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2011 IL App (3d) 090962-U

Order filed December 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellee,)	Kankakee County, Illinois
)	
v.)	Appeal No. 3-09-0962
)	Circuit No. 08-CM-1439
)	
JIMMIE MURRAY,)	Honorable
)	Kenneth Leshen,
Defendant-Appellant.)	Judge, Presiding

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice Wright specially concurred.

ORDER

¶ 1 *Held:* The defendant's trial counsel was not ineffective for failing to object when a police officer testified that the victim had identified the defendant as the person who beat her where the officer's testimony regarding the victim's identification statement would have been admissible under 735 ILCS 5/115-12 and the victim testified and was available for cross-examination.

¶ 2 The defendant, Jimmie Murray, was charged with domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2008)). Following a bench trial, the circuit court found the defendant guilty and sentenced him to 300 days' imprisonment. The defendant filed a motion to reconsider his

sentence, which the circuit court denied. The defendant appealed, arguing that he received ineffective assistance of counsel because his trial counsel failed to object to the admission of certain hearsay testimony which was the only substantive evidence implicating the defendant in the crime.

¶ 3

FACTS

¶ 4 The information filed by the State charged that, on October 13, 2008, the defendant knowingly caused bodily harm to Lucretia Branch, who was a family or household member, by hitting her in the head with a brick and a bottle. The defendant waived his right to a jury trial.

¶ 5 During the defendant's bench trial, the State called Lucretia Branch. Branch testified that she and the defendant had been dating "on and off" for 16 years and that they had two children together. On October 13, 2008, Branch lived at "270 North Chicago" with her children. She could not recall whether she had seen the defendant that day. She denied that the police came to her house during the month of October 2008. She also denied telling the police that the defendant had hit her in the head with a brick or a beer bottle. She also denied signing a complaint to that effect. When the State's Attorney asked Branch to review a document which bore her address and a signature, Branch testified that she did not recognize the document and that she did not know whose signature was on the document. When the State's Attorney asked Branch whether she was "ever laying in the street when the police came to [her] house in October 2008 with an injury to [her] head," Branch answered "no." At that point, the State's Attorney stated that she had no further questions for Branch. The defendant's attorney did not cross-examine Branch.

¶ 6 The State called Kankakee Police Officer Michael Herscher as its only other witness. Officer Herscher testified that, on October 13, 2008, he was dispatched to 270 North Chicago in Kankakee to respond to a battery in progress at that location. When he arrived, he saw Lucretia Branch lying in the street bleeding from her head. The State's Attorney asked Officer Herscher whether he had spoken with Branch "that day" and, if so, what Branch had said to him. Officer Herscher testified that Branch told him that "Jimmie Murray struck her in the head with a brick and a beer bottle and threw a lawn chair at her." The defendant's counsel did not object to the State's question or to Officer Herscher's response.

¶ 7 At the State's Attorney's request, Officer Herscher examined People's Exhibit No. 1, which was a photograph of the back of Branch's head taken at the hospital on the night of the alleged battery. Officer Herscher testified that the photograph fairly and accurately depicted how Branch looked that night. The photograph was then admitted into evidence, over the defendant's objection. The State then moved to admit People's Exhibit No. 2, a complaint for domestic battery allegedly signed by Branch, as a prior inconsistent statement. However, the circuit court refused to admit the exhibit when it became apparent that Branch had signed a blank complaint form at the hospital and Officer Herscher had subsequently filled in the information contained in the complaint.

¶ 8 On cross-examination, Officer Herscher testified that he spoke with Branch for approximately 10 minutes before an ambulance arrived and took her to the hospital. The defendant was not there when Officer Herscher arrived at the scene of the accident, and Herscher did not find a beer bottle at the scene. On redirect examination, Officer Herscher testified that Branch appeared to be in pain when he spoke with her on the night of the incident.

¶ 9 After Officer Herscher concluded his testimony, the State rested. The defense rested without putting on any evidence.

¶ 10 After hearing argument from the parties, the circuit court found the defendant guilty. The court based its finding on the out-of-court statement that Branch made to Officer Herscher. The court noted that it could consider the statement as substantive evidence because the defendant did not object to the statement. The court also noted that Branch's statement implicating the defendant was made "at or near the time of the event" while Branch was "lying in the street bleeding," and that the statement was "corroborated by the gash and bruising of [Branch's] scalp."

¶ 11 Although the circuit court suggested in passing that Branch's statement was "an excited utterance, as best I can tell," the court made it clear that it did not rule on that issue because the defendant had not objected to the admission of the statement. When the defendant's counsel attempted to make an oral motion regarding the circuit court's "ruling" "on the excited utterance part," the court told the defendant's counsel that there was "no reason" to make such a motion because "[t]here was no objection." The following colloquy between the court and defense counsel then ensued:

[Defense counsel]: Well, what I'm saying is that it doesn't qualify as an excited utterance.

[The Court]: I'm not saying whether it does or does not. There was no objection made.

[Defense Counsel]: It's simply not an excited utterance.

[The Court]: I'm not reaching that as a – I want to be clear. I'm not reaching that.

¶ 12

ANALYSIS

¶ 13 The defendant argues that his trial counsel was ineffective because he failed to object to the admission of Branch's out-of-court statement to Officer Herscher on hearsay grounds. In order to establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). However, a court may proceed directly to the second prong of the *Strickland* test and need not examine counsel's effectiveness in the absence of prejudice. *People v. Rodriguez*, 313 Ill. App. 3d 877, 887 (2009). To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Albanese*, 104 Ill. 2d at 525.

¶ 14 In this case, the defendant cannot demonstrate that he was prejudiced from his trial counsel's failure to object to the admission of Branch's alleged hearsay statement. Officer Herscher's testimony that Branch identified the defendant as the person who battered her was clearly a damaging piece of evidence since it was the only substantive evidence that implicated the defendant. However, the defendant must establish not merely that the admission of this hearsay statement prejudiced him; he must also demonstrate a reasonable probability that, but for his attorney's alleged error, the statement would not have been admitted. See *Rodriguez*, 313 Ill. App. 3d at 888.

¶ 15 The defendant cannot make this showing. Section 5/115-12 of the Code of Criminal Procedure of 1963 (Code) provides that "[a] statement is not rendered inadmissible by the

hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115-12 (West 2008). Our supreme court has clarified that, under this statute, "a witness' prior statement of identification is admissible as substantive evidence *** when testified to by the witness or by a third person, such as a police officer, who was present when the witness made the identification." *People v. Hayes*, 139 Ill. 2d 89, 140, 151 (1990), *abrogated on other grounds by People v. Tisdell*, 201 Ill. 2d 210, 219-21 (2002).¹ The statute "does not require a declarant to testify to the out-of-court identification before a third party may offer testimony on that matter." *People v. Lewis*, 223 Ill. 2d 393, 403 (2006). Moreover, "the declarant's prior statement of identification is admissible as substantive evidence when testified to by a witness to the identification, such as a police officer, *even when the declarant at trial denies making or repudiates the identification and denies that the defendant was involved in the crime.*" (Emphasis added.) *Miller*, 363 Ill. App. 3d at 73 n.1

¹ See also, *e.g.*, *People v. Newbill*, 374 Ill. App. 3d 847, 850-53 (2007) (affirming admission of police officer's testimony regarding statements that the victim made on the night she was robbed, including her description of the robber, where the victim testified at trial and was subject to cross-examination); *People v. Colts*, 269 Ill. App. 3d 679, 688 (1993) (holding that police officer's testimony that the victim identified the defendant as the person who shot him while the victim was in the hospital shortly after the shooting was admissible under section 5/115-12 where the victim testified at trial and was subject to cross-examination); see also *People v. Miller*, 363 Ill. App. 3d 67, 69-70, 73-74 (2005); *People v. Tayborn*, 254 Ill. App. 3d 381, 390 (1993).

(quoting M. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 611.16, at 467 (8th ed. 2004)); see also *People v. Williams*, 193 Ill. 2d 306, 358-60 (2000) (ruling that the trial court erred by refusing to admit as substantive evidence a police officer's testimony that a testifying witness had previously identified someone other than the defendant as the perpetrator of the crime, even though the witness denied making the identification during her trial testimony).

¶ 16 Here, Branch, the declarant of the identification statement at issue, testified at trial and was "subject to cross-examination concerning the statement."² Accordingly, her statement to Officer Herscher identifying the defendant as the person who battered her was admissible under section 5/115-12, and the defense counsel's failure to object to the admission of this statement on hearsay grounds did not prejudice the defendant. See *Rodriguez*, 313 Ill. App. 3d at 887-88 (the defendant failed to establish prejudice under *Strickland* based upon his counsel's failure to object to the admission of certain damaging evidence where the evidence would have been

² The fact that the defendant's counsel chose not to cross-examine Branch about the alleged identification statement does not alter the fact that she was "subject to cross-examination concerning the statement," as required by section 5/115-12. *Lewis*, 223 Ill. 2d at 404-05. A witness is "subject to cross-examination" under the statute when she is "placed on the witness stand, under oath, and responds willingly to questions," regardless of whether she is actually cross-examined by defense counsel. *Lewis*, 223 Ill. 2d at 404. Nor does it matter that Branch denied making the statement during her trial testimony. See *Miller*, 363 Ill. App. 3d at 75 ("Even if the witness denies making the out-of-court statement of identification, so long as the witness is available at trial, under oath, and willing to testify, the witness is deemed "subject to cross-examination."").

admitted even if his counsel had objected); *cf. Colts*, 269 Ill. App. 3d at 688 (holding that police officer's testimony that victim had identified the defendant as the shooter was admissible under section 5/115-12 and that "[d]efense counsel's failure to object to [this] admissible testimony did not bring his representation below an objective standard of reasonableness").

¶ 17 The defendant argues that Branch's out-of-court statement identifying him as her attacker "was introduced in violation of [his] right to confrontation, since he had no opportunity to challenge the reliability and credibility" of the statement. Thus, the defendant maintains that, "[h]ad trial counsel posed an objection to Officer Herscher's identification testimony based on the rule articulated in *Crawford v. Washington*, 541 U.S. 36 (2004)," "the trial court would have been obliged to sustain the objection and bar the officer from relating what *** Branch told him."

¶ 18 We disagree. In *Crawford*, the United States Supreme Court ruled that the confrontation clause of the sixth amendment permits the admission of out-of-court, "testimonial" statements—such as statements made to a police officer in the course of an interrogation—to prove the truth of the matter asserted only if the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68. However, "when the declarant appears for cross-examination at trial, the [c]onfrontation [c]lause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n. 9; see also *People v. Sutton*, 233 Ill. 2d 89, 120-22 (2009); *People v. Monroe*, 366 Ill. App. 3d 1080, 1087 (2006); *Miller*, 363 Ill. App. 3d at 74. A witness is "subject to cross-examination" when he is "placed on the stand, under oath, and willingly responds to questions." *United States v. Owens*,

484 U.S. 554, 561 (1988); *Monroe*, 366 Ill. App. 3d at 1087 (2006); *Miller*, 363 Ill. App. 3d at 74.

¶ 19 This case is clearly distinguishable from *Crawford* and the other cases cited by the defendant.³ In each of those cases, the declarant did not testify during the defendant's trial. Here, by contrast, Branch testified and was available for cross-examination. Accordingly, *Crawford* and its progeny do not apply, and the confrontation clause does not place any limits on the admissibility of Branch's identification statement.

¶ 20 The parties have devoted a substantial portion of their briefs to arguing over whether Branch's hearsay statement to Officer Herscher would have been admissible as an excited utterance. Because we hold that the statement would have been admissible under section 5/115-12, we do not need to reach this issue. However, we note that Officer Herscher's testimony did not specify how much time passed between the battery and Branch's statement. It is not entirely clear whether Branch made the statement while she and Officer Herscher were waiting for the ambulance to arrive or later, when Officer Herscher spoke with her again at the hospital. However, even if Branch made the statement while waiting for the ambulance, it is not clear precisely how much time transpired between the battery and the statement. Moreover, although Officer Herscher testified that Branch appeared to be in pain when he spoke with her on the night of the incident, Officer Herscher's testimony did not clearly establish that Branch made the

³ The defendant also cites *Davis v. Washington*, 547 U.S. 813, 822 (2006), *People v. Purcell*, 364 Ill. App. 3d 283, 296 (2006), *People v. Flournoy*, 336 Ill. App. 3d 739, 746-48 (2002), and *People v. Armstead*, 322 Ill. App. 3d 1, 12-13 (2001) in support of its confrontation clause argument.

statement while she was under the influence of the battery, *i.e.*, while "the excitement of the event predominated." *Sutton*, 233 Ill. 2d at 107. Accordingly, although we do not rule on the issue, we note that it would likely be difficult to conclude that Branch's statement would be admissible as an excited utterance. See *Sutton*, 233 Ill. 2d at 107 (for a hearsay statement to be admissible under the excited utterance exception, there must be "an absence of time for the declarant to fabricate the statement," and "[t]he critical inquiry with regard to time is whether the statement was made while the excitement of the event predominated.") (citations and internal quotation marks omitted).⁴

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, we affirm the defendant's conviction.

⁴ The State argues that the trial court found that Branch's statement was an excited utterance and that we must review this "finding" under the abuse of discretion standard. We disagree. The trial transcript indicates that, immediately after the circuit court first speculated that Branch's statement might qualify as an excited utterance, the court stated that "I have to make the ruling on that; because no objection came in." The State argues that this statement shows that the court ruled that Branch's statement was an excited utterance. However, when the circuit court's statement is read in the context of its subsequent comments on this issue, it is clear that this statement is either a typographical error or a misstatement by the court. The subsequent colloquy between the court and defense counsel leaves no doubt that the court did *not* rule on whether Branch's statement was an excited utterance. The court explicitly concluded that it was not required to make such a ruling because defense counsel had not objected to the admission of the statement on hearsay grounds.

¶ 23 Affirmed.

¶ 24 JUSTICE WRIGHT, specially concurring:

¶ 25 I agree with the author's conclusion in this case that defendant's conviction should be affirmed. However, by doing so, I do not express any opinion regarding whether the declarant's identification of defendant qualified as an excited utterance. For this reason, I specially concur.