2011 IL App (1st) 101037-U

SECOND DIVISION
November 22, 2011

No. 1-10-1037

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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 C 440828
	)	
GARY RAINEY,	)	Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

O R D E R

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

¶ 1 *Held*: Defendant who was convicted of armed robbery and sentenced to 15 years' imprisonment was not entitled to a new sentencing hearing even if trial court considered improper factors in aggravation or a reversal on grounds of ineffective assistance of counsel. Further, a reduction of defendant's conviction to theft was not warranted where the State proved defendant guilty of armed robbery beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant, Gary Rainey, was convicted of armed robbery (720 ILCS 5/18-2(A)(1) (West 2008)) for stealing money and a cell phone from Tammer Gholston while threatening him with a knife. Defendant was subsequently sentenced to 15 years' imprisonment. On appeal, defendant contends that: (1) his sentence should be vacated because

the trial court relied on factors in aggravation unsupported by the record; (2) he was denied effective assistance of trial counsel when his attorney failed to impeach Gholston with prior inconsistent statements made during a preliminary hearing; and (3) his conviction for armed robbery should be reduced to the lesser included offense of theft because the State failed to prove beyond a reasonable doubt that he was armed with a knife during the offense. For the reasons set forth below, we affirm.

¶ 3 The record shows that on June 30, 2009, Gholston, a resident of Maywood, Illinois, filed a report with the Maywood police department alleging that defendant, who resided in Gholston's home, took $142 and a cell phone from him while threatening him with a knife. The next day, Maywood police officers arrested defendant and charged him with armed robbery. Defendant waived his right to a jury trial, and a bench trial commenced on February 24, 2010.

¶ 4 At trial, Gholston testified that in June 2009, defendant and defendant's wife had been living in his home for two or three months and that defendant was not paying rent but would give him "a little something" from time to time. On June 30, 2009, at approximately 3:30 p.m., Gholston was sitting in his car when he agreed to give defendant a ride to defendant's mother-in-law's house. Gholston knew where defendant's mother-in-law lived and began driving in that direction when defendant directed Gholston to drive down an alley. Gholston testified that after he turned down the alley defendant said to him "give me your money." Gholston looked over and noticed that defendant was "kind of hyped up" and was holding a serrated butcher knife. Gholston said that defendant held the knife to Gholston's neck. Gholston then stopped the car, reached into his back pocket and gave defendant his money, which he said totaled "roughly

$142." Gholston said that defendant then took his cell phone, which Gholston had clipped to his shirt, turned the car off, took the keys and started to leave. Gholston told defendant to give him the keys back and defendant complied. Gholston then drove home and called the police to report the incident. Gholston gave the police defendant's name and a description of the clothes he was wearing. Gholston testified that defendant never returned to the home and that he had not seen him again until he arrived in court that day.

¶ 5 On cross-examination, Gholston acknowledged that he had previously let defendant and defendant's wife use his cell phone on occasion. He also stated that on the morning of June 30, 2009, he had driven defendant to defendant's brother's house so that defendant could cash his social security check and that defendant had given him about $150 for rent.

¶ 6 Maywood police officer Justin Prattt testified that he and his partner, Officer Larry Verpil, responded to Gholston's call on June 30, 2009. Pratt stated that Gholston told them that while he and defendant were in the car, defendant had a knife and took $50 and a cell phone from him. The next day, Officers Pratt and Verpil responded to a call of a disturbance and found defendant in the area. They arrested defendant and charged him with armed robbery. While taking defendant into custody, the officers found Gholston's cell phone in defendant's possession. On cross-examination, Officer Pratt stated that when he spoke to Gholston on June 30th, Gholston told him that defendant had taken $50 from him, however, on re-direct examination he said that his report from the day of the robbery states that Gholston said that defendant took $150.

¶ 7 Defendant, who testified on his own behalf, stated that he was unemployed and supported himself with a disability check he receives for a mental condition. Defendant testified that in

exchange for living in Gholston's house, he would give Gholston $100 from his disability check, $50 or $100 he earned from "junking," and would buy groceries for the house. Defendant testified that his disability checks were delivered to his brother's house, because his brother is his payee and that on the morning of June 30, 2009, Gholston drove defendant and defendant's wife to his brother's house to pick up his check. Defendant said that when they returned from his brother's house, he gave Gholston two $50 bills. Defendant said that Gholston stayed in the car eating a hamburger, and defendant and his wife went into the house and argued about the money he had given to Gholston. Defendant asserted that his wife would call the police when he did not give her the money from his check, so he went out to the car and told Gholston that he needed the money back. Defendant testified that Gholston gave him $50 and agreed to drive him to his mother-in-law's house so that she could take him to a hotel. Defendant stated that as they were driving, he asked Gholston to stop near a house so that he could pick up some junk. Defendant said that Gholston agreed and pulled the car over in the alley. Defendant then stated that:

> "I got out to see if my junk was on the side of the garage. I came back. I got the car key and told him I need more than $50 because she called the police. I need to get out. I need somewhere to stay. *** [Gholston] pulled his wallet out of his left back pocket, held it open, and I snatched 50 bucks, gave him the car keys, got out of the car and proceeded to go to my mother-in-law's house, because she was going to take me to a hotel trying to get me shelter."

¶ 8 Defendant stated that he did not have a knife at any point that day and did not display a knife when he was in the car with Gholston. He also denied taking Gholston's cell phone, stating

that Gholston had let him use the phone earlier in the day and that he had never returned it. He stated that Gholston let him use the phone because he helped pay the bill. He acknowledged that he took Gholston's keys but asserted that he returned them after taking $50 out of Gholston's wallet. Defendant said that he told Gholston he was not coming back.

¶ 9 On cross-examination, defendant stated that he had been removed from Gholston's home several times in the past because his wife would get mad when he gave Gholston money and that Gholston would allow her "to put me out." Defendant testified that he gave Gholston $100 on June 30, 2009, as payment for the June rent, but then asked for $50 back and took the other $50 while they were driving to his mother-in-law's house. Defendant stated that he did not ask Gholston to drive him the rest of the way to his mother-in-law's house because he was half a block away from where he was going to pick up his junk. Defendant stated that he did not ask Gholston to take him to the hotel because Gholston had to return to work as a school bus driver.

¶ 10 In rebuttal, the State offered defendant's prior convictions in 1994 and 2005. In response, over defendant's objection, the trial court admitted into evidence a certified copy of defendant's conviction for home invasion and armed robbery in a 1994 Cook County case. Further, the parties stipulated that defendant had been convicted of robbery in a DuPage County case in 2005

¶ 11 Following closing arguments, the trial court found defendant guilty of armed robbery. The trial judge stated that she reviewed the testimony and had a chance to watch the witnesses as they testified. She found that Gholston "was credible, and his demeanor while testifying was credible, although he was hesitant" and concluded, based on his testimony, that there was a robbery and a knife was used. As to defendant, the court found that "there were logical

inconsistencies in his testimony, and his demeanor while testifying was such that the court did not find him credible."

¶ 12 Defendant filed a Motion to Reconsider Finding of Guilty or in the Alternative Motion for a New Trial, which the trial court denied. The court then proceeded to the sentencing hearing. In asking the court for an 18-year sentence, the State argued that defendant is a violent man and detailed his criminal history, which include convictions for armed robbery, home invasion, robbery, and forgery. The State asserted that defendant is a risk to society because "[e]ven people that try to help him out and do favors for him and give him places to stay are not free from being robbed or threatened by defendant." The State added that the victim was "not very sophisticated" and was trying to give defendant "a hand up," but that defendant chose to victimize him.

¶ 13 Defendant requested the minimum sentence of six years in prison and in mitigation, asserted that he suffers from schizophrenia, has had minimal education, and a history of alcohol abuse. Further, defendant asserted that the incident involved a person he knew, not an innocent person, and that no one was physically injured. Defendant asked the court to consider a letter from his employer and certificates from activities defendant participated in while in jail.

¶ 14 The trial court sentenced defendant to 15 years' imprisonment. In sentencing defendant, the court stated that, in part, that "the public needs to be protected from this kind of conduct, robberies, home invasions, armed robberies, regardless of whether it's with a knife or a gun, ***[a]nd because of this background, the court could not consider a minimum sentence in this case." Further, the court stated, "this is a case where it is apparent to me that defendant took

advantage of a slow person who had taken defendant into his house, for which Mr. Gholston absolutely received no benefit." The court acknowledged defendant's lack of education, but stated that he had not taken advantage of any programs offered in jail "to rehabilitate himself for the protection of the public." Defendant filed a motion ro reconsider sentence, which the trial court denied. Defendant now appeals his conviction and sentence.

¶ 15 On appeal, defendant first argues that his sentence should be vacated and his case remanded for a new sentencing hearing because the trial court improperly relied on factors in aggravation unsupported by the evidence. Specifically, defendant contends that the trial court adopted the State's argument that the victim was mentally handicapped and acted charitably toward defendant as evidenced by the court's statement that "it is apparent to me that defendant took advantage of a slow person who had taken defendant into his house, for which Mr. Gholston absolutely received no benefit." Defendant concedes that a victim's mental handicap and charity to a defendant would be legitimate sentencing considerations if proven, but asserts that there was no evidence presented at trial showing that Gholston was mentally handicapped or that defendant did not give him money in exchange for a place to live.

¶ 16 We initially address the State's contention that defendant has forfeited his claim for review of this issue by failing to object during the sentencing hearing. The supreme court recently reiterated the well settled proposition that to preserve a claim of sentencing error, a defendant must object to the error at the sentencing hearing as well as raise the objection in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) citing *People v. Bannister*, 232 Ill. 2d 52, 76 (2008). Although defendant included the argument in his postsentencing motion, he did not

make a contemporaneous objection at the sentencing hearing. Thus, he has not preserved the issue for review.

¶ 17 Nevertheless, forfeited arguments related to sentencing issues may properly be reviewed for plain error. *Hillier*, 237 Ill. 2d at 545. A defendant must show either that: "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* Under either prong of the plain error rule, defendant bears the burden of persuasion. *Id*. We must "hold the defendant to his burden of demonstrating plain error" and if he fails to meet that burden, we must honor the procedural default. *Id*. Because defendant failed to recognize his forfeiture on this issue, he has not made any argument under either prong of the plain error doctrine. As such, he "obviously cannot meet his burden of persuasion." *Id.* Thus, he has forfeited plain error review. *Id.*

¶ 18 Even if defendant had not forfeited this issue, we would affirm his sentence. Defendant was convicted of armed robbery pursuant to 720 ILCS 5/18-2(a)(1), which is a Class X felony. The sentencing range for a Class X felony is 6 to 30 years in prison. 730 ILCS 5/5-8-1(a)(3) (West 2008). Factors that a court may consider in aggravation and mitigation are set forth respectively in 730 ILCS 5/5-5-3.2 (West 2008) and 730 ILCS 5/5-3.1 (West 2008). In sentencing a defendant, it is the trial court's duty to take into account all factors, both in aggravation and mitigation, and to balance those factors against each other; thereafter, it is within the court's discretion to determine the appropriate sentence. *People v. Powell*, 159 Ill. App. 3d 1005, 1010 (1987). The trial court is normally in a superior position during the hearing in aggravation and mitigation to make a sound determination as to the punishment to be imposed.

People v. Barrios, 114 Ill. 2d 265, 277 (1986). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, (*People v. Bowman*, 357 Ill. App. 2d 290, 303-304 (2005)), and a sentence that is within the statutory range, it will not be disturbed unless its imposition constitutes an abuse of discretion. *People v. Gutierrez*, 403 Ill. App. 3d 866, 900 (2010). However, a sentence based on improper factors will not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence. *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008).

¶ 19 Based on the record before us, the trial court's references to Gholston during sentencing were minimal, and the trial court's primary focus was on protection of the public, defendant's prior criminal history and his failure to rehabilitate himself. Therefore, where defendant was sentenced to 15 years' imprisonment for a crime with a minimum sentence of 6 years and a maximum sentence of 30 years, we cannot say that the trial court's consideration of Gholtson's mental acuity or his charity necessarily led it to impose a harsher sentence than would otherwise have been imposed. Consequently, remand for resentencing is not necessary in this case.

¶ 20 Next, defendant contends that defense counsel's failure to perfect Gholston's impeachment and use evidence of an earlier inconsistent statement he made during a preliminary hearing as substantive evidence amounts to ineffective assistance of counsel. In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a

claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. " *Id.* at 697, 104 S.Ct. 2052.

¶ 21 We are asked here to determine whether defense counsel's failure to submit the transcript of Gholston's preliminary hearing testimony as substantive evidence as allowed under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10/1 (West 2008)) amounts to ineffective assistance of counsel. We hold that it does not. We first note that a transcript of Gholston's earlier testimony was not made a part of the record on appeal. Only those parts of Gholston's earlier testimony quoted by counsel at trial here are before us on appeal. We question our ability to review this issue absent the complete transcript. Lack of a complete transcript aside, defendant's ineffective assistance argument is unpersuasive.

¶ 22 Defendant contends that his counsel was ineffective by failing to impeach Gholston using his earlier testimony as substantive evidence under section 115-10.1 of the Code. 725 ILCS 5/155-10.1 (West 2008). But our review of the record shows that Gholston was impeached, when the following exchange occurred during defense counsel's cross-examination of Gholston:

"Defense counsel: And you testified that he took $142; is that correct?

Gholston: That's what I–that's what I imagine I had in my pocket, $142.

Defense counsel: Okay. Again, when you spoke with the police that same day that the incident happened, you told the police that he took $150?

Gholston: No, I didn't say that.

Defense counsel: You never told the officer that?

Gholston: Uh-uh.

Defense counsel: And you testified in this case previously; is that right?

Gholston: Yeah.

Defense counsel: Okay. You testified once before, and that was–that was on July 8th of 2009?

Gholston: Of when the incident happened?

Defense counsel: No. When you testified in this case. When you came–

Gholston: I guess it was. I'm not sure about the date.

Defense counsel: And you were asked how much money was taken from you?

Gholston: Yeah, right.

Defense counsel: Okay. And what you–this is Page 5, Line 3. You were asked the following question and you gave the following answer:

> Q: How much did you give the defendant?
>
> A. It was $140.

You were asked that question and you gave that answer; is that correct?

Gholston: I said 142 roughly.

Defense counsel: So you never testified that you said $140. Is that what you're saying?

Gholston: No, I did not.

Defense counsel: I'm sorry?

Gholston: No, not that I know. I said 142."

¶ 23 The purpose of impeaching evidence is to destroy the credibility of a witness. *People v. Terrell*, 185 Ill. 2d 467, 509 (1998). To qualify as an inconsistent statement, a witness' prior statement need not directly contradict his or her testimony, but need only have a tendency to contradict it. *People v. Modrowski*, 296 Ill. App. 3d 735, 746 (1998). Here, it is questionable whether Gholston's testimony during the preliminary hearing that defendant took $140 would have a tendency to contradict defendant's trial testimony that defendant took "roughly $142." Nonetheless, this apparent inconsistency was established for the trier of fact. Therefore, defense counsel did attempt to impeach Gholston with his prior testimony.

¶ 24 We also decline to hold that counsel's failure to use Gholston's earlier inconsistent preliminary hearing testimony as substantive evidence amounts to ineffective assistance of counsel. Generally, the cross-examination or impeachment of a witness is considered to be trial strategy, which does not support a claim of ineffective assistance of counsel. *People v. Smith*, 177 Ill. 2d 53, 92 (1997); *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment, which is

entitled to substantial deference from a reviewing court." *Pecoraro*, 175 Ill. 2d at 326-27. The only way for a defendant to prevail on his ineffectiveness claim is by "showing that counsel's approach to cross-examination was objectively unreasonable." *Pecoraro*, 175 Ill. 2d at 327. We do not believe counsel's choice not to make substantive use of Gholston's inconsistent statement was objectively unreasonable where defendant was tried in a bench trial and no possibility of jury confusion existed. Therefore, we conclude that counsel's performance here did not fall below the standard of objective reasonableness required under *Strickland.*

¶ 25 Moreover, even if we accept defendant's suggestions that trial counsel should have offered Gholston's preliminary hearing testimony into evidence, defendant cannot show that he was prejudiced by this error. It is true, as defendant asserts, that because no knife was recovered, the trial court's verdict of guilt rested largely on its findings regarding the credibility of the testimony of victim and defendant. Defendant contends therefore, that additional impeachment of Gholston with prior inconsistent statements would likely have resulted in the trial court giving more credibility to defendant's version of events and acquitting him of armed robbery. We disagree. First, as noted above, the testimony that defendant sought to use to impeach Gholston was not necessarily contradictory to his trial testimony and therefore, it is of questionable impeachment value. Further, the material issue in this case was the use of a knife during the commission of the crime not the amount of money taken. The trial court found that Gholston's testimony regarding the knife, in which he described details about the knife and how defendant threatened him with it, to be credible. Therefore, there is not a “reasonable probability" that had defense counsel introduced the preliminary hearing transcript the result of the proceeding would have been

different. As a result of defendant's failure to establish either prong of the *Strickland* test, there was no ineffective assistance of counsel.

¶ 26 Lastly, defendant contends that his conviction should be reduced to the lesser included offense of theft because the State failed to prove beyond a reasonable doubt that he was armed with a knife. Defendant argues that because a knife was never found, the State's case hung entirely on Gholston's testimony, which defendant claims was inherently implausible, contradictory and inconsistent.

¶ 27 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "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.) *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct.2781, 61 L.Ed.2d 560 91979). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

¶ 28 It follows that where the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. In conducting this inquiry, as noted, the reviewing court must not retry the defendant. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *Id.* Testimony may be found insufficient under the

Jackson standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id.* However, the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Id.* Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 29 A person commits robbery when he takes property from the person or presence of another by the use of force or threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2008). Section 18–2(a) of the Criminal Code of 1961 (Criminal Code) sets forth the offense of armed robbery and provides in pertinent part:

> A person commits armed robbery when he or she violates Section 18–1; and
>
> (1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm[.] 720 ILCS 5/18-2(a)(1) (West 2008).

¶ 30 Here, Gholston testified that after directing him to drive down an alley, defendant pulled out a butcher knife and held it to Gholston's throat while demanding he give defendant his money. Gholston described the knife in detail, stating that it was serrated, not straight-edged and demonstrated how defendant held it under his neck. Conversely, defendant testified that he did not have a knife at any point on the day in question and did not display a knife when he was in the car with Gholston. In finding defendant guilty, the trial court stated "I find that the complaining witness was credible and his demeanor while testifying was credible ***." Conversely, the court

found that "there were logical inconsistencies in [defendant's] testimony, and his demeanor while testifying was such that the Court did not find him credible." We do not find that the evidence in the record compels the conclusion that no reasonable person could accept Gholston's testimony regarding defendant's use of a knife during the robbery beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d at 280. Therefore, we will not disturb the trial court's finding of guilt on the charge of armed robbery.

¶ 31 For the foregoing reasons, we affirm the circuit court.

¶ 32 Affirmed.