2020 IL App (1st) 181937-U

Order filed July 17, 2020

FIRST DISTRICT
FIFTH 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. 17 CR 975401
	)	
LARRY MCCURRY,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's conviction of aggravated unlawful use of a weapon, finding that the State proved him guilty beyond a reasonable doubt and that the prosecutor's closing argument did not deprive him of a fair trial.

¶ 2 A jury convicted defendant, Larry McCurry, of aggravated unlawful use of a weapon (AUUW) and the trial court sentenced him to 20 months' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt, and that the

prosecutor made improper remarks during closing arguments that denied him a fair trial. We affirm.[1]

¶ 3 At trial, Officer Jarredd Cochran testified that on June 11, 2017, he was the passenger in an unmarked police car driven by his partner, Officer Kevin Burg. They wore civilian dress and police vests. At about 11:30 a.m., they parked in the area of 79th Street and Essex. He described the lighting conditions as "broad daylight, sunny outside." Officer Cochran saw defendant and another individual come out of the alley between Kingston and Colfax, a few hundred feet away. They looked in the officers' direction and immediately fled back down the alley. Finding their behavior suspicious, the officers drove near the alley but did not see defendant.

¶ 4 A few seconds later, the officers drove south on Colfax and saw defendant running in the alley. Officer Cochran exited the vehicle, ran into the alley, and came within 20 feet of defendant, who had his back turned toward him and who was with another man. Officer Cochran had an unobstructed view of defendant and noticed the handle of a black gun protruding from the right side of his waistband. The officer announced his office. Defendant turned toward the officer, then ran away into the backyard of a residence at 8018 South Colfax and headed right. The person who had been with defendant also ran into the backyard and headed left.

¶ 5 Officer Cochran ran after defendant, briefly lost sight of him, then saw him again running and turning into a gangway on the right side of the backyard (right side gangway). There was a fence at the end of the right side gangway. Officer Cochran got within 10 feet of defendant and saw him drop a pistol to the ground before he "hopped" over the fence. The officer followed defendant over the fence. Defendant ran down the street past four or five houses and then

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

stopped running and put his hands up. Defendant was placed in custody and then Officer Cochran returned within two to three minutes to the right side gangway in the backyard of 8018 South Colfax, where defendant had dropped the weapon, and recovered a loaded, black handgun lying on the ground. Officer Cochran unloaded the gun and brought it to the police station, where it was inventoried.

¶ 6 Officer Cochran testified that on June 11, 2017, he was wearing a body worn camera (body cam) affixed to the middle of his chest that recorded the incident. The body cam video was played for the jury and is contained in the record on appeal. The video depicts Officer Cochran's viewpoint as he is riding as a passenger in the police car. He suddenly exits the car and runs into an alley, where he sees defendant about 20 feet away standing next to a garage with his back turned toward him. He calls out to defendant, who runs away, past the garage, into a back yard. Officer Cochran follows defendant into the back yard, momentarily losing sight of him, then runs to the right side of the backyard and past a wooden deck and turns into the right side gangway, where he sees defendant scaling a fence at the end of the gangway; a gun is on the ground near the fence. Defendant jumps over the fence, followed by Officer Cochran. Defendant runs down the street past several houses before stopping. Officer Cochran places defendant in handcuffs and subsequently returns to the gangway and recovers the gun.

¶ 7 After the body cam video was shown to the jury, Officer Robert Franks, an evidence technician, testified that he was assigned to the case but was unable to recover any fingerprints from the weapon.

¶ 8 The parties stipulated that at the time of the offense, defendant did not have a valid firearm owner's identification (FOID) card or concealed carry license.

¶ 9 On appeal from his conviction and sentence, defendant contends that the State failed to prove him guilty of AUUW beyond a reasonable doubt.

¶ 10 The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found each of the essential elements beyond a reasonable doubt. *People v. Baldwin*, 2020 IL App (1st) 160496, ¶ 17. The reviewing court will not substitute its judgment for that of the trier of fact on questions involving the credibility of the witnesses or the weight of the evidence. *Id.* The reviewing court must not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v. Wright*, 2017 IL 119561, ¶ 70.

¶ 11 To convict defendant of AUUW, the State must prove that defendant: (1) knowingly carried an uncased, loaded firearm on or about his person, at a time when he was not on his land or in his abode, legal dwelling or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission; and (2) had not been issued a valid FOID card or concealed carry license. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5), (a)(3)(C) (West 2016).

¶ 12 The State met its burden of proof here. Officer Cochran testified that he saw defendant carrying a handgun on the right side of his waistband while standing in an alley, and then chased him into the backyard at 8018 South Colfax, where he ran into the right side gangway and dropped the handgun while jumping over a fence. After arresting defendant, Officer Cochran retrieved the gun and discovered that it was loaded. The body cam video largely corroborated Officer Cochran's testimony regarding his confrontation with defendant in the alley, and his chasing him over the fence in the right side gangway and his subsequent arrest of defendant and

recovery of the weapon where it had been dropped in the gangway. Viewing Officer Cochran's testimony and the body cam video in the light most favorable to the State, in conjunction with the stipulation that defendant did not have a FOID card or concealed carry license, any rational trier of fact could find each of the essential elements of AUUW beyond a reasonable doubt.

¶ 13 Defendant argues, though, that the body cam video raised a reasonable doubt of his guilt as it shows that he was not carrying a gun in his waistband when standing in the alley. We disagree. The body cam's view of defendant in the alley is shaky because the body cam is affixed to the officer's chest and he is running toward defendant; the image moves up and down with each step that the officer takes and as such it does not clearly depict defendant's waistband or what was inside of it. Contrary to defendant's argument, the video does not affirmatively show that he was weaponless.

¶ 14 Defendant has taken some still photographs of the body cam video showing him standing in the alley, and he has printed them in his appellant's brief and claims that they show that he was not carrying a gun. Defendant admits, though, that these still photographs were not admitted into evidence and shown to the jury and therefore they are not properly before us. See *People v. Jones*, 2017 IL App (1st) 143718, ¶ 21 ("A challenge to the sufficiency of the evidence is not a question of what the State could have proved at trial; it is a question of what the State actually proved at trial."). Even if the still photographs had been introduced into evidence and shown to the jury, they are too dark and grainy to clearly depict defendant's waistband or what was inside of it and as such they do not support his argument that he was not carrying a gun.

¶ 15 Defendant also argues that the video raised a reasonable doubt of his guilt as it appears to show that the gun is already on the ground at the time that Officer Cochran sees defendant at the fence, which is contrary to the officer's testimony that he actually viewed defendant throw the

gun to the ground. The State counters that a wooden deck in the backyard partially obscured the body cam's chest-high view of the fence until the officer ran past the deck into the right side gangway, at which point defendant can be seen on the video scaling the fence with the gun already on the ground. The State contends that unlike the body cam, the officer had the ability to turn his head and look past the wooden deck toward defendant as he was running toward the right side gangway, which would have enabled him to see defendant throw the gun to the ground prior to scaling the fence. Defendant responds that Officer Cochran was at all times running in a straight line and that the body cam's angle of view matched the officer's and depicted everything he saw. We need not resolve this dispute, because even *if* the video caused the jury to doubt whether Officer Cochran actually saw defendant throw the gun to the ground, the jury still could have found from the gun's proximity to defendant that the weapon had been in his possession but that he discarded it while running from the officer and jumping the fence. The evidence is not so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt of AUUW.

¶ 16 Defendant also argues for reversal of his conviction because the body cam video contradicts Officer Cochran's testimony on direct examination that defendant's companion ran through the gangway on the left side of the backyard (left side gangway). The video shows no one running through the left side gangway.

¶ 17 However, Officer Cochran clarified on cross-examination that he did not actually see the other offender run through the left side gangway:

> "Q. Did you testify on direct examination that the other male black individual besides [defendant] ran through the left side gangway?
>
> A. The left side of the house, yes.

* * *

Q. You didn't see him run through there though, did you?

[ASSISTANT STATE'S ATTORNEY]: Objection.

[THE COURT]: Overruled. He can answer that.

A. I am sorry. Repeat that.

Q. You did not see the other individual run through the left side gangway, did you?

A. No, I did not."

¶ 18 The officer's testimony on cross-examination is consistent with the video and does not raise a reasonable doubt of guilt.

¶ 19 Next, defendant contends that the State made improper remarks during closing argument, depriving him of a fair trial. A prosecutor is allowed wide latitude during closing arguments, and may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005); *People v. Cook*, 2018 IL App (1st) 142134, ¶ 61. On review, we consider the challenged remarks in the context of the record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). Reversal is warranted only if the prosecutor's improper remarks substantially prejudiced defendant, that is, if they constituted a material factor in his conviction. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

¶ 20 Initially, we note that it is unclear whether the proper standard of review for alleged 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 at 121 (employing a *de novo* standard of review) and *People v. Blue*, 189 Ill. 2d 99, 132 (2000)

(employing an abuse of discretion standard of review)). We need not resolve this issue because the outcome here is the same under either standard.

¶ 21 Defendant first argues that the prosecutor deprived him of a fair trial by the following comments:

> "Here in Illinois, if you want to walk around 80th and Colfax with a gun in your waistband or your pocket, you need to have a FOID card and a concealed carry license. Why? You know why. Turn on the news. *** Left and right people are being killed with guns. *** People are dying at gunpoint. People are being robbed at gunpoint. Men are being killed. Women are being killed. Children are being killed *** by guns. *** There has to be some kind of regulation on guns, and that applies to everyone, including [defendant]. He is not above the law. He cannot outrun the law. He cannot outsmart the law. It applies to him. Guns are killing machines. That's why there is a regulation. He did not comply with the law that day, and he knows that he didn't. That's why he tried to run. Don't let him run anymore. Don't let him get away with it."

¶ 22 Defendant likens the prosecutor's comments to those found to have been erroneous in *People v. Johnson*, 208 Ill. 2d 53 (2003), where defendants Clyde Cowley and Jimmie Parker were convicted of the first degree murder of a police officer. *Id.* at 61, 67-70. During closing arguments, the prosecutor made extensive comments exhorting the jury that anything other than a guilty verdict would send a message "to the streets" encouraging criminals to "get those sawed off shotguns" and other weapons and shoot police officers. *Id.* at 77. The prosecutor exacerbated the exhortation to "send a message" by merging his position as prosecutor with the jury, the society, and the community by stating, "We as a society do not have to live in their twisted

world. *** We don't have to allow that to happen in our community. *** We as a people can stand together." *Id.* at 79.

¶ 23 In finding these comments to be improper, the *Johnson* court held that "*limited* prosecutorial exhortations are proper where it is made clear to the jury that its ability to effect general and specific deterrence is dependent *solely* upon its careful consideration of the specific facts and issues before it." (Emphasis in the original.) *Id.* However, where the prosecutor "blurs that distinction by an extended and general denunciation of society's ills and, in effect, challenges the jury to 'send a message' by its verdict, he does more than urge 'the fearless administration of justice,' he interjects matters that have no real bearing upon the case at hand, and he seeks to incite the jury to act out of undifferentiated passion and outrage, rather than reason and deliberation." *Id.*

¶ 24 In the present case, the complained-of comments were much more limited in duration and scope than those made in *Johnson*. They merely informed the jury that the gun regulations were designed to decrease gun violence and death, and that defendant flouted those regulations by carrying a concealed handgun without obtaining a FOID card or concealed carry license. The prosecutor tied her argument to the specific facts of defendant's case by noting that the gun regulations "appl[y] to him," that defendant "knows" that he did not comply with the applicable gun regulations, which is why he ran away from the police, and that the jury should not "let *him* get away with it." (Emphasis added.) The prosecutor focused her argument on *defendant*'s guilt and did not ask the jury to send any general messages by its verdict. Accordingly, we find no reversible error.

¶ 25 Next, defendant contends that the prosecutor denied him a fair trial by arguing in rebuttal:

"[ASSISTANT STATE'S ATTORNEY]: The defense wants you to believe that this other person, this other individual that the defendant was with, dropped the gun, may have dropped the gun, may have left the gun by that fence, but in order for you to believe that, you have to believe that Officer Cochran wasn't telling the truth.

Officer Cochran didn't get up there and tell you he saw the individual that this defendant was with with the butt of a handgun sticking out of his waistband. He didn't tell you that because that's not what he saw. He saw this defendant in the alley with a butt of a handgun [sticking] out of his waistband. That's what he saw, and that's what he testified to.

So in order for you to believe that this other person had the gun, Officer Cochran is a liar ***.

Don't you think if Officer Cochran wanted to make up a lie to plant a gun on [defendant] he would have done a better job? How about I saw [defendant] with the gun in his hand. I saw [defendant] waving the gun around in the air? Not I saw [defendant] in an alley about 15 feet away with a butt of a handgun sticking out of his waistband. Officer Cochran did his job that day. This wasn't an elaborate scheme to plant a gun—

[DEFENSE COUNSEL]: Objection, your honor.

[THE COURT]: Overruled.

[ASSISTANT STATE'S ATTORNEY]: — on this defendant. That's not what happened. He did his job and he did it well."

¶ 26 Defendant forfeited review of much of the prosecutor's rebuttal argument by failing to object to many of her comments regarding Officer Cochran's veracity. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Forfeiture aside, we find no reversible error.

¶ 27 Defendant contends that the prosecutor's rebuttal argument was a purposeful mischaracterization of his own closing argument. Specifically, defendant contends that contrary to the prosecutor's rebuttal argument, he never impugned Officer Cochran's honesty or accused the officer of lying about seeing the handgun sticking out of his waistband.

¶ 28 Review of the record indicates otherwise. During his closing argument, defendant stated:

> "Based on all of the circumstances surrounding the case, based on everything I talked about on the opportunity to view, it is entirely possible that Officer Cochran thought he saw a gun *or maybe he saw a gun on the other guy*. Those are two distinct possibilities in this case. So I submit to you that you could find that that may be something that leads towards a finding of reasonable doubt." (Emphasis added.)

¶ 29 Defendant's statement that Officer Cochran possibly saw the gun "on the other guy," suggests that the officer perjured himself when he testified at trial that he saw the gun in defendant's waistband and when he testified to seeing defendant throw the gun to the ground. Defendant's argument invited the prosecutor's rebuttal argument refuting defendant's suggestion that Officer Cochran perjured himself. We find no reversible error. See *People v. Glasper*, 234 Ill. 2d 173, 204 (2009) (statements made during prosecutor's rebuttal argument are not improper where they were provoked or invited by defendant's argument); *People v. Willis,* 2013 IL App (1st) 110233, ¶ 110 ("the prosecution may fairly comment on defense counsel's characterizations of the evidence and may respond in rebuttal to statements of defense counsel that noticeably invite a response").

¶ 30 For all the foregoing reasons, we affirm the circuit court.

¶ 31 Affirmed.