

THIRD DIVISION
March 16, 2011

No. 1-09-1663

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. 99 CR 1960 |
| |) | |
| TREMAYNE CORA, |) | Honorable |
| |) | Evelyn B. Clay, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE STEELE delivered the judgment of the court.

Presiding Justice Quinn and Justice Neville concurred in the judgment.

O R D E R

HELD: Where testimony that State witness claimed was coerced by police was not material to defendant's murder conviction, the circuit court's dismissal of his postconviction petition without an evidentiary hearing was affirmed; mittimus corrected to reflect one count of murder, not two counts, for single victim.

Defendant Tremayne Cora appeals the circuit court's order granting the State's motion to dismiss his postconviction

petition. On appeal, defendant contends this court should remand for an evidentiary hearing on his postconviction claim that a State witness, Tamika Day, was coerced by police into testifying against him at his murder trial. Defendant also asserts one of his murder convictions should be vacated under the "one act, one crime" rule. We affirm as modified.

After a jury trial in 2000, defendant was convicted of the first degree murder of Rafael Mahomes and was sentenced to 35 years in prison. Day, defendant's former girlfriend, testified for the prosecution that on the night of December 17, 1998, defendant and another man arrived at her apartment near 83rd and Langley Avenue in Chicago. Defendant left the door partially open as he entered the apartment and told Day there was a "bunch of dirty m----- f----- in the hallway." One of the men in the group, Tony Davis, heard defendant's remark and told defendant to "watch his mouth." Day said she told defendant to "leave it alone."

Day testified she pulled defendant back into her bedroom because she "didn't want the guys outside in the hallway to hear what [defendant] was saying." Defendant told Day "they don't know nothing, they don't know me" and he would "air out this whole block." Defendant made a phone call, stating there was "trouble on 83rd." Day walked downstairs with defendant, his

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friend and Day's female cousin. Defendant drove away in a green Dodge Intrepid.

Louis Turner and Timothy Reason also testified for the State. Day knew Turner and Reason and testified they were in the hallway when she and defendant left her apartment. Turner testified he was in the hallway and that defendant was wearing a red jogging suit and tinted glasses. Turner offered testimony similar to Day's account of the remarks exchanged between defendant and those in the hallway. Turner was nearby when the shooting occurred and saw defendant drive away in a green Intrepid.

Reason lived in Day's building and testified Mahomes was in the hallway with the group, but Mahomes left before defendant left Day's apartment with Day and another man. Defendant wore a red jogging suit and tinted glasses and drove away in a green Intrepid. Reason returned to his apartment and watched television, and Mahomes knocked on Reason's window and asked to use the phone because he could not get into his house, which was a couple of blocks away.

Reason opened the window and spoke to Mahomes for 5 or 10 minutes. Reason could see Mahomes from the chest up. The window faced the alley, which was lit by streetlights. Mahomes told Reason the men they had seen earlier, including defendant, were approaching. Reason said defendant wore a white jogging suit and

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a black leather jacket, which was different from his earlier attire.

Reason testified defendant walked past Mahomes and then turned and asked "where was the weed." Defendant displayed a gun and said he "had the weed right here." Defendant fired between 7 and 10 shots at Mahomes. Reason said several people, including Turner, came to assist him and Mahomes after the shots were fired. Reason identified defendant in a police lineup several hours after the shooting. On cross-examination, Reason stated there were two gunmen, but then acknowledged he was unsure and only saw a weapon in defendant's hand. Reason said between 10 and 12 shots were fired in total.

Police recovered a red jogging suit from defendant's residence before arresting him. Reason identified that suit as defendant's. Police determined a relative of defendant had leased a green Intrepid during the time of the shooting.

On direct appeal, defendant contended the trial court erred in denying his motion to quash his arrest and suppress evidence, as well as erred in limiting defense counsel's questioning of Reason about drug use. Defendant also challenged the sufficiency of the evidence to support his conviction. This court affirmed in *People v. Cora*, No. 1-00-3318 (2002) (unpublished order under Supreme Court Rule 23).

After his direct appeal was complete, defendant filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). When the court did not rule on defendant's petition within 90 days, the petition proceeded to the second stage of postconviction review.

In 2004, counsel amended defendant's petition to assert, among other claims, that Day was coerced into testifying falsely for the State. The petition states that in 2003, Day told David Jackson, an investigator for defendant's counsel, and Mellonie Houston, defendant's cousin, that defendant did not state before the shooting that "they don't know me" and he would "air out" the block. According to the petition, Day told Jackson that police threatened to take away her child if she did not provide that testimony. Attached to the amended petition were affidavits of Jackson and Houston attesting that Day told them about the police coercion. Counsel filed a certificate pursuant to Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)).

The State moved to dismiss defendant's petition, and the circuit court granted the State's motion as to all claims except Day's assertion of coerced testimony. Defense counsel filed a second amended petition accompanied by an affidavit of Day in which she attested she testified falsely at trial because the police threatened her. Day also said members of Mahomes' family

threatened her and she moved away as a result. The circuit court granted the State's motion to dismiss the petition.

On appeal, defendant asserts this court should remand for an evidentiary hearing on his postconviction claim that Day provided false testimony. He argues a reasonable likelihood exists that the jury could have acquitted him had the alleged false portion of Day's testimony not been offered.

The Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights, and to be entitled to postconviction relief, a defendant must show he has suffered a substantial deprivation of those rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

An evidentiary hearing on a postconviction petition is warranted only where the allegations of the petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that a defendant's constitutional rights have been violated. *People v. Orange*, 195 Ill. 2d 437, 448 (2001). In determining whether to grant an evidentiary hearing on claims in a postconviction petition, all well-pleaded facts in the petition and accompanying affidavits are taken as true. *Orange*, 195 Ill. 2d at 448.

Defendant contends his due process rights were violated by the State's presentation of Day's account that he told her "they don't know me" and he would "air out this whole block." Due process concerns are implicated when a conviction is obtained through the use of false material testimony. *Coleman*, 183 Ill. 2d at 391-92. Where the prosecution knowingly uses perjured testimony, the conviction must be overturned if there is a reasonable likelihood the testimony could have influenced the jury verdict. *Coleman*, 183 Ill. 2d at 392; *People v. Gutman*, 401 Ill. App. 3d 199, 218 (2010).

The State raises several technical and substantive challenges to the petition and Day's affidavit. The State argues: (1) Day's affidavit in support of the petition was not notarized; (2) the affidavit lacked sufficient detail and also lacked a statement that Day would testify to the facts surrounding her alleged coercion; and (3) Day's testimony was not material to defendant's conviction.

We first consider the issue of the materiality of Day's testimony that defendant stated to her before the shooting that "they don't know me" and he would "air out this whole block." An allegedly perjurious statement is material if it influenced, or could have influenced, the trier of fact in its deliberations on the issues presented to it. *People v. Baltzer*, 327 Ill. App. 3d 222, 227 (2002). More precisely, evidence is material to the

guilt or innocence of a defendant when it is probative, meaning it tends to prove or disprove a matter at issue. *People v. Nichols*, 27 Ill. App. 3d 372, 386 (1975); see also *People v. Favors*, 254 Ill. App. 3d 876, 888 (1993). It is not likely the portion of Day's testimony that she now recants would have influenced the jury to convict defendant. Reason witnessed the shooting and identified defendant as the gunman. The remainder of Day's testimony was consistent with Reason's account of the shooting and also with Turner's description of the night's events.

Defendant contends Day's testimony that he told her "they don't know me" and that he would "air out" the block was material because it showed his intent to commit the crime. We disagree that Day's testimony was material on that basis; a defendant's intent may be inferred from the act itself and defendant's conduct surrounding the act. See *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009). Reason's eyewitness testimony that defendant approached the victim and fired at least seven shots was sufficient to establish defendant's intent to kill. Moreover, even without Day's testimony as to those two remarks, the State presented other evidence of tension and words exchanged between defendant and the group in the hallway. Notably, Day did not recant her testimony regarding the altercation in the hallway.

Defendant also argues Day's account of his statements was material because Day provided facts not described by any other witness, including Turner or Reason. However, the fact that Day provided the sole testimony as to the remarks in question does not establish their materiality. Indeed, of the State's witnesses, only Day could have attested to defendant's comments in question. As Day testified at trial, defendant made the remarks to her in an interior bedroom to which she directed him so they would not be heard by people in the hallway, including Turner and Reason.

Taking as true Day's affidavit that defendant did not tell her "they don't know me" and he would "air out" the block, and presuming that she falsely testified about those remarks, Day's testimony could not likely have influenced the jury's verdict. Because we conclude that portion of Day's testimony was not material to defendant's conviction, it is unnecessary to address the State's additional challenges to the petition and affidavit. We affirm the circuit court's dismissal of the petition without an evidentiary hearing.

Defendant's remaining contention in this appeal requires correction of the mittimus. Defendant argues, and the State concedes, the mittimus in this case reflects two murder convictions for one physical act, *i.e.*, the shooting of Mahomes, and one of those convictions must be vacated under the "one act,

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one crime" rule, which bars multiple convictions based on the same physical act. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). Defendant was convicted of intentional murder (720 ILCS 5/9-1(a)(1) (West 2000)) and knowing murder (720 ILCS 5/9-1(a)(2) (West 2000)). A conviction only on the most serious offense can be sustained and because intentional murder involves a more culpable mental state, we vacate defendant's conviction for knowing murder. See *People v. Walton*, 378 Ill. App. 3d 580, 590 (2007).

Affirmed as modified.