2011 IL App (1st) 093410-U

No. 1-09-3410

FIFTH DIVISION
September 9, 2011

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. 07 CR 13575
	)	
OMAR MOORE,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.

Presiding Justice Epstein and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

HELD: The fact that several prior inconsistent statements were admitted by the State to rehabilitate two witnesses who recanted their identification of defendant as the offender did not violate the evidentiary bar against admitting prior consistent statements. The State's comments during rebuttal closing argument did not amount to prosecutorial misconduct sufficient to justify reversing defendant's convictions.

1. Following a jury trial, defendant Omar Moore was convicted of first degree murder and aggravated battery. He was sentenced to consecutive 31-year and 3-year prison terms respectively. On appeal, defendant contends the State's use of improper and unnecessarily repetitive hearsay evidence to rehabilitate two trial witnesses who recanted their pre-trial identification of defendant as the offender denied defendant a fair trial. Defendant also contends the State's prosecutorial misconduct during closing argument denied him a fair trial. For the reasons that follow, we affirm defendant's convictions and sentences.

2. BACKGROUND

3. The evidence adduced at trial established that Wilbur Martin and Henry Johnson were scavenging for scrap metal near the area of 54th and Shields in Chicago, Illinois when Martin was the victim of a beating that subsequently resulted in his death. Johnson, a convicted felon and admitted cocaine addict, testified he met Martin at an abandoned house, where Martin was already removing aluminum siding. Johnson said Martin was talking to defendant's father at the time. Johnson testified he knew defendant from the neighborhood for about four to five years and had never had any bad dealings with him before. According to Johnson, defendant lived two doors away from the abandoned building.

4. Johnson and Martin finished removing the siding and started to leave the area while pulling a cart loaded with the scrap metal. When Johnson and Martin reached the corner of 57th and Shields, a maroon car pulled up next to them. Defendant then got out of the driver's side of the car and started walking in their direction while saying "you think this is a joke or something." When Johnson turned around to see if defendant was speaking to him, defendant started swinging at him. Johnson said defendant missed with his first swing, but swung again and grazed his chin. Johnson fell backwards trying to duck a third swing by defendant, hit his head on the concrete and passed out. Johnson testified he woke up later that day in the hospital. Although Johnson admitted he was under the influence of cocaine at the time of the incident, he testified the drugs did not affect his ability to identify defendant as the offender.

5. Johnson testified that on January 24, 2007, he identified defendant in a photo array as the offender. He also identified defendant in a line-up conducted in May 2007. Johnson admitted on cross-examination that he had spoken to a defense investigator prior to trial, but denied telling the investigator that the police offered to pay him to incriminate defendant.

6. Robert Delaney testified at trial that he was with some friends near the scene of the incident when he saw two men

running towards him. Delaney said one of the men, who was later identified as Martin, was older but running fast. The second man was yelling at Delaney and his friends to stop Martin because the man had been robbed. Delaney tried but failed to trip Martin. However, Delaney's friend, Clifton Elliot was able to push Martin to the ground. While Martin was on the ground, Delaney saw the second man strike Martin four to six times on the head with a pipe. The man then dropped the pipe, returned to his car and left the area. Martin subsequently died in the hospital from head injuries he received in the beating.

7. Delaney admitted he had previously identified defendant in a line-up as the man he saw strike Martin with the pipe. However, he testified he only identified defendant as the offender because he had been coerced by the police. Delaney said he was scared because the police had threatened to charge him for the incident. Delaney testified he did not see the attacker and could not identify him. Delaney admitted he had made a pre-trial written statement to the police identifying defendant as the offender, but said the police had told him whom to incriminate.

8. Over defense counsel's objection, Delaney testified that later on the day of the incident "an unknown black male" drove up to him and told him to keep his mouth shut. No evidence was presented to link the threat to defendant. Delaney testified he

was not afraid of defendant.

9. Clifton Elliott, a convicted felon, testified he was in custody at the time of defendant's trial because he had missed a court date. Elliott testified he could not remember any incident where a man chased and beat another man with a pipe. Elliott said he did not tell the police anything when he was question because he "knew nothing."

10. Elliott identified People's Exhibit No. 17 as a pre-trial written statement he had signed. Elliott testified that the statement: "is what they [the police] told me. I never told them nothing." Elliott said he let the police "spook" him because he had pending federal charges, so he "signed whatever they gave [him], plain and simple." When the State read back excerpts of Elliott's written statement where he said he witnessed defendant beat the victim, Elliott maintained he had not made any statements to the police. Elliott claimed he was threatened by the police and denied use of the bathroom. Elliott said he signed the statement because he was told to do so by the felony prosecutor.

11. Elliott was also questioned regarding his grand jury testimony. When portions of his grand jury testimony identifying defendant as the offender were read to him, Elliott admitted making the statement to the grand jury but denied the statement's

truth. Elliott testified he made the untruthful statement during his grand jury testimony because he had been threatened by the police. Elliott recanted his grand jury testimony, saying: "I'm telling you all this statement right here I don't know nothing about this. All I know is about I got right here, I got in my car and left. That is what I know about." Elliott denied ever seeing defendant strike Martin with a pipe.

12. Elliott testified that when he met with a prosecutor prior to his grand jury testimony, he told the prosecutor that he did not know anything about the incident. According to Elliott, the prosecutor became "frustrated" and sent in a "lady detective" who told Elliott to testify against defendant because: "[w]e need to get this monster off the street. You're going to go in here and do it. You're going to do it." Elliott said the detective did not make an explicit threat, but "it looked like [a threat] if you ask me." Elliott testified the detective "went through" his entire grand jury testimony in the grand jury prosecutor's office.

13. In order to rebut Delaney's and Elliott's recantations at trial, the State presented testimony from several prosecutors and detectives who had been involved in the case. Assistant States Attorney Lauren Brown testified she was the felony review prosecutor assigned to defendant's case. ASA Brown said that

when she interviewed Delaney at the police station, he told her that on the day of the incident he saw defendant beat Martin with a pole. When she later spoke to Delaney without the investigating detectives being present, Delaney said in response to her question that he had not been threatened by the detectives and that "he was giving [his] statement freely and voluntarily." Delaney did not complain to her regarding any mistreatment by the police. ASA Brown testified Delaney agreed to memorialize his statement by having her write it for him. After Delaney dictated the statement to her, ASA Brown had Delaney review the statement and sign it.

14. ASA Brown testified Delaney told her he did not know the defendant prior to the incident, but that he identified defendant from a photo array as the man who struck Martin "four to six times in the head with the pole." ASA Brown said Delaney's statement also indicated Delaney had "recognized [Moore] as the person with the pipe who beat [Martin]."

15. ASA Keane testified she was a felony review prosecutor assigned to defendant's case, which included interviewing Elliott regarding the incident on February 27, 2007. With Detective Wright in the room, ASA Keane asked Elliott about the beating. Elliott told ASA Keane he saw defendant beat Martin with a pole. ASA Keane testified that Elliott identified defendant from a

photo array as "the person who had beaten [the victim] to death." ASA Keane said Elliott agreed to memorialize his statement by dictating it to her. After the statement was memorialized, ASA Keane asked Detective Wright to leave the room. When ASA Keane then asked Elliott how he had been treated by the police, Elliott told her "he had been treated fine."

16. The State was allowed to publish parts of Elliott's statement to the jury, which included his assertion that the statement was freely and voluntarily given, that he had identified defendant as the assailant in a photo array, and that he knew defendant for about "fifteen years" from the neighborhood. Elliott's written statement also noted that "young guys kicked and stomped [Martin] on the ground," that defendant's strikes with the pipe landed on Martin's "upper back or his head," and that defendant "really was swinging the pipe hard" at Martin.

17. ASA John Carroll, the prosecutor assigned to present defendant's case to the grand jury, testified he met with Elliott to go over his statement prior to his testimony on June 14, 2007. The State was allowed to publish parts of Elliott's grand jury testimony, which was substantially similar to the facts outlined in his written statement.

18. Detectives Tim Cerven and Paulette Wright testified they

were assigned to investigate Martin's death. The detectives testified that when Elliott was brought to the police station on February 27, 2007, he identified defendant's picture in a photo array as the person who struck Martin on January 14, 2007. They testified, however, that Delaney did not identify defendant as the offender in an initial photo array even though defendant's picture was present. Detective Wright testified no threats were ever made to Delaney to induce him to talk. Detective Cerven testified Johnson identified defendant from a photo array given at Johnson's home on January 24, 2007.

19. Detectives Carlton Flagg and Allen Nathaniel testified that Delaney identified defendant as the offender in a line-up conducted at the police station on May 29, 2007. Both detectives testified that they did not tell Delaney whom to identify, and that defendant was not shown a photo of defendant before the line-up.

20. Jerry Wilson, a private defense investigator, testified he interviewed Johnson on April 3, 2009. According to Wilson, Johnson told him that defendant was not Martin's assailant and that the detectives offered Johnson money to identify defendant as the assailant. Johnson also told Wilson that a woman detective had shown him a photo array, but Johnson did not identify defendant as the detective wanted. Johnson also told

Wilson he refused to identify defendant in a line-up, even though the female detective threatened to charge him in the incident if he failed to do so.

21. Betty Robinson testified for the defense that she heard screaming at the time of the incident and went outside to see what was going on. Robinson said that from a distance of around 15 to 20 feet, she saw a "street fight" with around four people swinging a pipe at a man on the ground. Robinson testified she got "a good look" at the pipe-wielding assailant, but could not identify defendant in either a photo array or in a line-up. Robinson denied telling police that defendant was "the closest one who resembled the guy with the pipe out" of those in the photo array. Although she said she might have seen defendant around the neighborhood before, she could not specifically remember ever seeing him.

22. The jury found defendant guilty of first degree murder and aggravated battery. The trial court sentenced defendant to a 31-year prison term for first degree murder and a consecutive 3-year prison term for aggravated battery. Defendant appeals.

23. ANALYSIS

24. Defendant contends he was denied a fair trial by the State's improper use of unnecessarily-repetitive and cumulative

hearsay evidence in order to rehabilitate two of its witnesses--Delaney and Elliott-- who recanted their pre-trial identification of defendant as the offender.

25. Defendant concedes the evidence was admissible under a well-established exception to the hearsay rule; namely, the exception for prior inconsistent statements as described in section 1158-10.1 of the Illinois Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2008)). However, defendant claims the sheer volume of testimony and evidence presented at defendant's trial regarding the prior inconsistent statements amounted to a violation of the long-standing evidentiary rule against repetition of prior consistent statements. Defendant suggests the admission of overly-repetitive and cumulative evidence regarding these alleged "consistent statements" unfairly bolstered the statements' content, in effect prejudicing defendant.

26. Initially, the State contends defendant failed to preserve this issue by failing to object to the evidence at trial and by failing to raise the issue in his post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Although defendant acknowledges the issue was not properly preserved for review, he contends we may review the issue as plain error. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005) ("the plain error doctrine

allows a 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.") Forfeiture aside, we find defendant's contention is without merit.

27. Section 115-10.1 of the Code provides, in relevant part, that:

> "In all criminal cases, evidence of a [prior inconsistent] statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at *** trial, and
>
> (b) the witness is subject to cross-examination concerning the statement; and
>
> (c) the statement --
>
> (1) was made under oath at a[n] *** other proceeding, or
>
> (2) narrates, describes or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness[.]" 725 ILCS 5/115-10.1 (West 2008).

28. The admission of evidence is within the trial court's sound discretion, and this court will review such decisions only for an abuse of that discretion. *People v. Johnson*, 385 Ill. App. 3d 585, 607 (2008).

29. It is well-settled that the consistency of a statement is measured against a witness' trial testimony--inconsistent statements are inconsistent with trial testimony, while consistent statements are consistent with it. *Johsnon*, 385 Ill. App. 3d at 608, citing *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000).

30. In *Johnson*, the defendant contended cumulative and repetitive evidence regarding a witness' prior inconsistent statements violated the evidentiary rule against repetition of a prior consistent statement. Specifically, defendant contended the trial court erred by (1) admitting both the witness' grand jury testimony and his prior written statement; (2) permitting several witnesses to testify about the statements; and (3) admitting the entirety of the statements, although some parts were consistent with the witness' trial testimony. In rejecting the defendant's contentions, the court noted defendant was "confusing apples with oranges, or more specifically, *inconsistent* statements with *consistent* ones." (Emphasis in original). *Johnson*, 385 Ill. App. 3d at 608.

31. Although the court recognized there is a long-established evidentiary rule against admitting a prior consistent statement, the court noted the statements at issue constituted prior inconsistent statements because they were ultimately inconsistent with the witness' trial testimony. *Johnson*, 385 Ill. App. 3d at 608. Since the rule against admission of consistent statements exists because they needlessly bolster the witness' trial testimony, and inconsistent statements cannot bolster a witness' trial testimony, the court held the "application of the rule makes no sense here." *Johnson*, 385 Ill. App. 3d at 608. See also *People v. Maldonado*, 398 Ill. App. 3d 401, 423 (2010) ("the introduction of more than one statement that is inconsistent with a witness's trial testimony, whether or not such statements are consistent with each other, is proper."); *People v. Harvey*, 366 Ill. App. 3d 910, 913-15 (2006) (evidence was not cumulative when trial court admitted as prior inconsistent statements both the grand jury testimony and the prior written statement for each witness.)

32. Here, similar to *Maldonado*, *Johnson* and *Harvey*, we find defendant is attempting to improperly conflate the concept of prior consistent statements with the concept of prior inconsistent statements. As this court has consistently recognized, "the introduction of more than one statement that is

inconsistent with a witness's trial testimony, whether or not such statements are consistent with each other, is proper." See *Maldonado*, 398 Ill. App. 3d at 423. The evidence and testimony defendant challenges here clearly constituted prior inconsistent statements properly admitted under section 115-10.1 of the Code. The fact that multiple witnesses testified to multiple prior inconsistent statements both Delaney and Elliott made before defendant's trial did not render that evidence inadmissible under the evidentiary bar against prior consistent statements. See *Johnson*, 385 Ill. App. 3d at 608. Because we see no reason to depart from this court's prior holdings on this issue, we find defendant's contentions here are without merit.

33. II. Prosecutorial Misconduct

34. Defendant contends the State engaged in prosecutorial misconduct by offering improper other crimes evidence regarding an unknown third party's alleged intimidation of a witness prior to defendant's trial, without attempting to link the evidence to defendant. Defendant also contends the State engaged in prosecutorial misconduct by arguing during closing argument that Delaney and Elliott recanted their earlier identification of defendant because they were "scared" of him, without adducing any proof of witness intimidation by defendant.

35. A. Other Crimes Evidence

36. As previously noted, the admission of evidence is within the trial court's sound discretion, and this court will review such decisions only for an abuse of that discretion. *Johnson*, 385 Ill. App. 3d at 607.

37. Generally, evidence of other crimes is only admissible if it is relevant for any purpose other than to show a propensity to commit crime. *People v. Bedoya*, 325 Ill. App. 3d 926, 937 (2001). "Evidence of other crimes cannot be admitted, however, unless it is first shown that a crime actually took place and that the accused committed it or participated in its commission." *People v. Wachal*, 156 Ill. App. 3d 331, 335 (1987), citing *People v. Miller*, 55 Ill. App. 3d 421 (1977).

38. During Delaney's trial testimony, the State began to question him regarding whether a car had pulled up to him on the day he identified defendant at the police station. Defense counsel objected, arguing the evidence about to be adduced amounted to other crimes evidence defendant had not been previously informed of in discovery. During a sidebar, the State explained to the court that it was only using the evidence to show Delaney's state of mind and bias, not to show proof of defendant's evolvement in other crimes. The State noted it was not attempting to show that defendant was the person who pulled up in the car or initiated the threat. The trial court denied

defense counsel's objection and motion for a mistrial, finding:

> "Here's why. You have a witness who apparently admitted, he's going to say he didn't ID. He did ID because he was threatened by the police. So, the State, with limits, can ask questions about his fear of the defendant."

39. When the prosecutor asked Delaney if anything had happened prior to trial that made him hesitant to identify defendant as the offender, Delaney said no. Delaney admitted, however, that he had told Detective Cerven he was approached by an unknown black male on the day of the beating, who had told him to keep his mouth shut. The court then admonished the jury that:

> "Ladies and gentleman, this is a statement, a question and answer I told you has nothing to do with the issues that you have to decide as to the charges. It only has to do with a limited purpose. If you believe it occurred what effect it has on the credibility of this witness. For that limited purpose."

40. Initially, we note the State contends defendant forfeited this issue by failing to properly raise it in his motion for a new trial. Any potential forfeiture aside, we find defendant's

contention is without merit.

41. It is well-established that a witness may be impeached by showing interest, bias, or an inclination to testify falsely. *People v. Barajas*, 322 Ill. App. 3d 541, 556 (2001); *People v. Williams*, 262 Ill. App. 3d 734, 743 (1994). "Evidence of witnesses' fears are also relevant and admissible where it tends to prove a material fact in issue and its probative value outweighs its prejudicial effect." *Williams*, 262 Ill. App. 3d at 743, citing *People v. Eyler*, 133 Ill. 2d 173 (1989).

42. Although defendant contends the State's questioning of Delaney amounted to presenting other crimes against defendant without adequately establishing defendant participated in the alleged crime, we find the testimony adduced did not amount to other crimes evidence. Instead, the record reflects the State properly adduced the testimony to explain a potential reason why Delaney made inconsistent statements regarding defendant's involvement in the victim's death. The trial court's instruction to the jury also made it clear that Delaney's testimony regarding the threat was to be considered for the limited purpose of what effect it had on his credibility as a witness.

43. Accordingly, we find the State properly admitted the evidence to explain why Delaney may have told different versions of the crime at different times, not to show that defendant had

committed other crimes. See *Williams*, 262 Ill. App. 3d at 742-43.

B. Closing Argument

45. Defendant also contends his constitutional rights were violated when, during closing arguments, the prosecutor repeatedly referred to Delaney's and Elliott's "fear" of defendant as the reason they recanted their pre-trial identifications of defendant as the offender at defendant's trial. Specifically, defendant contends the State's rebuttal closing argument improperly suggested that defendant was involved in the alleged threat against Delaney, even though no evidence was presented during the trial to support such an inference.

46. Generally, a prosecutor is permitted wide latitude during closing argument. *People v. Burns*, 171 Ill. App. 3d 178, 187 (1988). Moreover, improper prosecutorial remarks during closing argument do not warrant reversal unless the complained-of remarks resulted in substantial prejudice to the defendant, meaning absent those remarks the verdict would have been different. *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987).

47. During rebuttal closing argument, the prosecutor noted to the jury that Delaney had been "threatened by an unknown male black" who told him "you better keep you mouth shut." The prosecutor then argued:

> "That's why [Delaney] didn't identify anyone when he got to the police station. He was threatened from day one. But most people when they watch a brutal beating like they did, they do the right thing when they talk to authorities. And they do the right thing when they go in the secret proceeding which a grand jury is. When there are 16 jurors. They are under oath. And it's their stage. They don't do the right [thing] all the time two years later when they have to face the attacker."

48. The trial court overruled defendant's objection to the prosecutor's argument.

49. We find it is clear from the record that the prosecutor's remarks were intended to explain why Delaney gave a different account to police regarding defendant's role in the beating death of the victim than he gave at defendant's trial. The prosecutor's argument cited above does little more than argue the evidence presented at trial and the reasonable inferences that may be drawn from that evidence. Nothing in the prosecutor's argument suggested defendant initiated or even knew of the threat made against Delaney by an "unknown male black" on the day of the

incident. Accordingly, we find the prosecutor's remarks during closing argument were not improper. See *Williams*, 262 Ill. App. 3d at 744.

50. To the extent defendant also challenges the prosecutor's remarks that the two witnesses recanted their pre-trial identification of defendant at trial because "they were scared of the defendant" and "did not want to face him," we note the trial court immediately sustained defense counsel's objections to the remarks and instructed the State to move on. We find the brief and issolated remarks, which might be viewed as improper in certain circumstances, were cured by the trial court's prior admonishment to the jury that closing arguments are not evidence and should not be considered as such, and by the trial court's decision to sustain defense counsel's objections and instruct the prosecutor to move on. See *People v. Simms*, 192 Ill. 2d 348, 398 (2000).

51. CONCLUSION

52. We affirm defendant's convictions and sentences.

53. Affirmed.