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2011 IL App (3d) 100042-U

Order filed December 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10 th Judicial Circuit
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0042
v.)	Circuit No. 08-CF-1050
)	
LEVERSUS MABRY,)	The Honorable
)	Michael E. Brandt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion when it denied the defendant's motion for a mistrial after a witness offered the unresponsive testimony that the victim had been shot a second time, as this statement could cause substantial prejudice to the defendant and the jury did not know that the defendant could not have participated in the second shooting. This error, combined with other deficiencies at trial, amounted to cumulative error such that the defendant was denied a fair trial.

¶ 2 A jury convicted the defendant, Leversus Mabry, of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and unlawful possession of a weapon by a felon (720

ILCS 5/24-1.1(a) (West 2008)), and the trial court subsequently sentenced him to a 48-year term of imprisonment. The defendant appeals, contending that: (1) the trial court abused its discretion when it, over defense counsel's objection, permitted a witness to testify that the victim did not come to a meeting with the witness and the defendant because the victim did not know if "something" would happen at the meeting; (2) the trial court abused its discretion when it denied the defendant's motion for a mistrial when a witness offered the unresponsive testimony that the victim had been shot a second time; and (3) trial counsel provided ineffective assistance by failing to move to sever the charges. Because we conclude that the trial court should have granted the defendant's motion for a mistrial, and because this error compounded other errors such that the defendant was deprived of a fair trial, we reverse the defendant's convictions and remand the cause for a new trial.

¶ 3

FACTS

¶ 4 The State charged the defendant with aggravated battery and unlawful possession of a weapon by a felon. These charges stemmed from the August 21, 2008, shooting of Jerome Ashford. The cause proceeded to jury trial on May 12, 2009. However, after the jury began deliberating, it informed the court that it could not reach a unanimous verdict. The court ascertained that the jury was "hopelessly deadlocked," and it declared a mistrial. Prior to the defendant's second trial, the defendant moved to present evidence that Ashford was a drug dealer and had been shot a second time by an unknown person while the defendant was in the county jail. On August 25, 2009, the trial court heard and denied this motion. The cause then proceeded to a second jury trial.

¶ 5 Tamera Ward testified that she was Ashford's girlfriend. According to her, after she awoke on the morning of August 21, 2008, she looked outside her window and saw two men beating out the windows of Ashford's car, so she called the police. As she was doing so, the two men ran towards the back of the home. Ward recognized one man because she had attended school with him. Ward stated that the other man was wearing a mask, but she could still see some of his facial features, and described him as "older" and "bald." Ashford, who was upstairs with Ward and who also saw these events transpire, went downstairs. Ward subsequently heard two shots.

¶ 6 Ashford testified that after he ran downstairs, he proceeded to the back door of the home because he saw one of the men run towards the back. Ashford then opened the kitchen door, and saw the two men outside. According to Ashford, the man wearing the mask grinned at Ashford for approximately 10 seconds and then shot two rounds at the door. One shot hit Ashford in the left bicep. Ashford identified the shooter as the defendant, whom he knew as "Main." Ashford explained that he knew the shooter was the defendant because the mask worn by the shooter only covered the shooter's eyes. Thus, Ashford could still see the shooter's cheekbones, chin, nose and mouth.

¶ 7 Ashford explained that the connection between the defendant and himself was that the defendant was dating Aneshia Smith, the mother of Ashford's daughter. According to Ashford, he had prior negative encounters with the defendant before the August 2008 shooting. Ashford specifically stated that he had seen the defendant at the gym sometime in June 2008. At that time, the defendant entered the premises with two other men. The group approached Ashford and asked him to come outside, which Ashford declined to do because he "was outnumbered and

[he] didn't want to go out there." According to Ashford, the defendant then informed Ashford that he was "'gonna stop looking at [the defendant] and saying stuff about [the defendant], because [Ashford] knew who [the defendant was] and what [the defendant did] on the streets.'" Ashford further testified that he had a telephone conversation with the defendant the night before the shooting. Ashford stated that at that time, he was at home with his mother and daughter, and he was speaking with Smith about their daughter's well-being. According to Ashford, "all of a sudden [the defendant] got on the phone" and stated that Ashford "[did not] need to be stirring up trouble" because of "who [the defendant] was and what [the defendant] did."

¶ 8 Peoria police officer Shannon Parnell testified that he was dispatched to the scene of the offense, and when he arrived, he saw a blood trail from the kitchen down into the hallway, and also saw Ashford with a towel wrapped around his left bicep. After Ashford removed the towel, Parnell viewed a bullet wound in Ashford's bicep. Parnell asked Ashford who had shot him, and Ashford responded that it was his "baby momma's boyfriend" who went by the name of "Main." Peoria police detective Steven Garner testified that he showed Ashford a photo array of six individuals while Ashford was in the hospital on the day of the incident. Ashford identified the defendant as the person who had shot him.

¶ 9 After the parties "stipulate[d] that the Defendant ha[d] previously been convicted of a forcible felony," in a 1996 case, the defendant presented the testimony of Smith. Smith stated that she had previously dated Ashford for 5 years, and they shared a daughter. According to Smith, she and Ashford had prior disputes over custody of their daughter, as well as child support and social security payments. Smith specifically stated that Ashford was angry because

of a court's custody decision in her favor, and also that their daughter had called the defendant "dad."

Smith testified that she met and began dating the defendant in April 2008, and that she moved in with him around that time. On the day of the incident, Smith stated that she awoke between 8 and 9 a.m., and discovered that she had missed a number of telephone calls. She subsequently answered a telephone call from her sister, and Smith's sister informed Smith that Ashford had been shot. According to Smith, at that time the defendant was asleep in the home, and Smith stated that she would have known had the defendant arisen earlier and left the house as she had been "asleep on him[.]"

¶ 10 Smith acknowledged that sometime after the shooting of Ashford, at the request of the defendant, she attempted to broker a meeting among herself, the defendant, and Ashford. She telephoned Ashford and asked if he would meet her and the defendant at Barnes and Noble, and Ashford agreed. Smith explained that she attempted to set up this meeting after October 2008, but before December 2008, as she recalled that it was after the first time that the defendant went to jail, but before the second time. Smith further explained that she wanted the parties to meet because she knew that the defendant did not shoot Ashford, and that the defendant could not speak to Ashford "without it being a big blowup or blown out of proportion." She also stated that the defendant believed that she "was the only one in the middle that could mediate the situation."

¶ 11 Ashford did not come to this meeting, so Smith telephoned him to ascertain the reason for his absence. As Smith began testifying to Ashford's response to her inquiry, defense counsel offered a hearsay objection to this testimony. The court responded, "[o]verruled. Cross-

examination[.]" to which defense counsel reiterated that the testimony still consisted of hearsay. The trial court then stated "[o]verruled for the limited purpose of impeachment." Smith then stated that Ashford had informed her that he did not attend the meeting "because he didn't know if something would happen there."

¶ 12 Smith also stated that in October 2008, she informed defense counsel that the defendant was at home with her at the time the shooting occurred, and that counsel stated that he would turn the statement over to the prosecutor. On cross-examination, however, Smith acknowledged that she did not inform police that the defendant could not have shot Ashford because he was at home at the time of the shooting until after they came to her place of employment in December 2008 to speak with her about the instant incident. She also acknowledged that at that time, she provided a written statement to the police. Smith affirmed that in that statement, she had written that Ashford told her that he did not come to the meeting because he "didn't feel safe meeting or talking to [the defendant.]"

¶ 13 Smith also denied that she had informed Ashford in late November 2008 that he could claim their daughter on his tax return and that he would receive money if he chose not to prosecute the instant incident. Smith believed that the defendant did not shoot Ashford. She acknowledged on cross-examination that she loved the defendant and did not want him to go to jail.

¶ 14 On re-direct examination, in response to defense counsel's questioning of when the police contacted her about the alibi statement she gave to defense counsel in October 2008, Smith stated that she did not "remember what the date was [that police contacted her], but [it was] after [Ashford] had been shot again[.]" The State objected. The court sustained the State's

objection, and stated that "all the testimony, other than the fact that the police did not contact [Smith] during that time [was] stricken from the record as irrelevant." The court excused the jury, and defendant moved for a mistrial. Defense counsel explained that his questioning did not invite Smith's statement that Ashford had been shot in another incident, and that the jury could infer that Ashford was shot by the defendant because they did not know that the defendant was in the county jail at the time of the second shooting. The State asserted that the court had sustained its objection, stricken the irrelevant testimony, and instructed the jury to disregard it; thus, no prejudice resulted to the defendant. The court denied the defendant's motion for a mistrial. The court stated that it was "unfortunate that [Smith] volunteered that information," and that it had sustained the objection, struck the testimony, and specifically instructed the jury to disregard it. The court also stated that the witness should have been specifically instructed not to mention the second shooting incident.

¶ 15 In rebuttal, Ashford testified that Smith had told him in late November 2008 that he could claim their daughter for tax purposes and receive money if he dropped the instant charges. Ashford stated that he immediately informed police of Smith's statement, and also did not show up to the meeting she proposed at Barnes and Noble at the beginning of December 2008. Garner also testified in rebuttal that Ashford informed him that Smith had contacted him.

¶ 16 After the parties rested and offered closing arguments, the jury began to deliberate at 11:41 a.m. At some point, the jury informed the bailiff that they were unable to reach a decision, so the court requested that the jury inform the court of this information in writing. The jury then provided a note by indicating the numerical division between the guilty and not guilty votes, which the record indicates was 9 guilty and 3 not guilty. At 2:08 p.m., after conferring with

counsel, the court instructed the jury pursuant to *People v. Prim*, 53 Ill. 2d 62 (1972). At 3 p.m., the jury returned guilty verdicts on both offenses.

¶ 17 The defendant filed a *pro se* motion for a new trial. In it, he alleged, among other things, that defense counsel provided ineffective assistance. The court subsequently permitted trial counsel to withdraw, and appointed new counsel to represent the defendant. Defendant's new counsel filed a motion for a new trial. At the hearing on this motion, defense counsel adopted the arguments proffered by the defendant in his *pro se* motion for a new trial. The trial court denied this motion.

¶ 18 The court conducted a sentencing hearing on January 14, 2010. At this hearing, defense counsel stated that at the request of the defendant, rather than argue for a specific sentence, defendant wanted him to indicate for the record that defendant was innocent of the crimes for which the jury had convicted him, and that he intended to pursue his right to appeal. The defendant himself also proclaimed his innocence, to "[j]ust have everything preserved for the record." The court entered a sentence only on the offense of aggravated battery with a firearm, and imposed an extended term of 48 years of imprisonment. The defendant appeals.

¶ 19 ANALYSIS

¶ 20 On appeal, the defendant contends that: (1) the trial court abused its discretion when it, over defense counsel's objection, permitted Smith to testify that Ashford did not come to a meeting with Smith and the defendant because Ashford did not know if "something" would happen at the meeting; (2) the trial court abused its discretion when it denied the defendant's motion for a mistrial when Smith offered the unresponsive testimony that Ashford had been shot a second time; and (3) trial counsel provided ineffective assistance by failing to move to sever

the charges. Because we conclude that the trial court should have granted the defendant's motion for a mistrial, and because this error was compounded by other errors such that the defendant was deprived of a fair trial, we reverse the defendant's conviction and remand the cause for a new trial.

¶ 21 Motion for a Mistrial

¶ 22 Taking the issues out of the order in which the defendant presented them, we first consider whether the trial court abused its discretion when it denied the defendant's motion for a mistrial following Smith's unresponsive testimony that Ashford had been shot a second time. The defendant specifically asserts that after Smith so testified, "there [was] a likelihood that the jury might have concluded that it was the defendant who shot Ashford the second time." The defendant contends that this error was especially harmful because the case was closely balanced and essentially came down to a credibility determination between Ashford and Smith. The State asserts that the trial court did not abuse its discretion because the defendant only speculates that the jury concluded that the defendant shot Ashford a second time, and that the Smith's unresponsive testimony did not influence the jury to such an extent that it became prejudiced against the defendant and could no longer be fair and impartial.

¶ 23 A trial court should grant a party's motion for a mistrial when an error occurs of such gravity that it results in a denial of fundamental fairness such that continuation of the trial would defeat the ends of justice. *People v. Nelson*, 235 Ill. 2d 286 (2009). In some instances, when a trial court sustains a party's objection to unresponsive testimony and instructs the jury to disregard it, it may prevent any error that flows from the unresponsive testimony. See *People v. Bishop*, 218 Ill. 2d 232, 251 (2006). However, in other cases, a curative instruction will not

remedy the impact of otherwise prejudicial testimony in the minds of the jury, as the prejudicial effect of improper testimony cannot merely be erased by an admonition from the court. See *People v. Gregory*, 22 Ill. 2d 601 (1961). The trial court's denial of a party's motion for a mistrial will not be disturbed by a reviewing court unless the record demonstrates that the trial court abused its discretion. *People v. Sims*, 167 Ill. 2d 483 (1995).

¶ 24 In this case, due to the irrelevant but highly prejudicial nature of Smith's unresponsive testimony and the closeness of the evidence, we conclude that the court abused its discretion when it denied the defendant's motion for a mistrial.

¶ 25 First, Smith's statement that Ashford had been shot a second time was wholly irrelevant to any issue at trial. We acknowledge that it is impossible to determine the exact effect that this irrelevant and unresponsive testimony had on the minds of the jury. However, the statement that Ashford had been shot a second time in the absence of any evidence that the defendant absolutely could not have been the perpetrator of the second shooting can quite reasonably be expected to invoke sympathy in the members of the jury for Ashford, while also arousing a certain degree of prejudice and animosity towards the defendant.

¶ 26 In reaching this conclusion, we note that the trial court did not permit the defendant to present evidence that he could not have been the person who shot Ashford the second time because he was in the county jail at the time of that occurrence. We also note that the defendant had a constitutional right to refrain from testifying at his own trial, and this court is conscious of the position in which it would put a criminal defendant were the defendant forced to choose between this constitutional right, and taking the stand to exculpate himself of a subsequent crime or bad act only because another witness offered unresponsive and irrelevant testimony and the

trial court denied his motion for a mistrial.

¶ 27 Next, we conclude that the evidence in this case was very closely balanced, as it essentially came down to a credibility determination between Ashford, with whom the defendant had shared an acrimonious history, and Smith, the defendant's girlfriend. Specifically, the defendant's first trial resulted in a mistrial, and the jury that ultimately convicted the defendant was initially deadlocked. Thus, we believe that the prejudicial nature of Smith's irrelevant statement was compounded by the closeness of the evidence in that we cannot with certainty conclude that the result of the trial was fair. Because of the closeness of the evidence, we choose to err on the side of caution and conclude that any prejudice that flow from Smith's unresponsive testimony is sufficient to warrant a new trial.

¶ 28 Overall, we believe that in a case where the evidence is as closely balanced as in the instant case, once the jury heard testimony that created prejudice against the defendant, the damage was done. As our supreme court has noted, "[j]urors are not robots but are humans with qualities common to all persons. *** [T]he [juror]'s emotions are not destroyed when he becomes a juror, and neither is the power of memory." *Gregory*, 22 Ill. 2d at 605. Accordingly, the court abused its discretion when it denied the defendant's motion for a mistrial.

¶ 29 Other Claims of Error

¶ 30 Although we need not reach the defendant's remaining contentions of error since our conclusion that the trial court abused its discretion when it denied the defendant's motion for a mistrial is sufficient to warrant a reversal of the defendant's convictions and a remand for a new trial, we consider both briefly.

¶ 31 The defendant contends that the trial court abused its discretion when it permitted Smith's

hearsay testimony that Ashford did not come to the meeting she arranged at Barnes and Noble "because [Ashford] didn't know if something would happen there." We agree.

¶ 32 Hearsay is an out of court statement offered to prove the truth of the matter asserted. *People v. Banks*, 237 Ill. 2d 154 (2010). In general, hearsay is inadmissible, unless it meets an exception to the general rules of exclusion, or if the statement is offered for a reason other than the truth of the matter asserted. *People v. Dunmore*, 389 Ill. App. 3d 1095 (2009). Smith's statement that Ashford did not attend the meeting at Barnes and Noble "because [Ashford] didn't know if something would happen there" was certainly hearsay, as the State proffered it for the truth of why Ashford did not meet Smith and the defendant at Barnes and Noble. Nonetheless, neither at trial, nor on appeal, has the State offered a legal basis for the admission of this statement, and the trial court's reasoning that the statement was admissible because it was elicited during cross-examination and for impeachment was incorrect. Thus, the court erred by admitting this statement.

¶ 33 The defendant's final claim is not of error by the trial court but of ineffective assistance provided by his counsel. He asserts that counsel failed to file a motion to sever the charges, and had counsel so moved and had the motion been granted, the jury would not have heard that the defendant had previously been convicted of a forcible felony. The defendant specifically asserts that the evidence was closely balanced, and that no reasonable trial strategy could underlie defense counsel's failure to file a motion to sever.

¶ 34 For a defendant to prevail on a claim of ineffective assistance of counsel, he must show that counsel's performance was deficient and that this deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, the stipulation that the defendant had

previously been convicted of a forcible felony was required because of the unlawful possession charge and was unfairly prejudicial to him relative to the aggravated battery charge. Because the evidence was so closely balanced, we again cannot conclude that there is no possibility that presenting this evidence to the jury could have negatively impacted its verdict. Also, we can think of no reasonable trial strategy that supports defense counsel's decision not to file a motion to sever. However, finding the prejudice required by *Strickland* is speculative because there is no certainty that the trial court would have granted the motion to sever. Accordingly, while we believe counsel's performance was deficient, we cannot find ineffective assistance as a matter of law.

¶ 35 This second error and counsel's flawed assistance, coupled with our conclusion that the trial court abused its discretion when it denied the defendant's motion for a mistrial, have resulted in cumulative error that denied the defendant a fair trial. See *People v. Speight*, 153 Ill. 2d 365 (1992). Consequently, the defendant's convictions must be vacated, and the cause remanded for a new trial.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we reverse the judgment of the circuit court of Peoria County, and remand the cause for further proceedings consistent with this order.

¶ 38 Reversed and remanded.