2011 IL App (1st) 093109-U

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FIRST DIVISION
FILED: SEPTEMBER 26, 2011

No. 1-09-3109

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. 06 CR 08237
	)	
CARAIL WEEKS,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

Held: The defendant's conviction and sentence were affirmed where he could not establish that he was convicted due to ineffective assistance of counsel, where he forfeited two additional contentions of error, and where the circuit court gave him proper credit for pre-sentence incarceration.

¶ 1 The defendant, Carail Weeks, appeals from his conviction and subsequent sentence for one count of first-degree murder and two counts of attempted first-degree murder. On appeal, the defendant argues that (1) his counsel was ineffective for failing to strike a purportedly biased juror from the venire, (2) the trial court committed reversible error by allowing the State to introduce a witness's prior consistent statement regarding identification, (3) his trial was rendered unfair due to improper closing argument from the State, and (4) he is entitled to a one-day sentencing credit for

his incarceration on the day he was sentenced. For the reasons that follow, we affirm the judgment of the trial court.

¶ 2 As the parties and court conducted voir dire for the defendant's second trial--his first trial ended with a hung jury--the defendant's attorney asked potential jurors whether there would be "anything about the fact that [the defendant] does not take the stand in his own defense that would cause [them] to have some concerns about his guilt or innocence." A member of the venire raised her hand to indicate a concern, and the following colloquy ensued:

> "A. I would have to just say I don't think it would prejudice me, but I would really wonder why somebody didn't want to take the stand in defense of himself, yes.
>
> THE COURT: Would your answer be any different if I told you that the law states that if the Defendant does not testify, you must not consider that in any way in arriving at your verdict?
>
> A JUROR: Well, I would take the information and try to make a fair judgment, but I have honest [sic], I would wonder why somebody wouldn't want to, yes.
>
> BY [DEFENSE COUNSEL]:
>
> Q. Do you have any concerns with the *** legal principle that the Defendant is in fact presumed innocent until the State proves [its] case beyond a reasonable doubt?
>
> * * *
>
> A. No, I don't disagree with it.
>
> Q. You don't disagree with the principle that the State has that burden?
>
> A. No, I don't disagree."

The venire member was later selected to serve on the defendant's jury, with no objection from the defense.

¶ 3 The State's first witness, Armica Reed, testified that, on the morning of March 3, 2006, she and her family were in their home when she heard "at least ten" gunshots coming from outside the house. After hearing the gunshots, Armica walked to her living room, where she saw her 14-year-old

sister, Starkeshia, lying motionless on the floor near a bullet-pierced window. Armica detected no heartbeat when she tended to her sister, who, later evidence revealed, had been killed by the gunfire.

¶ 4 Juarez Merchant testified that, near the time of the shooting, he often saw his former girlfriend and the defendant riding in his neighborhood in a green two-door automobile with tinted windows and temporary license plates. Merchant recalled that he had seen the same green car, often occupied by the same two people, in the weeks preceding March 3, 2006. On the morning of March 3, 2006, Merchant and an acquaintance, Charles Labon, were walking the neighborhood and stationing themselves to sell drugs when he saw the green automobile pass near them three times in close succession. During the last encounter, Merchant recalled, the car slowed, a passenger door opened, and the defendant got out of the car carrying a gun pointed at Merchant and Labon. The two men fled as the defendant shot the gun at them "10 to 15" times. Merchant said that neither he nor Labon were shot before they escaped but that he later learned that Starkeshia had been shot in her home.

¶ 5 Merchant testified that, shortly after the shooting, he identified the defendant as the shooter in a police photo lineup. During the State's direct examination, the prosecutor asked Merchant if he had appeared before a grand jury in this case, and the trial court overruled the defense's unexplained objection to the question. Merchant then went on to say that he had identified the defendant as the shooter for the grand jury.

¶ 6 On cross-examination, Merchant agreed that he was a convicted felon and was facing residential burglary charges; he also agreed that he had long sold illegal drugs. When asked on cross-examination about the timing of events on March 3, Merchant stated that he and Labon did not begin running until the defendant fired his first shot at them; however, he agreed that he had told the grand jury that he ran before any shots were fired. He also acknowledged having told the grand jury that he did not know how many people were in the green car on the morning of the shooting, even though he testified at trial that the car had two occupants. Merchant further agreed that he delayed coming forward to give police the information he had about the shooting. On re-direct examination,

Merchant agreed that, at the defendant's first trial, he had identified the defendant as the shooter.

¶ 7 After a neighborhood resident testified that she saw a two-door green car with a temporary license plate leaving the scene of the shooting, the State presented the testimony of Merchant's acquaintance, Charles Labon. Labon's account of the shooting incident largely matched Merchant's, and it echoed Merchant's recollection of the defendant getting out of a green car and shooting at them several times. Labon recalled that he identified the defendant for the authorities as the shooter. On cross-examination, Labon agreed that he had been convicted of several felonies and had sold drugs for many years. Labon also agreed that he was a member of a street gang, and, although he equivocated as to whether Merchant was a gang member, he acknowledged that he had explained Merchant's gang affiliation during the defendant's first trial. On further cross-examination, Labon agreed that he had spoken with a man who identified himself as the defendant's attorney and had subsequently signed an affidavit saying he did not see the defendant get out of the car or fire any shots. Labon explained that he signed the affidavit because the attorney had promised to help him with his case.

¶ 8 The State's next witness, James Kline, an acquaintance of the defendant, testified that, the day after the shooting, the defendant made a point of comparing a newspaper description of the shooter with his own physical characteristics but did not explicitly admit involvement. Kline also acknowledged signing a statement to the effect that the defendant admitted having fired the shots that killed Starkeshia, but Kline insisted that he never described any such admission by the defendant. Kline also said he could not recall his grand jury testimony that the defendant had been present at the shooting. The State later presented the testimony of the prosecutor who took a statement from Kline to the effect that the defendant had admitted being present at the time of the shooting, as well as the prosecutor who elicited Kline's grand jury testimony regarding the defendant's admissions.

¶ 9 The State next presented the testimony of a police officer who found an abandoned gun during a routine patrol; a store clerk for a gun store that had sold the defendant a gun, whose serial number matched that of the abandoned gun, several months before the shooting; a police investigator

who found 14 spent cartridge cases in the street at the scene of the shooting as well as other physical evidence; a forensic scientist who restored the obscured serial number on the abandoned weapon; and the forensic pathologist who performed Starkeshia's autopsy. Jon Flaskamp, a police firearm identification specialist, testified that, before examining any suspected firearms, he determined that at least 13 of the 14 cartridge cases had been ejected from the same firearm. Flaskamp further testified that his testing led him to conclude that all 14 cartridge cases, as well as some bullet fragments at the scene, had been fired from the firearm that earlier testimony had established was purchased by the defendant.

¶ 10 After testimony from the police officer to whom Merchant and Labon identified the defendant as the shooter and who asked Utica Collins to bring her car (a green two-door car with tinted windows and a temporary licence plate) to the police station for inspection, the State rested its case. The trial court denied the defendant's motion for a directed finding, and the defendant began his case with the testimony of George Grzeca, an attorney who once represented the defendant and met Labon during the course of his related investigation. Grzeca recalled that he found Labon, who was incarcerated, and interviewed him about the defendant's case. Grzeca denied that he promised any assistance to Labon. According to Grzeca, during the interview, Labon denied having seen the defendant fire any shots. During cross-examination, Grzeca agreed that he told Labon that he was the defendant's attorney and that he normally keeps his clients apprised of the results of his interviews and investigations. He also answered affirmatively when the prosecutor proposed that he had asked Labon "[a]s an inmate in Cook County Jail, *** if he was going to be identifying" the defendant, but Grzeca explained that he was investigating the facts of the case, not attempting to determine who would appear as witnesses in the State's case.

¶ 11 Utica Collins, who owned a green two-door car at the time of the shooting, testified that she drove her car that morning to a car repair shop at approximately 10:00 a.m., a time that previous testimony established was approximately two hours after the shooting. She said that nobody had borrowed or driven her car earlier that morning. On cross-examination, she agreed that she was

acquainted with the defendant but denied that the defendant had ever been in her car. She was then impeached with her testimony from the first trial indicating that the defendant had previously ridden in her car. Collins's sister confirmed this account during her own testimony, and added that she was awake at 8:00 a.m. on the morning of the shooting and saw the green car parked in the driveway and blocked in by another parked car. The sister added that she and Collins departed at the same time that morning, the sister for a job that began at 9:00 a.m. and Collins to take her car in for repairs. The defendant also presented a stipulation that, if called to testify, a car repair shop manager would state that Collins dropped off her car at approximately 10:30 to 11:00 a.m. on the morning of the shooting and picked it up four days later.

¶ 12 The defendant's sister, Stormy Westfield, testified that she was with him on the morning of the shooting, including at the time of the shooting, and that they were sitting in her cousin's house, eating, or shopping for items for an upcoming move to a new apartment in the cousin's building. The defendant also called Westfield's cousin's landlord, who confirmed that the people connected to the defendant and Westfield were considering moving into another of his apartments at the time of the shooting (and in fact did later move into the new apartment).

¶ 13 In rebuttal, the State presented testimony from a police detective who questioned Westfield after the shooting and who recalled that she was not then as forthcoming about the timing of the morning's events as she was during her testimony.

¶ 14 During closing arguments, the State discounted Labon's interview with Grzeca as follows:

> "Let's just look at it with common sense. [Labon] is in Cook County Jail. He is being asked by the defendant's attorney are you going to identify my client. He is essentially asking him are you going to be a witness.
>
> Charles Labon is in Cook County Jail. What do you think of witnesses in Cook County Jail? When Charles Labon says I am not going to identify [the defendant], I didn't see him, that's not a lie. It is self-preservation. It is self-preservation.
>
> Yeah, I am going to be a witness, I am going to come in, I am going to identify your

client. Now I am going to go back to my cell. It is self-preservation."

¶ 15 In response, defense counsel asserted as follows in closing argument:

"Just this one note. Being interviewed in the Cook County Jail, that's the State's reason, for his own safety, that [Labon] wouldn't identify [the defendant] as the shooter?

Juarez Merchant was in that Cook County Jail uniform. Charles Labon was in the Illinois Department of Corrections uniform. To say the reason is because a person is in jail they are scared and they don't want to identify the shooter makes absolutely no sense."

The State then offered its rebuttal:

"You know the difference, though? Juarez, he was never interviewed by [the defendant's] lawyer in the jail. He was never asked questions by an attorney representing [the defendant].

What was the important information from Mr. Grzeca? He was going to inform his client, [the defendant], of the progress of the investigation. He was going to tell him what the witnesses were saying.

You don't think Charles Labon was concerned about that information getting back to [the defendant]? You don't think he knew that the information that he provided to [the defendant's] lawyer was going to get back to [the defendant]?

Can anybody possibly blame Charles Labon for telling [the defendant's] lawyer that he wasn't going to identify him, that he didn't remember or whatever the nonsense was? Of course you can't blame him for that. His own safety, *** self preservation, was his main focus."

All of the above argument was presented without objection from either side.

¶ 16 After a deliberation that included a jury request for a copy of Merchant's grand jury testimony, to which the court responded by informing the jury that it already had the transcript, the jury returned a verdict finding the defendant guilty of one count of first-degree murder committed using a firearm, and two counts of attempted first degree murder. The circuit court thereafter

sentenced the defendant to 60 years' imprisonment for the murder to run consecutive with two concurrent 30-year terms of imprisonment for the attempted murder convictions. The circuit court granted the defendant credit against his sentence for the 1329 days he had been incarcerated prior to his sentence, but it did not award him a credit for the day he was sentenced. The defendant now timely appeals.

¶ 17 The defendant's first argument on appeal is that his convictions should be reversed and the cause remanded for retrial because his attorneys, who did not attempt to have a purportedly biased juror stricken from the venire, rendered ineffective assistance. We find however that the defendant has failed to show that, but for the alleged failure on the part of his attorneys, the result of his trial would have been different.

¶ 18 An accused is entitled to capable legal representation at trial. People v. Wiley, 165 Ill.2d 259, 284, 651 N.E. 2d 189 (1995). Under the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel will prevail only where he is able to show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. People v. Albanese, 104 Ill.2d 504, 525, 473 N.E. 2d 1246 (1984) (adopting Strickland).

¶ 19 Here, even if we were to accept the defendant's position that his attorneys were deficient for failing to strike the juror who raised a concern regarding a defendant's failure to testify, we agree with the State that the defendant has not demonstrated a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. The defendant begins his argument on this second prong of the Strickland test by asserting that we should assume from the nature of the error at issue that he was prejudiced. However, as the defendant acknowledges in his brief, the supreme court has rejected the notion that prejudice should be presumed where counsel fails to prevent a purportedly biased juror from sitting on a jury. See People v. Metcalfe, 202 Ill. 2d 544, 560, 782 N.E. 2d 263 (2002) ("We find no merit to defendant's claim that prejudice must be

presumed in this case."). The supreme court recently reiterated its stance on this issue. See People v. Manning, 241 Ill. 2d 319, 329-33, 948 N.E. 2d 542 (2011) (refusing to overrule Metcalfe). Accordingly, in order to satisfy the second prong of the Strickland test, a defendant arguing that counsel was ineffective for failing to have a juror stricken must show a reasonable probability that the outcome of his trial would have been different if the challenged juror had not been selected for service. Metcalfe, 202 Ill. 2d at 562-63.

¶ 20 Here, there is no direct evidence that the challenged juror's alleged bias actually infected the deliberations of the defendant's jury. The defendant nonetheless argues that he was prejudiced because the evidence here was so closely balanced that it becomes reasonably probable that a different jury would have acquitted him. See Metcalfe, 202 Ill. 2d at 562-63 (considering prejudice prong of the Strickland test by examining the closeness of the evidence); People v. Bowman, 325 Ill. App. 3d 411, 428-29, 758 N.E. 2d 408 (2001) (rejecting an ineffective-assistance-of-counsel claim regarding a purportedly biased juror by noting that "[t]he evidence against defendant was strong"). We disagree.

¶ 21 In pressing his assessment of the evidence marshaled against him, the defendant stresses the lapse of time (6 months) between his purchase of the gun and the shooting, the fact that the gun was not discovered near him, the fact that Merchant and Labon were felons and that Labon had signed a statement recanting his identification of the defendant, and an "unusually strong" alibi defense. However, these points obscure the manifest strength of the State's case, which included not only Merchant's and Labon's highly inculpatory accounts, but also essentially unimpeached evidence tying the defendant's gun to the shootings, testimony from a neighbor confirming that a green car resembling Collins's was present at the shooting, and evidence that the defendant either admitted or nearly admitted his involvement to an acquaintance. In the eyes of a rational trier of fact, the strength of this evidence from the State would be more than sufficient to overcome the deficiencies the defendant identifies. Accordingly, we cannot adopt the defendant's position that the closeness of the evidence establishes a reasonable probability that a differently constituted jury would have

acquitted him. Instead, we conclude that, to the extent the defendant's counsels provided deficient assistance by failing to challenge the juror who questioned his right not to testify, the defendant has not established that he was prejudiced by the error. For that reason, we reject the defendant's argument that his conviction must be reversed because he received ineffective assistance of counsel.

¶ 22 The defendant's second argument on appeal is that the trial court erred in allowing the State to bolster Merchant's eyewitness identification of the defendant with Merchant's prior consistent statements to the grand jury. However, although the defendant stridently maintains that he objected to this evidence at the time it was introduced, he concedes that the objection was not raised in his motion for a new trial. It is well-established that, in order to preserve an issue for review following a jury trial, a defendant must raise the issue both contemporaneously at trial and in a post-trial motion. People v. Enoch, 122 Ill. 2d 176, 186, 522 N.E. 2d 1124 (1988). Thus, by failing to include this objection in his post-trial motion, the defendant has forfeited it. The defendant nonetheless urges that we consider his argument as plain error.

¶ 23 The plain-error rule derives from Illinois Supreme Court Rule 615(a) (eff. August 27, 1999), which provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" but carves an exception for "[p]lain errors or defects affecting substantial rights." This plain-error rule, our supreme court has explained, "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." People v. Herron, 215 Ill. 2d 167, 186-87, 830 N.E. 2d 467 (2005). For the reasons stated above, we conclude that the evidence here was not so closely balanced to qualify for plain-error review under the first prong of the plain-error test. As for the second prong of the plain-error test, as the State observes in its brief, our supreme court has held that the introduction of prior consistent statements to bolster witness testimony does not implicate a substantial right so as to trigger plain-error review. See People v. Keene, 169 Ill. 2d 1, 18-19, 660 N.E. 2d 901 (1995) ("Assuming that prior consistent statements were in fact used improperly to bolster [a witness's]

credibility *** the claim does not implicate a substantial right."). Because the defendant can satisfy neither prong of the plain-error test, we must honor the forfeiture of the alleged error he now presses, and reject his argument that the improper introduction of Merchant's prior consistent statements mandates reversal of his conviction.

¶ 24 The defendant's third argument on appeal is that his conviction should be reversed due to improper closing argument by the State. Again, the defendant failed to preserve this objection for review, this time both by failing to raise a contemporaneous objection and by failing to include the objection in a post-trial motion. The defendant asserts that we may review his contention as plain error because the evidence was closely balanced. However, we have already rejected the notion that the evidence here was closely balanced, and we do so again now. The defendant's objection has been forfeited.

¶ 25 The defendant's final argument on appeal is that he is entitled to one additional day of credit against his sentence to reflect his incarceration on the day he was sentenced. However, the State points out in its brief–and the defendant does not dispute in his reply–that the supreme court has recently held that a defendant is not entitled to sentencing credit for his incarceration on the day his sentence is announced. See People v. Williams, 239 Ill. 2d 503, 509, 942 N.E. 2d 1257 (2011). That holding forecloses the defendant's sentencing-credit argument.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.