

No. 1-08-3581

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FIRST DIVISION
June 27, 2011

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. 03 CR 17652
)	
TONY ASHE,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

HELD: Where the record failed to show that the defendant requested a continuance, he forfeited his claim that the State violated Supreme Court Rule 412. Where the defendant's posttrial motion failed to specifically allege error as to the trial court's allowance of other-crimes evidence as proof of motive and the defendant failed to request plain-error review, the error was forfeited.

The defendant, Tony Ashe, was charged by indictment with the

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first degree murder of Laura Taylor and the attempted murders of Cynthia Hall and Miranda Carmickle. Following a jury trial, the defendant was found guilty of first degree murder and attempted murder. He was sentenced to a total of 90 years' imprisonment in the Illinois Department of Corrections.

The defendant appeals, contending that: (1) the State violated Supreme Court Rule 412 (eff. March 1, 2001) and (2) the admission of other-crimes evidence as proof of motive denied him a fair trial. The defendant has not raised a challenge to the sufficiency of the evidence. The trial evidence is summarized below.

On July 13, 2003, Laura Taylor, Cynthia Hall and Miranda Carmickle were seated in a car parked at 2430 North Lakeview Drive. The three women were employed by an escort service, co-owned by Ms. Taylor, Ms. Hall and Leonard Taylor, Ms. Taylor's husband. A man approached the car and shot into the window. The man then went to the back of the car and shot through the back window. Ms. Taylor died from gunshot wounds, and Ms. Carmickle sustained a gunshot to her arm.

According to her trial testimony, Ms. Hall, accompanied by the other two women, had been driving around in a Cadillac waiting for calls. Ms. Taylor had contacted Natalie Aponte, who sometimes worked for the Taylor/Hall escort service, about

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exchanging some money. They arranged to meet at an address on Lakeview Drive. When they arrived, Ms. Hall noticed a black Cadillac parked on the block. While she did not know the defendant, she had seen the car on other occasions and knew it belonged to the defendant. The black Cadillac moved and re-parked about six or seven car lengths away from Ms. Hall's car but on the opposite side of the street. A few minutes later, a hand appeared in the window on the passenger side of her car, and she heard two shots. Ms. Hall could not see the shooter's face but noticed that he was wearing surgical gloves and carried a nine millimeter gun. Ms. Hall then heard two more shots at the back of the car.

Eyewitness Iacon Dragos saw a man, dressed in dark clothes and a hooded sweatshirt, approach a car and shoot into the passenger-side window and then into the rear window. Mr. Dragos could not see the man's face because of the hood. Another witness, Mr. Mikkail Fikel, was standing at the intersection of Lakeview Drive and Arlington Avenue. He heard the shots and saw a black male, dressed in a dark brown warmup suit, walking quickly up the street. Mr. Fikel did not see the man's face.

The investigating police officers obtained the license plate number of the black Cadillac and the defendant's name from the witnesses at the scene. That information led the police to the

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defendant's residence. The defendant, Keith Green and Ms. Aponte were apprehended a short distance from the defendant's residence. A search of the black Cadillac revealed white latex gloves, one of which had black markings on it. In the trunk of the Cadillac, the police found a 9-millimeter handgun with a defaced serial number and a chrome-plated 25-caliber automatic. The defendant, Ms. Aponte and Mr. Green were arrested.

Ms. Aponte and Mr. Green were originally charged with murder in this case. In December 2004, they both pleaded guilty to conspiracy to commit murder and aggravated battery; each received a 10-year sentence. Both Ms. Aponte and Mr. Green testified against the defendant at trial.

Ms. Aponte testified as follows. On July 13, 2003, she was at her aunt's residence when Ms. Taylor called her about picking up some money. Ms. Taylor mentioned she had a new "wifey" (a new escort) she wanted Ms. Aponte to meet. Ms. Aponte suspected it was Ms. Carmickle, also known as Mia. Ms. Carmickle had lived with the defendant and Ms. Aponte until October 2002, when she had the defendant arrested for beating her. Ms. Aponte called the defendant and told him that Ms. Carmickle might be with Ms. Taylor when she went to pick up the money. The defendant instructed Ms. Aponte to have the women meet her at an address on Lakeview Drive. Ms. Aponte called Ms. Taylor and told her she

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was doing a party at 2430 North Lakeview Drive, and she would come down for the money when she was finished. Ms. Aponte believed that if the new "wifey" turned out to be Ms. Carmickle, the defendant would beat her up because he was very abusive.

Ms. Aponte remained at her aunt's residence. 45 minutes later, the defendant called to tell her he was coming by to pick her up.

Mr. Green is the defendant's cousin. According to his testimony, on the night of July 13, 2003, Mr. Green and the defendant were driving around in the defendant's black Cadillac. During that time, the defendant had a telephone conversation with Ms. Aponte. The defendant told Mr. Green to drive and directed him to an apartment building on the north side. As Mr. Green parked the defendant's car, he noticed a green Cadillac with a white top parked in front of a building. The defendant put on surgical gloves and took a 9-millimeter handgun from the glove compartment. After going to the trunk of his Cadillac, the defendant told Mr. Green that he would be back. The defendant was wearing construction goggles and a paper mask. Mr. Green watched as the defendant approached the green and white Cadillac and saw the defendant shoot into the car. When the defendant went to the back of the car, Mr. Green could no longer see him, but he heard six or seven more shots. When the defendant

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returned, Mr. Green asked whom he had shot. The defendant told him that he had just shot Mia.

The two men left the scene with Mr. Green driving. After changing places with Mr. Green, the defendant drove to the west side where they picked up Ms. Aponte. As they neared the defendant's residence, they were pulled over by the police.

The jury found the defendant guilty of one count of first degree murder and two counts of attempted murder. Following the denial of his motion for a new trial, the defendant was sentenced to a total of 90 years' imprisonment. Following the denial of his motion for reconsideration of sentence, the defendant filed a timely notice of appeal.

ANALYSIS

I. Supreme Court Rule 412 Violation

The defendant contends that the State's failure to disclose a statement by Mr. Green that the defendant had engaged in witness tampering violated Rule 412. We agree with the State that the defendant failed to preserve the issue for review.

A. *Relevant Facts*

On direct examination by the State, Mr. Green testified that, prior to his plea of guilty on December 9, 2004, he was in the Cook County jail. He was then questioned as follows:

"Q. At some point on one of your court dates did you

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have contact with the defendant?

A. Yeah.

Q. Can you tell us about that contact.

A. Man, he - - I seen him. We was talking, and he was telling me about the case or whatever.

MR. ADAM, JR. (one of the defendant's attorneys):

Objection to this, your Honor. I need a side bar.

THE COURT: All right."

The record reflects that a sidebar was held outside of the presence of the jury, but the record does not indicate that the sidebar was recorded by the court reporter. The colloquy continued on the record as follows:

"THE COURT: Bring Keith Green back out and let's get our jury."

The prosecutor showed Mr. Green a copy of a three-page hand-printed affidavit, dated November 26, 2004, and purportedly signed by Mr. Green. In the affidavit, Mr. Green denied that the defendant was involved in the Taylor shooting and stated that a friend of his, Samial, was the shooter. Mr. Green testified that he had been given the affidavit by the defendant but immediately returned it to him. Mr. Green denied that it was his signature on the signature line of the affidavit.

The prosecutor then showed Mr. Green another affidavit,

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which was typewritten and dated January 22, 2004, also purportedly signed by him. In the January affidavit, Mr. Green stated that the defendant had no involvement in the events of July 13, 2003, and that the statement he gave to police naming the defendant was false. While the affidavit was dated January 22, 2004, the date of the notarization was October 6, 2004. Mr. Green denied that the block-letter signature on the affidavit was his. He further maintained that he had not seen the January affidavit prior to the prosecutor showing it to him that day.

Mr. Green denied being with Samial on the night of the shooting and denied that he ever told the police that Samial was the shooter. He acknowledged that the signature on the trial subpoena he was served with was his. That signature was in cursive, rather than block letters. Mr. Green denied that any promises were made to him at the time he pleaded guilty to secure his testimony at the defendant's trial.

Under cross-examination by defense counsel, Mr. Green identified several documents prepared for him by another inmate. Like the signatures on the affidavits, his signature on these documents appeared in block letters. While he acknowledged signing some of the documents, he either did not recall signing or did not recognize his signature on others. In one case, Mr. Green noted that the "K" and the "G" appeared to be different

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from the way he made them. He denied that it was his signature on the January 22, 2004, affidavit, even though it was notarized. Mr. Green further denied writing or signing the November 26, 2004, affidavit.

B. *Standard of Review*

The standard for review of a discovery violation is whether the trial court abused its discretion. *People v. Lowry*, 354 Ill. App. 3d 760, 769, 821 N.E.2d 649 (2004). A reviewing court will find an abuse of discretion when a defendant is prejudiced by the discovery violation, and the trial court fails to eliminate the prejudice. *People v. Weaver*, 92 Ill. 2d 545, 559, 442 N.E.2d 255 (1982).

C. *Discussion*

Rule 412(a)(ii) requires that the State furnish the defendant with:

"any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements;"

The purpose of the discovery provision is to afford the accused protection against surprise, unfairness and inadequate preparation. *People v. Robinson*, 157 Ill. 2d 68, 79, 623 N.E.2d 352 (1993).

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The failure to comply with these requirements does not require reversal if there is no surprise or prejudice to the defendant. *Robinson*, 157 Ill. 2d at 78. The defendant bears the burden to show that the testimony actually surprised him or was unduly prejudicial. *Robinson*, 157 Ill. 2d at 78. Assuming, *arguendo*, that a discovery violation occurred in this case, reversal is not required because the defendant failed to establish actual surprise or that he suffered any prejudice as a result of the alleged discovery violation.

The failure to seek a continuance is a relevant factor to consider in deciding whether there was actual surprise or prejudice. *Robinson*, 157 Ill. 2d at 78. In *Robinson*, the defendant maintained that he did not receive the written report of a witness. Prior to the witness's testimony, the defendant moved for the exclusion of the witness's testimony or for a mistrial. Upon the denial of the motions, he chose to proceed with the trial. The supreme court held that the defendant could not request the most drastic measures where a continuance would have met the defendant's needs in a much less drastic way. By failing to request a continuance and electing to proceed with the trial, the defendant forfeited the Rule 412 error. *Robinson*, 157 Ill. 2d at 78-79.

This court followed *Robinson* in *People v. Batrez*, 334 Ill.

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App. 3d 772, 778 N.E.2d 1182 (2002). In *Batrez*, we held that the defendant had waived his Rule 412 claim by failing to request a continuance. We found no support for the defendant's argument that *Robinson* was limited to its facts. As *Robinson* was a decision of our supreme court, this court was bound to follow it. *Batrez*, 334 Ill. App. 3d at 778.

There is no indication in the record that the defendant requested a continuance to deal with Mr. Green's statement. Without a transcript of the sidebar between the trial court and the attorneys, we do not know the basis of defense counsel's objection and what, if any, measures, such as a continuance, defense counsel requested to remedy the alleged discovery violation. "[T]he responsibility for preserving a sufficiently complete record of the proceedings before the trial court rests with the defendant, as the appellant, and where the record on appeal is incomplete, any doubts arising from that incompleteness will be construed against the defendant, and every reasonable presumption will be taken in favor of the judgment below." *People v. Barker*, 403 Ill. App. 3d 515, 523, 932 N.E.2d 1207 (2010).

The record reflects that, following the sidebar, the prosecutor questioned Mr. Green about receiving the affidavit from the defendant, his refusal to sign it and his denial that it

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was his signature that appeared on it. We note that at the hearing on the defendant's motion for a new trial, defense counsel referred to the trial court's limiting or attempting to limit the questioning of Mr. Green. However, in light of the fact that defense counsel made no further objection to the subject of the testimony, we can only conclude that the defense counsel was satisfied with the trial court's resolution of the purported discovery violation and withdrew his objection.

The defendant argues that a continuance would not have provided an adequate remedy in this case since the damaging testimony was already in evidence. See *People v. Hendricks*, 325 Ill. App. 3d 1097, 1108, 759 N.E.2d 52 (2001) (continuance would not be an adequate remedy where the damaging testimony had already been elicited); see also *Weaver*, 92 Ill. 2d at 559-60. Unlike *Weaver* and *Hendricks*, in the present case, Mr. Green had not yet testified as to the undisclosed statement when defense counsel raised his objection and requested the sidebar.

Finally, defense counsel's cross-examination of Mr. Green reflects that the defendant was neither actually surprised nor unduly prejudiced by Mr. Green's testimony. Defense counsel's objection was well-timed, as if anticipating the area to which the prosecutor's questioning of Mr. Green was leading. Counsel's cross-examination of Mr. Green was not only vigorous but well

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prepared. Defense counsel produced document after document on which Mr. Green's signature appeared in block letters, just as it did on the affidavits the defendant maintained that Mr. Green signed. Under counsel's questioning, Mr. Green acknowledged that he signed some of the documents counsel showed to him. In light of defense counsel's skillful cross-examination, we conclude that Mr. Green's testimony about the affidavits did not come as a surprise. Rather than prejudice the defendant, if anything, the cross-examination raised questions as to the veracity of Mr. Green's denial that he signed the affidavits.

In the absence of an adequate record, the defendant failed to establish that he sought a continuance and therefore, he has forfeited his claim of Rule 412 error. Even if the defendant had preserved his claim, he failed to establish that the alleged failure to disclose either surprised or resulted in prejudice to him.

II. Other-Crimes As Evidence of Motive

The defendant contends that other-crimes evidence was improperly admitted to establish his motive for the shootings. Ms. Aponte was permitted to testify that in October 2002, the defendant had beaten Ms. Carmickle, for which Ms. Carmickle had him arrested. The State maintained that the defendant sought to retaliate against Ms. Carmickle. The defendant responds that the

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October 2002, incident was too remote and that the State failed to link that incident to the shooting in this case with evidence that during the nine months that separated the two events, the defendant remained angry with Ms. Carmickle for having had him arrested.

In order to preserve an issue for review, a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247 (2005). Failure to satisfy either prong of this test forfeits the defendant's claim of error on review. *Woods*, 214 Ill. 2d at 470.

The defendant's posttrial motion raised several errors with respect to other-crimes evidence elicited during Ms. Aponte's testimony. However, he failed to specifically assert, either in the posttrial motion or in argument on the motion, that her testimony as to the defendant's arrest after he beat Ms. Carmickle was improperly allowed as evidence of motive.

We note that the defendant failed to request that the issue be reviewed for plain error. By failing to request such review, the defendant forfeits such review. *People v. Taylor*, No. 1-09-0517, slip op. at 48; see *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184 (2010) (by failing to argue for plain error review, the defendant cannot meet his burden of persuasion).

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Moreover, we are satisfied that the defendant could not establish plain error. Our review of the record does not support the defendant's assertion that the evidence was closely balanced, and we are satisfied that any error in allowing Ms. Aponte's testimony to establish the defendant's motive for the shooting did not deny the defendant a fair trial.

CONCLUSION

We hold that, in the absence of evidence that he requested a continuance, the defendant forfeited his claim that the State violated Rule 412. We further hold that the defendant forfeited his claim of error in the admission of other-crimes evidence to prove motive where his posttrial motion was insufficient to preserve the error.

Affirmed.

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