the passenger side of Ugarte's car and dropped three Zip-loc bags of suspected heroin onto the passenger's seat. At this time, defendant was "a couple of feet" away with nothing concealing his face. Ugarte "look[ed] dead at him" for a couple of seconds and gave him the $30. Ugarte drove away and radioed defendant's description to his team. About five minutes later, he received a radio transmission that a suspect was in custody. Ugarte viewed the suspect and confirmed that it was

[1] Except as otherwise indicated, the transcript does not contain the first names of the people mentioned in this order.

defendant. Officer Rico Carter, a member of Ugarte's team, showed Ugarte the $30 that he recovered from defendant. Ugarte confirmed that they were the same bills he gave defendant by comparing their serial numbers to a list he made prior to the operation.

¶ 5 On cross-examination, Ugarte stated that he did not know defendant before meeting him on the day of the incident. He did not recall seeing anybody sitting on the porches of the homes in the area. He acknowledged that Roosevelt Road, which was one block south of Grenshaw, was a "heavily traveled street" with several businesses and restaurants. He also acknowledged that he did not describe defendant's facial features when he radioed a description to his team. Instead, the description was that of an African-American man, approximately six feet tall and 275 pounds, wearing all black. On redirect examination, Ugarte agreed that there was not "any doubt in [his] mind" that defendant was the man who handed him the bags. Ugarte also clarified that the transaction occurred on Grenshaw, not Roosevelt.

¶ 6 Chicago police officer Duran Lee testified that he was working as a "surveillance officer" on Ugarte's team on July 31, 2013. He explained that his role was to ensure Ugarte's safety and observe possible offenders. Lee was wearing plainclothes in an unmarked vehicle parked approximately 400 feet ahead of 3719 West Grenshaw. Defendant, whom Lee identified in court, was standing on the same side of the street on the sidewalk in front of 3719 West Grenshaw. Nobody else was around him. At approximately 3:50 p.m., Ugarte pulled up next to defendant as Lee kept watch in his vehicle's mirrors. There were other cars behind Lee on the street, but his view was unobstructed. He observed defendant reach inside Ugarte's vehicle. Ugarte drove away, but Lee continued to watch defendant as he crossed the street and stood on the sidewalk by 3716 Grenshaw. Lee radioed in defendant's description and location, and the "enforcement

officers" arrested defendant approximately three to five minutes later. Lee did not lose sight of defendant between the time Ugarte drove away and defendant was arrested. Ugarte returned a couple of minutes after the arrest and confirmed that defendant was the man who sold him the suspected heroin.

¶ 7 On cross-examination, Lee testified that he did not see anybody else "in the area in which the defendant was standing." He did not notice anybody sitting on a porch. Lee acknowledged that he did not actually see defendant place any objects in Ugarte's vehicle.

¶ 8 Carter testified that he was working as an "enforcement officer" on Ugarte's team on July 31, 2013. His role was to detain offenders after Ugarte executed the purchase. Carter and Sergeant Schnier waited in an unmarked vehicle about a block away from Grenshaw. At approximately 3:50 p.m., Carter received a radio transmission that Ugarte had purchased narcotics from a six foot tall black man dressed in all black. About two minutes later, Carter arrived at 3716 West Grenshaw, where Officers Patrick Wherfel and Bill Lepine were talking to defendant. Carter did not see anybody else matching the suspect's description in the area. Defendant was arrested after Ugarte drove by and identified him as the man who sold him suspected heroin. Carter performed a custodial search and found $164 in defendant's pocket. After checking the serial numbers on the bills, Ugarte confirmed that he had given defendant $30 of this money. On cross-examination, Carter acknowledged that he did not find any drugs in defendant's pockets.

¶ 9 Wherfel testified that he and Lepine were also working as enforcement officers on the team. At approximately 3:50 p.m., Ugarte radioed that he had made a narcotics purchase in the 3700 block of Grenshaw. Ugarte described the seller as a "heavy set" black man wearing all

black. Wherfel and Lepine arrived "[l]ess than a minute" later and detained a man matching the description, whom Wherfel identified in court as defendant. Ugarte arrived shortly thereafter and identified defendant as the man who sold him the suspected heroin, at which point defendant was arrested. Wherfel was present when Carter searched defendant and recovered police funds from his person. On cross-examination, Wherfel acknowledged that defendant did not attempt to flee or throw anything out of his pockets before he was detained.

¶ 10 Kathy Regan, a forensic scientist for the Illinois State Police, testified that she tested the suspected heroin, which weighed a total of 1.343 grams. The contents in each of the three bags tested positive for heroin.

¶ 11 The State rested, and the defense moved for a directed verdict, which was denied. The defense then rested without presenting evidence. During closing arguments, the State asserted in part, "How do we know it's him ladies and gentlemen? You heard uncontradicted evidence, there is no evidence[,] not a shred of evidence that contradicts any, any of the testimony of the officers that you heard." The court overruled defense counsel's objection, and the State continued:

> "How do we know that Officer Ugarte is correct about it being this defendant? Who else did you hear from? Officer Lee. What is his role? He is a surveillance officer. He is a trained observer. He has been with the Chicago Police Department for about 10 years. His testimony is completely uncontradicted, meaning, that there is no other evidence."

Finally, the State concluded by declaring:

> "Ladies and gentlemen, what happened on July 31st of 2013, was that the defendant delivered a controlled substance. That substance being heroin. There is no

> evidence to contradict it and we are asking that you find this defendant, L.C. Archer, guilty of that delivery."

¶ 12 Defense counsel argued that the officers did not have a sufficient opportunity to identify the man who sold Ugarte heroin. She recalled the testimony about the "very busy intersection" of Roosevelt and Independence, asserting that defendant was likely misidentified because "[c]ertainly it is not a stretch there might be a few other people besides [defendant] standing out in the area," such as people who "might be sitting out on their porch" or "might be out in their yards."

¶ 13 After closing arguments, the jury found defendant guilty. Defendant filed an amended motion for new trial, arguing, *inter alia*, that the State's comments on the "uncontradicted" nature of the evidence shifted the burden of proof to the defense and "highlighted indirectly the fact that the defendant did not testify." The court denied the motion, stating that

> "The state should use caution with comments like that, but it didn't rise to the level of burden shifting. It certainly also was a reference to the fact that I saw no impeachment or any substantial impeachment whatsoever of the officers or the chemist.
>
> Given the unimpeached testimony, not a shred of evidence contradicting it, certainly would apply to that as well. But, again, state should use caution."

Following a sentencing hearing, the court sentenced defendant to 12 years in prison.

¶ 14 Defendant now appeals, arguing that the State improperly highlighted his election not to testify by repeatedly noting that the evidence was "uncontradicted." The State responds that the comments were proper, and that in any case, they were harmless given the overwhelming evidence against defendant.

¶ 15 As a preliminary matter, the parties disagree on the applicable standard of review. Defendant, citing *People v. Wheeler*, argues that *de novo* review is appropriate. See *Wheeler*, 226 Ill. 2d 92, 121 (2007) ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."). The State acknowledges *Wheeler*, but contends that "every other Supreme Court decision" has reviewed a trial court's decision to allow an argument under an abuse of discretion standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-78 (collecting cases). However, as our precedent makes clear, there is no conflict. When reviewing the propriety of a closing argument, a reviewing court applies a bifurcated standard of review. *People v. Cook*, 2018 IL App (1st) 142134, ¶¶ 61-64; *People v. Davis*, 2018 IL App (1st) 152413, ¶ 68. First, the trial court's decision to allow particular remarks is reviewed for abuse of discretion. *Cook*, 2018 IL App (1st) 142134, ¶ 61. If a reviewing court finds that the trial court abused its discretion, it then considers *de novo* whether the error was egregious enough to warrant a new trial. *Id.* ¶ 62. Thus, the first inquiry here is whether the trial court abused its discretion in overruling defense counsel's objection to the State's closing argument. Because we find no error, we need not proceed further.

¶ 16 Criminal defendants have a constitutional right not to testify. *People v. Kliner*, 185 Ill. 2d 81, 156 (1998). When a criminal defendant exercises his right not to testify, the State cannot comment on his decision. *Id*. When considering whether the State made improper remarks, a reviewing court must examine the challenged portions in context with the closing argument as a whole. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). The State crosses "the danger line" into impropriety when it "point[s] the finger of blame directly at the defendant for his failure to testify." *People v. Mills*, 40 Ill. 2d 4, 9 (1968). However, the State is afforded wide latitude in

making closing arguments, and may comment on the evidence and reasonable inferences drawn from it. *Glasper*, 234 Ill. 2d at 204. Notably, "the State is free to point out what evidence was uncontradicted so long as it expresses no thought about who specifically—meaning the defendant—could have done the contradicting." *People v. Keene*, 169 Ill. 2d 1, 21 (1995). This is so even when the defendant was the only person who could have provided contrary evidence. *Id.* Put another way, the State is permitted to remind the jury "the 'what' of the evidence [being] uncontradicted" without "stray[ing] into the 'who' of the issue." *Id.* at 22-23.

¶ 17 Here, the State clearly emphasized "what" was uncontradicted rather than "who" should have done the contradicting. The State argued, correctly, that none of the testimony from its witnesses was contradicted. It did not mention in any way that defendant specifically could have offered a different account. Although defendant argues that he was the only person who could have possibly contradicted the officers, this does not render the State's comments improper. See *id.* at 21. This is especially pertinent here, as a critical part of defendant's trial theory—which he repeats on appeal—was that other people must have been in the area. See *id.* at 22 (fact that other people were present during the offense "is relevant in evaluating the State's comments within the context of the trial"). We also reject defendant's argument that the State's remarks were improper because they were "repeated" and strategically "interspersed" so as to maximize their prejudicial effect. Repetition is not necessarily fatal. See *People v. Hopkins*, 52 Ill. 2d 1, 6-7 (1972) (no impropriety where the State accurately described the evidence as "uncontradicted" seven times).

¶ 18 In light of the foregoing, defendant's reliance on *People v. Edgecombe*, 317 Ill. App. 3d 615 (2000), is misplaced. In *Edgecombe*, we found that the State's closing argument "crossed the

line" in highlighting defendant's decision not to testify contrary to the victim, the sole trial witness. *Id.* at 621. However, there, the challenged comments included:

> " 'There has been no evidence whatsoever from that witness stand that says $60 wasn't taken * * *. *No one* says $60 wasn't taken from them * * *,' 'there's *no one* that got up there that said anything different * * *,' 'there's *no one* that got up there and said the defendant was just standing there * * *,' and 'is there any evidence that you heard that this guy was just there? *Nobody* told you that.' "

(Emphasis added.). *Id.* The closing argument in *Edgecombe* was thus significantly more evocative on "who" failed to contradict the State's evidence. Consequently, for reasons we have explained, it does not support defendant's argument.

¶ 19 In short, we find that the State's references to the evidence as "uncontradicted" during closing argument were not improper. The trial court therefore did not abuse its discretion in allowing the comments, and defendant's conviction is affirmed.

¶ 20 In so holding, however, we note that the State's comments nonetheless were very close to crossing the line into impermissible burden shifting. We remind the State that a prosecutor "is the representative of all the people, including the defendant, and it is as much his duty to safeguard the constitutional rights of the defendants as those of any other citizen." *People v. Oden*, 20 Ill. 2d. 470, 483 (1960). Although, as noted, prosecutors are afforded wide latitude during closing arguments, such discretion does not obviate their ethical obligation to ensure that all defendants receive a fair trial. *People v. Yonker*, 256 Ill. App. 3d 795, 798 (1993). Accordingly, the best practice is to avoid teetering the line of improper argument by abstaining from any implication that a defendant was required to present evidence. Similarly, the State

should remember that, although we have upheld cases in which it described the evidence as "uncontradicted," "an argument whose thrust is the defendant's non-appearance rather than the strength of the State's case is error." *People v. Escobar*, 77 Ill. App. 3d 169, 178 (1979).

¶ 21 As a final matter, defendant argues, and the State concedes, that the mittimus should be corrected to reflect that he spent a total of 1076 days in presentence custody. A defendant is entitled to receive credit for time spent in presentence custody, which includes the day of his arrest, but not the day of sentencing. 730 ILCS 5/5-4.5-100 (West 2012); *People v. Harris*, 2012 IL App (1st) 092251, ¶ 38. While the mittimus indicates that defendant was credited for 1057 days in presentence custody, the record shows that he was arrested on July 31, 2013 and sentenced on July 11, 2016. Exclusive of the sentencing date, that is a period of 1076 days. Accordingly, we agree with the parties and remand so that the circuit court may correct the mittimus to reflect 1076 days of presentence credit.

¶ 22 For the foregoing reasons, we affirm defendant's conviction, but remand with instructions to correct the mittimus.

¶ 23 Conviction affirmed; remanded to correct the mittimus.