2019 IL App (2d) 170032-U
No. 2-17-0032
Order filed August 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID STARKS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 15-CF-2844 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of aggravated vehicular hijacking and retail theft, specifically his identity: although there were weaknesses in the eyewitness identification, that identification was bolstered by DNA and video and photographic evidence; (2) defendant showed no plain error in the State's closing arguments: in arguing that the DNA evidence proved defendant's guilt completely and irrefutably, the State was arguing a fair inference from the forensic expert's testimony.

¶ 2 Defendant, David Starks, appeals his conviction of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(2) (West 2014)) and felony retail theft (*id.* § 16-25(a)(1)). He contends that the evidence identifying him as the perpetrator was insufficient to prove him guilty beyond a

reasonable doubt and that the State engaged in prosecutorial misconduct by misleading the jury about DNA evidence during closing arguments. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with multiple offenses in connection with a July 22, 2015, retail theft in which two men removed merchandise from a Home Depot and then pulled a boy out of a van in a parking lot before driving off in the van. A jury trial was held.

¶ 5 At trial, Tim Pederson, an asset protection specialist at Home Depot, testified that he was working on July 22, 2015, and saw on the security cameras two men in the hardware aisle wearing unseasonably heavy jackets. An African-American man was wearing a white baseball cap—the State's theory was that was defendant—and a Hispanic man was wearing a black cap. The white cap had a logo on the front. Pederson could not describe it, but thought that there was a red top button on the cap. Pederson moved to the floor and saw the men open packages, conceal the merchandise on their persons, and return empty boxes to the shelves. Pederson followed the men to the exit and vaguely saw their faces as they exited the store.

¶ 6 When Pederson followed the men and identified himself, they ran away in the direction of a Walgreen's parking lot, dropping a stolen item in the process. At the Walgreen's lot, the men opened the passenger door of a van and pulled a boy, Jarvion Watson, out. Pederson described Watson as delusional, kind of in shock, and not aware of his surroundings. The men then fled in the van. Pederson was about 10 feet away and saw only the side of the men's faces. A month later, Pederson viewed a photo array and identified two men, Nos. 3 and 4, as "maybe" the perpetrators. He testified that he wrote "maybe" because he thought that the photos depicted the men who came into the store but he was not 100% sure. Pederson described man No. 3 as the one wearing the white hat and the "skinnier" of the two men. A police officer later testified that

defendant was man No. 4. However, photos and video of the perpetrators in the store show that the person wearing the white hat appeared slightly "skinnier" than the other.

¶ 7 Watson testified that he was 14 years old at the time of the incident and had undergone an appendectomy the previous day. He was waiting in the van for his mother to return with pain medication and felt kind of sleepy when he saw two men running toward the van. He was dozing off and was not wide awake or sharp and focused. Watson was pulled from the van, where he was helped by bystanders. A month later, Watson viewed a photo array and identified two men. There was no further testimony about that, but both the State and the defense stated in closing that Watson did not identify defendant.

¶ 8 The van was left in the Home Depot parking lot the next day. When Watson's mother retrieved it, she found a white hat with a red logo on the front. She had never seen the hat before, it did not belong to anyone in her family, she did not know defendant, and she had not given anyone permission to use her van. A photo and video of the suspects in the Home Depot showed the "skinnier" of the two wearing what appeared to be the same hat.

¶ 9 The parties stipulated that DNA analysis of Watson and his mother eliminated them as contributors to DNA found in the hat. A forensic scientist, M. Kelly Lawrence, gave expert testimony that she found two DNA profiles in the hat, one major and one minor. The major profile could have been from the person who wore the hat the most or a person who wore it once but was sweating. Lawrence obtained a "full" DNA profile that "matched" defendant's DNA sample. In contrast, despite testing at 21 locations, the other profile was only a partial profile. The full profile provided a high level of confidence. Lawrence testified that the full profile would be expected to occur by chance in 1 in 205 quintillion random unrelated African Americans, 1 in 19.9 quintillion random unrelated Caucasians, and 1 in 26.1 quintillion unrelated Hispanics. The

defense did not object to this testimony or cross-examine on it. Defendant's motion for a directed verdict was denied.

¶ 10 During closing arguments, the State said without objection that it presented "unequivocal DNA evidence" and that "[t]he defendant definitively was a match. There is no mistake about it." The State noted that there was video and photographic evidence that one of the suspects was of the same size, shape, and race as defendant, that he was wearing the hat that contained a major DNA profile matching defendant, and that Pederson identified defendant as one of the perpetrators. The defense argued that the DNA evidence did not prove that defendant was in the van or was at the Home Depot on the day of the crime.

¶ 11 During rebuttal, the State argued without objection:

> "The DNA evidence in this case is the linchpin. It is one of the more important pieces of evidence in this case. DNA evidence tells you this. There is a hat, a white hat that was worn by one of the two offenders in this case. The defendant's DNA is a 100 percent match to the inside of that hat, to the major profile of the inside of that hat. A 100 percent chance. Imagine he might be underselling it a little, but Kelly Lawrence said that she would expect to see the same DNA randomly in 1 in 205 quintillion unrelated African Americans. What that means in English is it was him. It was his DNA in that hat period. There is no way to refute that his DNA was the major profile in that hat.
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> They talk about all the other evidence that they want. And it's fine. You consider all of the evidence together. You should. But there is no way to refute the fact that the white hat that was worn by one of the two bad guys, the defendant was the major profile inside that hat period. There is no way to refute that evidence."

The State later repeated: "[T]he major profile inside the swab in this hat is the defendant. A hundred percent. A thousand percent. The major profile inside the hat that was worn by the man who committed this crime is the defendant."

¶ 12 Finally, the State summed up its case by stating:

> "Really there are two pieces of evidence, and when you put those two pieces of evidence together, there is one inescapable conclusion. Piece of evidence No. 1 is Tim Pederson identified this defendant as one of the two offenders in this case. Piece of evidence No. 2 is the defendant's DNA major profile was in the hat that was worn by the man who did this. When you put these two together, it brings us to the inescapable conclusion that that defendant was one of the two offenders."

¶ 13 The jury found defendant guilty. Defendant moved for a new trial, arguing that the trial court erred in denying his motion for a directed verdict, but did not raise any issues concerning the State's closing arguments. The motion was denied, and defendant was sentenced to a total of eight years' incarceration. He appeals.

¶ 14 II. ANALYSIS

¶ 15 Defendant first contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt. He argues that the DNA evidence was questionable and that Pederson's identification of him was dubious.

¶ 16 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 17 A single witness identification may be sufficient proof when the witness viewed the defendant under circumstances permitting a positive identification. *People v. Rojas*, 359 Ill. App. 3d 392, 397 (2005). However, a conviction cannot stand when the identification is vague and doubtful. *Id.* When assessing identification testimony, we look to the following factors: "(1) the opportunity the [witness] had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the [witness] at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989).

¶ 18 "However, we should also consider all circumstantial facts to determine the sufficiency of the identification." *Rojas*, 359 Ill. App. 3d at 397. "[W]here identity is not proved by direct, in-court identification, it may properly be inferred from all the facts and circumstances in evidence and the course of the trial proceedings." *People v. King*, 151 Ill. App. 3d 644, 648 (1987). Ultimately, the reliability of a witness's identification of a defendant is a question for the jury, and it is the function of the jury, as the trier of fact, to resolve inconsistencies in the evidence and assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn therefrom. *People v. Cox*, 377 Ill. App. 3d 690, 697 (2007). A jury is not required to disregard the inferences that flow normally from the evidence, nor must the jury

search out all possible explanations that are consistent with the defendant's innocence and raise them to the level of reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 380 (1992).

¶ 19 Here, there was sufficient evidence to prove defendant guilty beyond a reasonable doubt. To be sure, Pederson did not obtain a full view of defendant and did not identify him with full certainty, perhaps also confusing him with his accomplice. But that identification was not the only evidence. Also presented were photographs of the hat found in the van, Pederson's description of the "skinnier" of the men wearing a similar hat, and photos and video of the "skinnier" man wearing the hat in the Home Depot. Defendant then matched the major DNA profile in the hat at such high odds that it would seem generally impossible for the DNA to match anyone else. These facts bolstered Pederson's identification.

¶ 20 Defendant cites various studies showing that eyewitness identification is unreliable and illustrating various issues with DNA evidence, but he did not object to the State's evidence on these grounds, and thus the jury was entitled to weigh and credit it. Defendant also argues that the DNA evidence was questionable because it did not confirm the commission of a crime. See *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 31. However, while the DNA evidence merely connected defendant to the hat, the additional evidence connected defendant and the hat to the crime. Coupled with Pederson's identification and the documentary evidence, the DNA evidence supported the overwhelming inference that defendant committed the crime.

¶ 21 Nevertheless, citing *People v. Gomez*, 215 Ill. App. 3d 208 (1991), defendant argues that the prosecution failed to prove that he wore the hat on the day of the crime. In *Gomez*, we held that, to be reliable evidence of identification, a fingerprint had to have been left at the crime scene under such circumstances that it could have been left only when the crime occurred. *Id.* at 216. There, the defendant's fingerprint was inside a ransacked drawer in the victim's kitchen

near the crime scene, and a hair similar to the defendant's hair was found on the victim. But the defendant had previously been in the victim's kitchen to pay rent. Further, although the victim had been hit with a paint can and paint was found on the defendant's belongings, the defendant had previously painted the house and there was no evidence presented to show how long that paint had been there. *Id.* at 213-14. Thus, in *Gomez,* there were alternate explanations for the presence of the identification evidence.

¶ 22 Here, however, unlike in *Gomez*, there was no alternate explanation for how the hat with defendant's DNA got into the van. Further, as noted, that evidence was consistent with Pederson's identification of defendant and the video and photographs showing a person of defendant's size and race wearing what appeared to be an identical hat in the store during the theft. Accordingly, *Gomez* is distinguishable, and we determine that the evidence was sufficient to identify defendant as the perpetrator beyond a reasonable doubt.

¶ 23 Defendant next argues that the State committed prosecutorial misconduct in its closing arguments by misstating the DNA evidence. After the State argued on appeal that the issue was forfeited, defendant argued in his reply brief that plain error applies. "[A]lthough defendant did not argue plain error in his opening brief, he has argued plain error in his reply brief, which is sufficient to allow us to review the issue for plain error." *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010). The first step in a plain-error analysis is to determine whether a clear or obvious error occurred. *Id.*

¶ 24 A prosecutor has wide latitude in closing arguments and may comment on the evidence and any reasonable inferences drawn from it. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). On review, we consider the challenged remarks in the context of the entire record, particularly the closing arguments of both sides, as a whole. *People v. Williams*, 313 Ill. App. 3d 849, 863

(2000). If the prosecutor made the challenged comments in rebuttal, a defendant cannot complain if defense counsel's comments clearly invited a response. *People v. Brown*, 172 Ill. 2d 1, 43 (1996). Furthermore, in closing arguments, a prosecutor may challenge the defense's characterizations of the evidence and comment on the persuasiveness of the defense. *People v. Jones*, 156 Ill. 2d 225, 252 (1993). Even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993).

¶ 25 We note that our supreme court in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), applied the *de novo* standard in reviewing a prosecutor's comments made in closing argument. However, in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), a case cited by *Wheeler*, our supreme court applied the abuse-of-discretion standard of review. We need not resolve the issue of the appropriate standard of review at this time since our determination would be the same under either standard.

¶ 26 Defendant argues that the DNA evidence was flawed in that there was no detail about Lawrence's testing methods and she failed to discuss the number of loci that matched defendant. Defendant also cites a number of studies to challenge the reliability of the DNA evidence. For example, defendant cites articles stating that matches at three, six, or nine loci might be less reliable. But, as previously noted, defendant stipulated that Lawrence was an expert, did not cross-examine her on her methods of testing loci, and did not object to her conclusion that defendant's DNA "matched" the "full" profile found on the hat. Further, the record shows that Lawrence tested at 21 "locations," resulting in the "full" profile that "matched" defendant with high confidence. Thus, to the extent that defendant argues that the State in closing misstated the evidence when it argued that the DNA "matched" defendant, he is incorrect.

¶ 27 As to other statements that defendant argues inflated or misstated the evidence, the State spoke of the DNA as being a 100% match and argued that there was no way to refute that evidence. However, the State also acknowledged during its arguments that Lawrence said that the same DNA would be seen randomly in 1 in 205 quintillion unrelated African Americans. The reasonable inference to be drawn from such a large number is that the DNA evidence was indeed irrefutably defendant's DNA. Further, most of the comments were made in response to defendant's argument that the DNA evidence was not probative.

¶ 28 Moreover, we must presume, absent a showing to the contrary, that the jury followed the trial court's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Here, the jury was instructed that neither opening statements nor closing arguments were evidence and to disregard any statement or argument not based on the evidence. Defendant presents nothing to counter the presumption that the jury followed the trial court's instructions in reaching a verdict. Overall, the State's closing arguments were not error, and as such there was no plain error.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 31 Affirmed.