2011 IL App (1st) 092610-U

THIRD DIVISION
September 28, 2011

No. 1-09-2610

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. 08 CR 1283
	)	
JORGE PENA,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

O R D E R

¶ 1 *Held*: The State's introduction of a prosecution witness's grand jury testimony that was partially consistent with her trial testimony did not amount to plain error, and defendant's trial counsel was not shown to be ineffective where defendant could not establish he was prejudiced by the grand jury testimony.

¶ 2 Following a jury trial, defendant Jorge Pena was convicted of first degree murder and sentenced to 70 years in prison. On appeal, defendant contends the trial court erred in allowing the State to use prior grand jury testimony of a prosecution witness where the testimony was not admissible as either a prior consistent statement or a prior inconsistent statement. Defendant

also asserts his trial counsel was ineffective for failing to object to the State's use of the grand jury testimony. We affirm.

¶ 3 Defendant was charged with the first degree murder of 15-year-old Khalid Mohammed, who was shot to death on July 8, 2006. Both defendant and Mohammed were members of the Maniac Latin Disciples (MLD) street gang. Defendant's gang name was Cuba; Mohammed's gang name was Egypt. The evidence adduced at defendant's jury trial revealed that on June 4, 2006, about five weeks before Egypt was murdered, Mark Evans was fatally shot during an armed robbery attempt. The jury was instructed that testimony concerning the Evans murder was to be received only for the limited purpose of defendant's motive in the instant case.

¶ 4 Defendant and his brother were taken into custody and questioned about Evans's murder but were released. Subsequently, Timothy Leszynski, also an MLD gang member, was arrested and charged with the murder of Evans. At defendant's trial for the murder of Egypt, Timothy testified for the State. He admitted that, in exchange for his testimony against defendant, the State had dismissed the charge of the murder of Evans and allowed Timothy to plead guilty to attempted armed robbery and receive a 12-year prison sentence. Timothy's testimony about the circumstances of the Evans murder was presented to establish a motive for the murder of Egypt one month later. On June 4, 2006, Timothy acted as a lookout while defendant, defendant's brother Kiko, and Egypt attempted to rob Evans by taking him by force to an ATM machine. When Evans attempted to run from them, defendant shot him in the neck. Evans fell, and defendant shot him two or three more times. Shortly thereafter, defendant told Egypt, Kiko, and Timothy that he would kill any of them who would say anything about Evans's death.

¶ 5 About two weeks after the murder of Evans, when defendant, Timothy, and Egypt were in the presence of two girls, Egypt started to tell the girls about the murder of Evans. Defendant slammed Egypt against a wall and told Egypt that if he kept talking about Evans, defendant would kill him.

¶ 6 Shortly after midnight on July 8, 2006, Chicago police went to the alley behind 2856 West Fletcher Street and found Egypt's body lying in the alley against a garage door. Later that day, police received information about a four-door silver Mercury Sable in connection with the case. The car was found about three blocks from where Egypt's body was found. The car was impounded, and the fingerprints of defendant and Egypt were found on the interior rear-view mirror. An autopsy on Egypt's body revealed he had been shot five times.

¶ 7 Oscar Miramontes was on a front porch of a home on Richmond Street on the evening of July 7, 2006. Oscar, a former member of the MLD gang, saw several MLDs on the corner of Richmond and Fletcher. Among them were Cuba (defendant) and Egypt. Defendant and Egypt were walking together and arguing as they passed Oscar on the porch. Defendant pushed Egypt and told him, "You talk too much. Shut the f*** up." Then the pair walked toward Fletcher Street. Oscar heard four or five gunshots coming from the direction of Fletcher, and 5 or 10 minutes later he saw defendant running from Fletcher, yelling to everyone still on the corner, "Ya'll get the f*** out of here."

¶ 8 In the summer of 2006, Genassia Gonzalez knew both defendant and Egypt from the neighborhood. On July 7, Genassia saw defendant driving a gray or silver car; Egypt was in the front passenger seat. That evening, around midnight, Genassia and a friend, Sylvia Alfaro, were walking together when they saw Egypt in front of a garage in an alley off of Belmont. When Genassia spoke to Egypt, he pushed her away from the garage and out of the alley toward the street. Genassia looked down a gangway and saw defendant sitting on a bench. He had something shiny in his hand that appeared to be a gun. Then Egypt grabbed Genassia and told her to leave. Genassia and Sylvia walked toward Fletcher. When they reached the corner, they heard five gunshots. They walked back toward the alley and saw defendant running out of the alley. Genassia walked into the alley and saw Egypt lying on the ground in front of the garage. Genassia and Sylvia started to go home when they saw defendant again. He went up to Sylvia,

hugged her, and told her he was sorry. Then he tried to hug Genassia. His eyes were red and watery and he was short of breath. About two weeks later, Genassia saw defendant near Nelson Park. Defendant grabbed her by the shoulder, pushed her against a wall, and said he heard she had been talking about him to the police. He told her she should not say anything or she was going to get herself into problems with him.

¶ 9 Sarah Vargas had known defendant for 8 or 10 years and saw him every day in the summer of 2006. She also knew Egypt. About one week before Egypt was killed, defendant told Sarah that Egypt "was running his mouth and that he needed to go." "And I thought he meant like just leave. And he said smoke him. *** He meant smoke him." The prosecutor attempted to elicit further details from Sarah:

"Q. Did he say anything other than he had to go?

A. I don't recall. He just said that he had to go. Those were his words.

Q. Did he describe to you how Egypt was going to go?

A. Shoot him. Going to shoot him.

* * *

Q. Did he say anything else about Egypt other than he had to go and that Egypt was running his mouth?

A. No. He just said that he was running his mouth and he had to go."

¶ 10 At that point, the prosecutor read selections from the transcript of Sarah's grand jury testimony from January 2007:

"QUESTION: Okay. He indicated to you that he was going to smoke him, is that correct?

ANSWER: Yes.

QUESTION: Is that [*sic*] the words he used?

ANSWER: Yes.

* * *

QUESTION: What does smoke him mean to you?

* * *

ANSWER: Shoot him.

* * *

QUESTION: Did you ask him why he was going to smoke him?

ANSWER: Yes.

QUESTION: What did he tell you?

ANSWER: He said that he did something and when he did it, Egypt was with him.

* * *

QUESTION: When he said he did something, was he referring to himself?

ANSWER: Yeah. He said that – Cuba said he did something and when he did it, Egypt was there. And Egypt was going around the hood telling everybody what Cuba did and Cuba wanted to kill him before it got out to the wrong person."

¶ 11 Sarah testified those were the questions asked and the answers she gave before the grand jury. There was no defense objection to the State's use of Sarah's grand jury testimony.

¶ 12 Sarah further testified that, about one week after Egypt was killed, she had another conversation with defendant. He told her he took Egypt in an alley and shot him. "And then he bent down and picked him up and he told him that he loved him and that he felt real bad, but he had to do it." He said he had killed Egypt in the alley "because he was running his mouth."

¶ 13 Alexis Vargas, Sarah's brother, was a former MLD member and had known defendant for a number of years. Alexis also knew Egypt. Before Egypt's murder, defendant had asked Alexis

if Egypt had spread rumors about anything. Egypt had done so, but Alexis lied and told defendant he had not spoken with Egypt. Defendant said he heard that Egypt was running around talking about someone they had robbed, and that he was going to kill Egypt. After Egypt was killed, defendant told Alexis that he had handled the situation.

¶ 14 Luz Marie Gonzalez testified that in August 2006, she lived with defendant and his brother Jose. At that time she was aware of the murders of Mark Evans and Egypt, and she confronted defendant about them. Luz asked defendant whether he had killed Evans, and defendant just stared at her. She asked him if he had killed Egypt, and he replied, "yeah." Defendant said he took Egypt to an alley and shot him "[b]ecause he was running his mouth."

¶ 15 Jennifer Rice, an MLD gang member, had a brief intimate relationship with defendant. In June and July of 2006, she learned of the homicide deaths of Mark Evans and Khalid Mohammed. On October 18, 2006, Jennifer had a conversation with defendant and asked him about the two murders. Defendant said nothing but he smirked and put his hand over his mouth to hide a grin. Jennifer asked defendant whether he had used two different guns. He replied that he did and that he had disposed of the guns.

¶ 16 After the State rested, the defense presented no testimony. The instructions given to the jury included Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000), to which defense counsel stated there was no objection. The instruction advised the jury that it could consider a witness's earlier inconsistent statement as impeaching evidence, and also as substantive evidence when the earlier statement was made under oath. The jury returned a verdict of guilty of first degree murder. Defendant's written posttrial motion did not raise an issue concerning the State's use of Sarah Vargas's grand jury testimony. Defendant was sentenced to 70 years in prison, including a 25-year enhancement for personally discharging a firearm during the offense.

¶ 17 On appeal, defendant's first assignment of error is that the State's use of Sarah Vargas's grand jury testimony was reversible error as being improperly admitted under section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2008)) because the prior statements were not substantially inconsistent with her trial testimony and, thus, unfairly bolstered Sarah's credibility. Defendant also contends the statements were not admissible as consistent statements because the statements did not rebut a charge that Sarah was motivated to lie or that her trial testimony was a recent fabrication. Conceding the argument was not preserved for review, defendant asks us to consider it under the plain error doctrine.

¶ 18 The plain error doctrine permits a reviewing court to consider a trial error not properly preserved when (1) the evidence in a criminal case is closely balanced or (2) the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial. *People v. Byron*, 164 Ill. 2d 279, 293 (1995). Under the first prong, the defendant must prove prejudicial error, that is, both that there was clear or obvious error and that the evidence was so closely balanced that the error threatened to tip the scales of justice against defendant. Under the second prong, the defendant must establish there was clear or obvious error so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007).

¶ 19 Section 115-10.1 of the Code allows for the admission at trial of a prior statement that is *inconsistent* with the witness's trial testimony when the witness is subject to cross-examination concerning the statement and the statement was made under oath. However, a prior *consistent* statement is admissible only to rebut a charge or inference that the witness was motivated to lie or that his testimony was of recent fabrication. *People v. Brewer*, No. 1-07-2821, slip op. at 9 (Ill. App. June 30, 2011), citing *People v. Smith*, 362 Ill. App. 3d 1062, 1081 (2005).

¶ 20 Sarah's trial testimony was both consistent and inconsistent with her grand jury testimony. At trial, Sarah denied that defendant explained to her why he had to kill Egypt.

When the prosecutor asked Sarah whether defendant said anything else other than that Egypt had to go and was running his mouth, she responded, "No. He just said that he was running his mouth and he had to go." Before the grand jury, however, Sarah had testified that defendant told her he had done something that Egypt had witnessed, Egypt was telling everybody what defendant had done, and defendant wanted to kill Egypt "before it got out to the wrong person." Sarah's grand jury testimony, which explained in detail defendant's motive for killing Egypt, was inconsistent with her denial at trial that defendant had said anything else about Egypt. The State properly utilized that portion of the grand jury transcript inconsistent with Sarah's omission at trial to introduce defendant's detailed explanation for killing Egypt as substantive evidence.

¶ 21 One portion of Sarah's trial testimony was somewhat consistent with her grand jury testimony. On both occasions, Sarah testified that defendant told her he was going to "smoke" Egypt. Before the grand jury, Sarah testified that she understood the term "smoke" to mean defendant was going to shoot Egypt, although at trial she stated defendant actually told her that he was "[g]oing to shoot" Egypt. Even if that portion of Sarah's grand jury testimony were improperly admitted, however, we find no reversible error. Defendant has failed to establish prejudice under the first prong of the plain error doctrine where the evidence was not closely balanced.

¶ 22 Defendant claims no error regarding Sarah's testimony that, after the murder, defendant told her he had taken Egypt into an alley and shot him because Egypt "was running his mouth." There was testimony by Timothy that prior to Egypt's murder, defendant had threatened to kill Egypt if he talked about the Evans murder, and defendant told Alexis Vargas he intended to kill Egypt. Defendant made inculpatory admissions after the murder to Alexis Vargas, Luz Marie Gonzalez, and Jennifer Rice. And testimony comprising strong evidence of defendant's guilt, albeit circumstantial, came from Genassia Gonzalez and Oscar Miramontes. Oscar saw defendant and Egypt together just before the shooting and saw defendant running from the scene

after shots were fired. Genassia testified she saw defendant holding a gun as Egypt stood nearby in the alley, she heard five gunshots, she returned to the alley and saw Egypt's body lying in the alley. A short time later, defendant approached her and her companion and said he was sorry. Given the totality of the evidence, it is unlikely defendant would have been acquitted had the consistent grand jury statement been barred. See *People v. Dominguez*, 382 Ill. App. 3d 757, 771 (2008); *People v. Engle*, 351 Ill. App. 3d 284, 289 (2004).

¶ 23 Under the second prong of the plain error doctrine, even if the prosecutor improperly introduced a small portion of the grand jury transcript consistent with Sarah's trial testimony that defendant said he was going to "smoke" or shoot Egypt, her testimony was merely cumulative of similar testimony by Alexis Vargas and was not damaging in light of other evidence proffered by the State. Thus, the claimed error does not implicate a substantial right. See *People v. Keene*, 169 Ill. 2d 1, 17-18 (1995). We conclude defendant has failed to establish that any impropriety in the introduction of Sarah's grand jury testimony constituted plain error. In turn, we also find defendant has failed to establish that the giving of the jury instruction on inconsistent statements as substantive evidence constituted plain error. See *People v. Herron*, 215 Ill. 2d 167, 193 (2005).

¶ 24 Defendant also contends his trial counsel was ineffective for failing to object to the State's use of Sarah's grand jury testimony. A defendant's claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires deficient performance by counsel and prejudice to the defendant from the deficient performance. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). To prevail, the defendant must satisfy both prongs of the *Strickland* test. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Thus, if a claim of ineffective assistance can be disposed of because defendant suffered no prejudice, the reviewing court need not determine whether counsel's performance was deficient. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). As previously noted, defendant is unable to

establish he was prejudiced by the introduction of Sarah's grand jury testimony. Consequently, we reject defendant's claim of ineffectiveness of his trial counsel.

¶ 25 For the reasons stated, we affirm the judgment of the trial court.

¶ 26 Affirmed.