

FIRST DIVISION
DATE: DECEMBER 19, 2011

No. 1-10-0385

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 15504
)	
MANUEL BAILON,)	The Honorable
)	John J. Moran,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment entered on defendant's possession of a stolen motor vehicle conviction affirmed over claim that trial counsel was ineffective for failing to object to the State's introduction of a prior consistent statement when there was no allegation of recent fabrication or motive to lie.

¶ 2 Following a bench trial, defendant Manuel Bailon was found guilty of possession of a stolen motor vehicle (PSMV), then sentenced to two years' probation. That sentence was subsequently increased to three years' imprisonment after defendant pleaded guilty to a violation of his probation based on a new charge of unlawful possession of a firearm by a felon. On

appeal, defendant contends that trial counsel rendered ineffective assistance on the PSMV charge by failing to object when the State introduced a prior consistent statement to rehabilitate its primary witness where there were no allegations of recent fabrication or a motive to lie.

¶ 3 The record shows, in relevant part, that defendant was charged with PSMV after Chicago police officers, who were on aggressive patrol of the area near North Avenue and Pulaski Road, observed him driving a white Chevy van at that intersection and gave pursuit. They caught up with him a few blocks away where he and his passenger were within 10 feet of, and walking away from, the van. The officers subsequently discovered that the van had been reported stolen the previous day by its owner, Sergio Gomez.

¶ 4 At trial, Chicago police officer Rafael Medina testified that shortly after 9 p.m. on August 15, 2009, he and his partner, Officer Ortiz, were patrolling the area near the intersection at North Avenue and Pulaski Road in a marked car. At that location, North Avenue runs east-west with two lanes in each direction, and Pulaski Road runs north-south with one lane in each direction. As the officers were driving in the north lane of eastbound traffic on North Avenue and approaching the intersection at Pulaski Road, Officer Medina saw defendant in the driver's seat of a white Chevy van traveling in the north lane and approaching Pulaski Road from the opposite direction. The officer made eye contact with defendant from about 15 feet away, and saw another individual in the passenger seat of the car. At that time, the windows of both vehicles were down, and he had an unobstructed view of defendant under streetlight. Officer Medina knew defendant from the area, but did not know that he owned a white van.

¶ 5 When Officer Medina attempted to make a U-turn, defendant turned right and "took off" northbound on Pulaski Road. Officer Medina turned on his emergency lighting and followed

him. He subsequently saw defendant turn right onto eastbound Wabansia Avenue and followed him, but then lost sight of defendant's vehicle. Officer Medina continued east to Harding Avenue, turned left, and drove north to the end of the block where there is an alley, followed by a small factory, then a dead-end where he saw the white van parked in a diagonal spot by the factory. Defendant and another individual were walking southbound about 10 feet south of the vehicle at the mouth of the alley. Officer Medina and his partner detained defendant and investigated the vehicle, which had a stripped steering column and broken driver's side window. When they ran the license plate number, they learned that the vehicle belonged to Sergio Gomez who had reported it stolen the day before. Officer Medina placed defendant, who lived one block away at 1707 North Pulaski Road, under arrest, and did not recover any keys from him.

¶ 6 Defendant was brought to the police station and placed in an interview room. Officer Medina read defendant his *Miranda* rights from a "FOP book," and defendant acknowledged that he understood them and agreed to speak with him. Thereafter, defendant stated that he stole the vehicle from the "Brickyard area," and that the passenger in the van, his cousin, was not involved in the theft. About 10 p.m., Officer Medina called Gomez and requested that he come to the police station. Gomez later identified the white van as belonging to him.

¶ 7 On cross-examination, Officer Medina stated that on the day in question, he and his partner were on "aggressive patrol" of North Avenue, which means that they were "acting versus reacting," and that he had driven past the white van on North Avenue before it had turned onto Pulaski Road and before he made his U-turn. He stated that he has known defendant for a year and a half, and has arrested him once or twice before in the 1700 block of both Harding Avenue and Springfield Avenue one block east.

¶ 8 Officer Medina acknowledged that during a preliminary hearing on September 11, 2009, he was asked the following question and gave the following answer:

" 'Question: Sir, when you saw this vehicle, where was it when you first noticed the van?'

'Answer: We were traveling westbound on North Avenue entering the intersection of Pulaski. The vehicle was coming eastbound on North. They are entering the intersection, about to execute a turn to go northbound.' "

He also acknowledged that the arrest report, which had his name on it, stated that the white van was traveling eastbound on North Avenue and made a left turn onto northbound Pulaski Road. However, Officer Medina stated, "I think the arrest report reflects the court reporter's transcript. It's the case report has -- what I testified today." He also stated that Officer Ortiz prepared the arrest report, and that he did not read it after it was made.

¶ 9 On redirect, Officer Medina testified that he prepared a recovered vehicle supplementary report on August 15, 2009, in which he indicated that he was traveling eastbound on North Avenue, and that he observed the van attempting to turn north onto Pulaski Road from North Avenue.

¶ 10 On re-cross, the following exchange was had between defense counsel and Officer Medina:

"Q. If your offense case report says that you were traveling eastbound, why did you testify in front of the judge at the preliminary that you were traveling a different direction?

A. Because my partner, Ortiz, was preparing the arrest report. He made a mistake in the arrest report. And that's what I went off at the prelim.

Q. Even though you knew the answer was wrong, you said it anyway?

* * *

A. I wasn't thinking it was wrong; I just went off the prelim."

Officer Medina also stated that there had been a series of shootings from white vans in the area, and that seeing the white van and knowing that defendant was a member of the "La Razas" gang, he was "going to put a stop on [sic] it."

¶ 11 Sergio Gomez testified through an interpreter that on the evening of August 13, 2009, he parked his 1989 Chevy van on the street in front of his house at 6140 West Wellington Avenue. The next morning, he went outside and discovered that his vehicle was missing and filed a police report. In the late evening hours of August 15, 2009, Gomez received a call from Officer Medina and went to the police station where he saw his vehicle which now had a broken steering wheel and window. He never gave defendant the keys to his vehicle, or permission to enter it. The State subsequently entered into evidence vehicle reports from the Secretary of State which related to Gomez's 1989 Chevrolet van, license plate H270858.

¶ 12 For the defense, Edwin Bailon testified that he lives at 1721 North Harding Avenue, and that defendant is his cousin. In the late afternoon hours of August 15, 2009, he was watching a football game at the home of his cousin, Jose "Pepe" Hernandez, on Harding and Wabansia Avenues with defendant and the rest of his family. About 7:40 p.m., he and defendant decided to

walk to Edwin's house, about four or five houses down, to smoke a cigarette, but ended up walking seven to eight houses down, past Edwin's house and near a factory, because his mother was home and did not know that he smoked cigarettes. Before crossing the alley preceding the factory, they saw a reflection of light, looked back, and saw a marked police car which stopped at their location. Officers Medina and Eugene¹ called them over, and they were frisked and placed inside the car. The officers then searched the ground to no avail, but found a stolen white van near the factory. Edwin did not know anything about that vehicle, had not been riding in it that day, had never seen defendant riding in it, and did not see how the van got there. Edwin and defendant were taken to the police station, and Officer Medina asked him one question, "Do you have anything to tell me[?]" Edwin responded, "no."

¶ 13 Defendant testified that he is 18 years of age and lives at 1706 North Springfield Avenue. About 5 p.m. on August 15, 2009, he went to his cousin Jose Hernandez' house at 1707 North Harding Avenue to watch a football game with his whole family. About 8 p.m., he and Edwin left the house and walked north on the east side of Harding Avenue toward the factory and smoked a cigar. As they were walking, they passed the house of defendant's aunt at 1721 North Harding Avenue where everybody was out on the front porch, and walked four houses further because "it's disrespectful to smoke in front of your aunt." They then saw flashing lights, turned around, and police pulled up alongside them. Defendant testified that he was familiar with the officers whom he identified as officers Medina and Ruiz. As he and Edwin began walking back toward his aunt's house, the officers grabbed them, patted them down, and put them in the car. The officers then searched the ground without finding anything, and also searched cars at the end

¹ Edwin did not know the last name of Officer Eugene.

of the block.

¶ 14 Defendant did not know anything about, and had nothing to do with, the stolen white van, never drove the van, and had not been driving earlier at North Avenue and Pulaski Road. He also denied making any of the statements attributed to him by Officer Medina. Defendant also testified that Officer Medina did not ask him any questions about the stolen car, and that he only told Officer Medina his name. On cross-examination, defendant acknowledged that he was a gang member on the day in question.

¶ 15 The court found defendant guilty of PSMV, and, on January 7, 2010, sentenced him to two years' probation. Two days after sentencing, the State filed a petition for violation of probation alleging that on January 8, 2010, defendant committed the offense of unlawful use of a weapon by a felon. Thereafter, defendant pleaded guilty to the violation of probation on his underlying PSMV conviction and the new charge of unlawful possession of a firearm by a felon in exchange for concurrent terms of three years' imprisonment.

¶ 16 In this appeal, defendant contends that trial counsel was ineffective for failing to object to the State's introduction of a prior consistent statement to rehabilitate its primary witness where there was no allegation of recent fabrication or a motive to lie. Specifically, defendant claims that counsel should have objected to the State's introduction of Officer Medina's testimony on redirect regarding his discovered vehicle supplementary report from August 15, 2009, in which he indicated that he was traveling eastbound on North Avenue on the day in question.

¶ 17 We first address the issue upon which defendant's claim is founded, *i.e.*, whether the State's introduction of Officer Medina's prior consistent statement was, in fact, improper rehabilitation of its witness. The general rule is that prior consistent statements are inadmissible

to corroborate trial testimony or rehabilitate a witness unless there is a charge that the witness has recently fabricated testimony, or the witness has a motive to testify falsely. *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010), citing *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005); *People v. Heard*, 187 Ill. 2d 36, 70 (1999). In reviewing whether either of those exceptions apply, we observe that the mere introduction of contradictory evidence, without more, will not give rise to an implied charge of fabrication or motive to lie. *McWhite*, 399 Ill. App. 3d at 642.

¶ 18 Here, the record shows that defense counsel impeached Officer Medina on cross-examination with his preliminary hearing testimony that on the day in question, he and his partner had been traveling westbound on North Avenue, and that defendant had been traveling eastbound. Counsel also questioned Officer Medina about the arrest report in his name which, like his preliminary hearing testimony, indicated that defendant had been driving the van eastbound on North Avenue, and further indicated that defendant had made a left turn onto northbound Pulaski Road. Both the preliminary hearing testimony and the arrest report contradicted Officer Medina's trial testimony.

¶ 19 Notwithstanding that defense counsel's impeachment fell short of charging that Officer Medina recently fabricated his testimony or had a motive to lie (*McWhite*, 399 Ill. App. 3d at 642), the State responded on redirect by eliciting testimony from Officer Medina that he prepared a discovered vehicle supplementary report on August 15, 2009, in which he indicated that he had been traveling eastbound on North Avenue, consistent with his trial testimony. The State claims that this testimony was properly admitted, citing the rule in *People v. Harris*, 123 Ill. 2d 113, 142 (1988) that "where a witness has been impeached by proof that he has made prior inconsistent statements, he may bring out all of the prior statements to qualify or explain the inconsistency

and rehabilitate the witness." Here, however, the State did not bring out "all" of the prior inconsistent statements, as the rule announced in *Harris* contemplates, but rather, introduced a prior consistent statement, *i.e.*, the discovered vehicle supplementary report, which had nothing to do with the preliminary hearing testimony or arrest report used to impeach Officer Medina. *People v. Wetzel*, 308 Ill. App. 3d 886, 895 (1999). We thus find, under the circumstances, that the State's introduction of Officer Medina's prior consistent statement was, ultimately, improper rehabilitation of its witness. *McWhite*, 399 Ill. App. 3d at 642.

¶ 20 That said, to establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Defendant must also show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 21 Here, defendant maintains that because the credibility of Officer Medina was "crucial to the verdict," counsel's failure to object to the State's improper rehabilitation of his credibility was prejudicial and should result in a new trial. The State responds that counsel's decision of whether to object was a matter of trial strategy, and that, in any event, defendant cannot show prejudice.

¶ 22 The record shows that Officer Medina testified that on August 15, 2009, he observed defendant, whom he knew from the neighborhood and had previously arrested, in the driver's seat of a white Chevy van near the intersection of North Avenue and Pulaski Road. He made eye

contact with defendant from about 15 feet away, and when the van turned off North Avenue and headed northbound on Pulaski Road, Officer Medina gave chase. He lost sight of the van when he turned right onto Wabansia Avenue in pursuit, but a few blocks later, he turned north on Harding Avenue and saw Gomez' stolen white van parked on a dead-end street. He also saw defendant and his passenger 10 feet from the van and walking away. Under these circumstances, we do not find it reasonably probable that the proceedings would have been different if counsel had objected to the State's improper rehabilitation of Officer Medina on the largely insignificant detail of which direction the vehicles were initially traveling on North Avenue. *Strickland*, 466 U.S. at 694.

¶ 23 In reaching that conclusion, we find *Wetzel*, cited by defendant, distinguishable from the case at bar. In that case, a police officer testified that she saw defendant shooting in a northwest direction where there were some residential houses and a vacant lot, but was impeached on cross-examination with her arrest and case reports in which she had stated that defendant was shooting westward. *Wetzel*, 308 Ill. App. 3d at 888. Then, the State elicited on redirect that she had previously told a detective that defendant was shooting northwest, and called the detective to testify that she had told him that she saw defendant "leaning over the hood of a black Nissan firing a gun towards a vacant lot at approximately 7426 South on Dorchester[.]" *Wetzel*, 308 Ill. App. 3d at 888, 890. This court noted that the "angle at which [defendant] was firing his semi-automatic became an important issue in the case," and that it was error, under the circumstances, for the court to admit the officer's prior consistent statements to corroborate her testimony. *Wetzel*, 308 Ill. App. 3d at 895.

¶ 24 Here, unlike *Wetzel*, the direction in which Officer Medina and defendant were initially

traveling was not "an important issue" where Officer Medina positively identified defendant as the driver of the stolen van, and testified that he pursued the van and ultimately found it a few blocks away where defendant was 10 feet from it and walking away. We thus conclude that defendant has not established that counsel's failure to object to the State's introduction of a prior consistent statement resulted in prejudice to the defense (*Strickland*, 466 U.S. at 687), and that his ineffective assistance of counsel claim necessarily fails (*Flores*, 153 Ill. 2d at 283).

¶ 25 Defendant nonetheless claims, in the alternative, that even though counsel failed to object to the State's introduction of the prior consistent statement or raise the issue in a post-trial motion, the trial court committed plain error in allowing the State to rehabilitate Officer Medina with a prior consistent statement in the absence of an allegation of fabricated testimony or motive to lie where the evidence in the case was closely balanced. The State responds that defendant cannot establish plain error because the evidence was not closely balanced.

¶ 26 Under the plain error doctrine, a reviewing court may consider unpreserved error where the evidence is closely balanced, or the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under both prongs, defendant bears the burden of persuasion, and must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 27 We initially note that even though we have found that the State's use of Officer Medina's prior consistent statement constituted improper rehabilitation of its witness, defendant cites no authority that the trial court committed error by admitting such a statement in the absence of an objection from counsel. Notwithstanding that oversight, we observe that the supreme court has recently noted that plain error review under the closely balanced evidence prong is similar to an

ineffective assistance of counsel analysis based on evidentiary error in that, in either case, defendant must show prejudice. *People v. White*, 2011 IL 109689, ¶ 133. Thus, where, as here, we have already found that defendant has failed to show prejudice in the context of an ineffective assistance of counsel claim, we do not find it necessary to undertake any additional analysis under the closely balanced prong of plain error review (*White*, 2011 IL 109689, ¶ 134), and conclude that defendant's alternative claim must, likewise, fail.

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.