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No. 3-08-0651

Order filed April 13, 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
)	Tenth Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	No. 07-CF-559
)	
ANTHONY C. PELTS,)	The Honorable
)	Michael Brandt,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

Held: Where the trial court abused its discretion by refusing to permit defendant to impeach witnesses with their prior inconsistent statements, and the error was not harmless beyond a reasonable doubt because the trial turned on the testimony of the witnesses due to absence of physical evidence linking defendant to the crime, defendant's conviction was reversed and the cause remanded for a new trial.

The State charged defendant, Anthony C. Pelts, with two counts of first degree murder for the shooting death of Carlyts Bovan. Count I of the indictment alleged that defendant shot

Bovan with the intent to kill or to do great bodily harm. Count II of the indictment alleged that defendant shot Bovon with the knowledge that such act created a strong probability of great bodily harm or death to Bovon. The circuit court of Peoria County entered a judgment of conviction and sentenced defendant to fifty-five years' imprisonment. For the following reasons, we reverse.

BACKGROUND

Officer Shawn Curry of the Peoria Police Department testified that on April 27, 2007, he arrived at the scene of a shooting, to find the victim lying face down in the street, breathing, with a gunshot wound to the chest. Curry had seen the victim earlier that day in two other locations in the company of others whom he recognized. When Curry arrived, two women stood at the scene. Another officer arrived and prevented the women from leaving. The women were Tiffany Williams and Katy Sanders. Police interviewed Williams and Sanders at the police station on May 17 and 18 and videotaped the interviews. Neither was available to testify at defendant's trial. The State sought to admit Williams' and Sanders' videotaped statements as substantive evidence at defendant's trial. Defendant objected to the admission of their out-of-court statements as hearsay. The State responded the videotaped statements were admissible as substantive evidence because defendant forfeited his right to confront the witnesses by procuring their absence from trial.

At a pretrial hearing on the State's motion to admit the videotaped statements as substantive evidence, the State presented evidence that defendant procured Williams' and Sanders' absence from trial. The evidence was recorded telephone conversations between defendant, Williams, and Sanders while defendant was in jail. In those conversations, defendant

encouraged Williams and Sanders not to testify. Defendant assured Williams and Sanders that any warrants for their arrest would be dismissed after his trial. They both agreed to "fall back" until the trial was over. Following the hearing, the trial court found that defendant had not threatened or intimidated the witnesses but had encouraged them not to appear at his trial. The court held that defendant forfeited his right to confront the witnesses by his own wrongdoing in encouraging them not to appear. The court ruled that the videotaped statements were admissible at trial. Defendant does not appeal from that ruling.

At defendant's trial, the State elicited testimony from Michael Johnson. Johnson lives in the area of the shooting. On the night of the shooting, Johnson was in front of his home and observed two men involved in a loud discussion on the street, and a third man watching them. Johnson did not see any vehicles on the street, or near the intersection, prior to the shooting. Johnson turned to enter his residence and then heard five or six gunshots. He turned back to look in the direction where he had seen the three men and saw one lying on the street and the other two standing over him. He believed that he saw one of the men kick the man lying on the street. The State's forensic pathologist testified and confirmed that Bovan suffered blunt force injuries to his head which could have been caused by kicking. She testified that there were other possible explanations for those injuries.

Johnson saw no one else in the area. Johnson saw the men enter the alley behind his house, where he yelled at them and stated that police were coming. The men did not run. He did not see their faces. Johnson approached Bovan and informed him that police were coming. Neighbors, including a woman who was crying and yelling, joined him. Johnson did not see any vehicles until he was with Bovan.

Floyd Goree also testified at defendant's trial. On the day of the shooting, Goree encountered defendant, and defendant asked him for a ride home. Defendant lives near the intersection where the shooting occurred. As Goree drove defendant home they passed a man and woman on the street. Defendant yelled at the man. They arrived at defendant's home, defendant exited the vehicle, and Goree continued down the street. Goree looked to his left and observed defendant exiting the rear of defendant's home to stand on the side of the house. As defendant stood on the side of his home, Goree observed what he believed to be handgun in defendant's hand. Goree saw no one else on the street. Goree stopped at the intersection, then heard three or four gunshots. He looked in his rear-view mirror and saw defendant firing a gun. Goree believed he saw another person in a nearby backyard, but he did not see anyone, other than defendant, standing over Bovan after the shooting.

Goree testified that police did not interview him until May, then police interviewed him twice. During one interview, police arrested Goree. At the time of trial, the State had charged Goree with unlawful possession of a controlled substance with intent to deliver. On cross-examination Goree revealed that he actually first talked to police in April, and that police conducted two separate interviews in April.

In the first April interview, Goree stated that he drove defendant home, drove away, and that when he reached the intersection he did not look back. He did not see any shooting, and did not see anything else. During that interview, Goree told police he did not know where defendant went after exiting the vehicle. He denied ever telling police that he did *not* see defendant yell at the man on the street. Goree testified that police threatened him with arrest for obstruction of justice if he lied to them. During the second April interview Goree adhered to his statements in

the first interview. He added that he was being threatened, but he did not state by whom.

After the two interviews, police stopped Goree and again threatened him with arrest if he was dishonest with them. Goree responded he had told them the truth. The following day, police arrested Goree for obstruction of justice and interrogated him about the Bovan shooting. Goree declared he had been honest in his version of events. After he declared his honesty in his account, police found drugs in Goree's possession. Police informed Goree he would be charged with unlawful possession and asked if he wished to say anything more about the Bovan shooting. Goree stated he did not, as he had been honest in his account of the shooting.

The following day, police returned Goree to the police station from jail and interrogated him a fifth time. For the fifth time, Goree told police he did not see anything with regard to Bovan's shooting. Police continued to interrogate Goree. Eventually, he changed his statement. Goree told police that when he stopped his vehicle at the intersection after dropping defendant off, he did see the shooting. He did not see anyone standing over the body or anyone on the street. Goree did see someone standing in the alley, but he only saw Bovan and defendant on the street. He did not see two men kicking the victim. After the shooting, he immediately drove away.

At trial, Goree denied telling police that anyone threatened him, and testified that he was never threatened. He also testified that he had not lied to police during those earlier interviews when he stated he saw nothing. Goree claimed that his later statement, that he did in fact see the shooting, was not a change in his previous statement that he did not see the shooting.

Police retrieved a hat and four shell casings from the scene of the shooting but did not locate fingerprints on the shell casings. The State provided evidence that those shell casings all

came from the same firearm. The two bullets recovered from the victim's body were fired by that firearm. However, the State's forensic scientist could not link the recovered bullets directly to the recovered shell casings. Although the State recovered DNA from underneath the victim's fingernails, it was not defendant's DNA. The State's forensic pathologist ruled out person-to-person contact in Bovan's death based on the absence of broken fingernails. The forensic scientist could not testify as to when the unknown person's DNA became deposited underneath Bovan's fingernails. Police retrieved no other physical evidence from the shooting.

The trial court admitted the evidence the State used during the pretrial hearing into evidence at the trial. The court instructed the jury that the evidence could only be used on the issue of defendant's consciousness of guilt. Defendant does not appeal that ruling.

Although police conducted multiple interviews with Williams and Sanders, the State played a videotape of Williams' and Sanders' final statement only. Williams and Sanders both initially told police they saw no one at the scene of the shooting other than the victim. Williams and Sanders both repeated that statement immediately after the shooting and immediately before making their final videotaped statements.

In the videotaped statement played for the jury at defendant's trial, Williams tells police that she was in her home on the night of the shooting. Sanders and defendant's brother were on the porch. Defendant was not present. Williams told police she heard gunshots and moments later she and Sanders went outside, where Williams observed Bovan lying in the street and a man running up the alley. Williams told police she thought the man running up the alley may have been defendant so she called his name. The man turned and Williams recognized him as defendant. Williams did not see anyone with him.

In the videotaped statement played at trial Sanders told police that on the day of the shooting defendant and his brother were at the residence but left before the shooting. Sanders told police she was in her bedroom when she heard the gunshots. She and Williams looked out a window and saw Bovan lying in the street and a man running up the alley. Sanders believed the man running up the alley to be defendant and called out. Sanders stated that the man she saw running up the alley was defendant. Sanders did not see anyone else in the area. Sanders left the home, went to Bovan, and gave him medical attention.

During their deliberations the jury asked to view Williams' and Sanders' videotaped statements a second time. The jury also requested to hear a second time the State's evidence that defendant procured their absence from trial. That evidence consists of recorded telephone conversations between defendant, Williams, and Sanders while defendant was in jail. The trial court granted the jury's requests. Defendant does not appeal those rulings.

Following deliberations, the jury found defendant guilty of first degree murder. However, the jury answered that the State failed to prove that defendant personally discharged a firearm that proximately caused the death of another person. This appeal followed.

ANALYSIS

Defendant argues that the trial court abused its discretion in refusing to permit him to impeach Williams' and Sanders' videotaped statements with their prior, inconsistent statements. Defendant makes no claim that Williams' and Sanders' prior statements are admissible as substantive evidence. "We review a trial court's evidentiary rulings for an abuse of discretion." *Leonard*, 391 Ill. App. 3d at 935, 911 N.E.2d at 411.

Defendant sought to admit Williams' and Sanders' prior inconsistent statements through

testimony from police officers who questioned Williams and Sanders. Those officers would testify that before making the statements inculcating defendant, both women repeatedly told police they did not see anyone at the scene of the shooting other than the victim. The State objected on the grounds the witnesses were never confronted with their prior inconsistent statements and, therefore, defendant would be unable to provide a proper foundation to admit the statements. The trial court agreed, finding that defendant failed to provide a foundation to admit the statements and that a proper foundation is required to admit a prior inconsistent statement into evidence.

Defendant argues that the trial court abused its discretion because its ruling was based on its misunderstanding of the law. The trial court based its ruling on a finding that defendant failed to meet the foundational requirements to admit the prior inconsistent statements as substantive evidence. The trial court ruled as follows:

“[A]lthough there is a discussion where strict adherence to the rule may be relaxed in situations where the witness is confronted, at least functionally with the prior inconsistent statement, a proper foundation has been deemed to be laid, there are no instances where there’s no foundation for a prior inconsistent statement that is [s]ought to be admitted as an exception to the hearsay rule, which is the case at bar.”

Defendant argues that he did not seek to admit Williams’ and Sanders’ unrecorded statements to police “as an exception to the hearsay rule,” as the trial court believed, because a prior inconsistent statement submitted for the purpose of impeaching a declarant is *not* hearsay.

“Hearsay” is defined as “an out-of-court statement offered to prove the truth of the matter asserted.” *People v. Peoples*, 377 Ill. App. 3d 978, 983, 880 N.E.2d 598, 602 (2007). Our supreme court recognizes that hearsay concerns are not invoked where an out-of-court statement is not offered for the truth of the matter asserted but only to impeach the witnesses’s credibility. *People v. Cookson*, 215 Ill. 2d 194, 213, 830 N.E.2d 484, 495 (2005). We adhere to the supreme court’s guidance and find that, in this case, “hearsay is not at issue, [and] we [will] address only the parties' arguments on the impeachment issue.” *Cookson*, 215 Ill. 2d at 213, 830 N.E.2d at 495.

A proper foundation is also required to admit evidence of a prior inconsistent statement for purposes of impeachment.

“The foundation requirement for impeaching a witness with a prior inconsistent statement ‘is satisfied by presenting the place, circumstances and substance of the earlier statement to the witness and giving [the witness] an opportunity to explain the inconsistency.’ [Citation.]” *People v. Robinson*, 368 Ill. App. 3d 963, 982, 859 N.E.2d 232, 251 (2006).

Defendant concedes that he could not meet those foundational requirements due to Williams’ and Sanders’ absence from trial. He argues that the witnesses’ absence relieves him of the burden to provide a foundation for impeaching a witness with a prior inconsistent statement. Defendant cites *People v. Smith*, 127 Ill. App. 3d 622, 630, 469 N.E.2d 634, 641 (1984), wherein the court held that “[w]here a statement of an absent declarant is properly admitted into evidence under one of the hearsay exceptions, the opposing party may impeach such statement with a prior

inconsistent statement by the declarant.” *Smith*, 127 Ill. App. 3d at 630, 469 N.E.2d at 641.

Defendant also relies on *McConney v. U.S.*, 421 F. 2d 248, 251 (C.A. Cal. 1969), wherein the Ninth Circuit ruled as follows:

“While the general rule is that a witness may be impeached by his prior inconsistent statements only after a proper foundation has been laid ***, that rule has been dispensed with in situations where the witness is unavailable and hearsay evidence is offered to impeach the previously admitted hearsay evidence of the statements of the absent witness.” *McConney*, 421 F. 2d at 251.

The State argues that the rule stated in *Smith* does not apply because the facts of the case are distinguishable. Specifically, in *Smith*, the witness’s absence was not attributable to the defendant. The State argues that a defendant should not be able to impeach a witness’s statement with a prior inconsistent statement without providing a proper foundation when the defendant *created the circumstances* that preclude him or her from providing that foundation. In this case defendant created those circumstances by procuring the witness’s absence.

The State asks this court to consider and adopt *People v. Bosier*, 6 N.Y.3d 523, 528 (2006), where the defendant also sought to introduce evidence of a prior inconsistent statement. Similar to this case, the *Bosier* defendant had procured the witness’s unavailability as a trial witness. But there, it was through threats. The defendant was, therefore, similarly unable to give the witness an opportunity to explain the inconsistency and thus to lay a proper foundation. The *Bosier* court held that it was not an abuse of discretion to *exclude* the impeaching evidence. The court based its judgment on its finding that “the inconsistency defendant relied on did not go to

the heart of the prosecution's case and might well have been credibly explained if the witness had been present.” *Bosier*, 6 N.Y.3d at 528.

The State admits that, under *Bosier*, even under similar facts (*i.e.*, where the defendant is the cause of the witness’s absence) impeachment should be allowed in limited circumstances. *Bosier*, 6 N.Y.3d at 528 (“even a defendant who has tampered with a witness is entitled to a fair trial. For that reason, we do not hold that such a defendant should never be able to introduce the unavailable witness's out-of-court statements for impeachment purposes”). The *Bosier* court found that “[t]he trial judge has discretion to permit such impeachment where there is a possibility that, if it is not allowed, the jury will be misled into giving too much weight to the statement offered by the prosecution.” *Bosier*, 6 N.Y.3d at 528.

We have considered *Bosier* and find that the circumstances under which impeachment of an absent witness should be permitted without requiring the foundation for impeachment with a prior inconsistent statement are present in the case at bar. Williams’ and Sanders’ statements would have great weight with the jury absent impeachment by the defendant, their statements go to the heart of the State’s case, and there is no credible explanation for the inconsistency between the two statements.

The State’s argument that the jury was not misled into giving undue weight to Williams’ and Sanders’ statements, because they merely corroborate Goree’s testimony, or because neither would have reason to falsely inculcate defendant, is unpersuasive. The State argues that the prior statement is not in fact inconsistent. The prior statement was that neither witness saw anyone else when they arrived at the scene of the shooting from their home. The State argues that the witnesses may have been referring to a time after defendant ran away. That assertion is the result

of nothing more than speculation as to the meaning of the witnesses's statements. The true meaning of the witnesses's statements is a matter that should be left to determination by the trier of fact rather than speculation by the State. See generally *People v. Herring*, 324 Ill. App. 3d 458, 466, 754 N.E.2d 385, 392 (2001); *People v. Nicholls*, 236 Ill. App. 3d 275, 281, 603 N.E.2d 696, 700 (1992).

The State's speculation also ignores the equally reasonable inference that neither witness saw anyone other than the victim *at anytime*, either before or after the shooting, until coerced to say that they saw defendant in the alley.

The State also argues that it could have elicited testimony that the witnesses initially lied to protect defendant or that “[i]t *** may have been that the sisters did not tell the true story until notified that their statements were going to be videotaped.” The State complains that due to their absence, the State would have been precluded from rehabilitating the witnesses, therefore, the trial court properly excluded the impeaching evidence. *Cf. Bosier*, 6 N.Y.3d at 528 (“Where impeachment is permitted, the defendant, in direct contravention of the most basic legal principles and the policy objectives of *Geraci*, may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered by the defendant”).

The limitation of the State's ability to rehabilitate its witnesses who both gave inconsistent statements is insufficient to overcome the prejudice to defendant that resulted from his inability to impeach the witnesses. The State incorrectly assumes that the only value of the testimony is to establish the basic facts of the occurrence. However, determination of defendant's guilt turns on whether the State established those facts beyond a reasonable doubt.

Absent physical evidence, whether the State met that burden depends heavily on the credibility of its witnesses.

Absent impeachment, Williams' and Sanders' statements do have undue weight. Absent any opportunity to impeach, the State was able to provide testimony from four uncontradicted witnesses to establish its theory of the case. Moreover, Goree himself made inconsistent statements, and the jury may have discredited his testimony absent corroboration by Williams and Sanders. On the other hand, had the trial court permitted defendant to impeach Williams and Sanders, the jury may have found the State's evidence less credible.

Nor was the error in refusing the impeachment harmless beyond a reasonable doubt.

“To determine whether an ordinary trial error, such as the improper admission of hearsay evidence, was harmless, we must ask whether the verdict would have been different if the evidence had not been admitted.” *People v. McWhite*, 399 Ill. App. 3d 637, 643, 927 N.E.2d 152, 158 (2010).

The State makes the argument that impeachment would not have aided defendant--despite relying on the veracity of Williams' and Sanders' statements in support of its position that the “properly admitted evidence” is overwhelming proof of defendant's guilt.

“The question is whether it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. [Citation.] ‘When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; [or] (2) examine the other properly

admitted evidence to determine whether it overwhelmingly supports the conviction.” *People v. Garcia-Cordova*, 392 Ill. App. 3d 468, 484, 912 N.E.2d 280, 295 (2009).

The evidence adduced by the State proves that failing to impeach the witnesses with their prior statements that they did not see defendant at the scene of the shooting contributed to the conviction. In this case, the trial turned on witness credibility because the State did not present physical evidence linking defendant to the crime, and the case against him was limited to the testimony of four witnesses. Williams and Sanders told police they did not see anyone involved in the shooting and only inculcated defendant after repeated police interrogation. Impeaching their statements could have weakened or negated some, if not most, of the evidence against defendant.

Under the particular facts of this case, the credibility of the witnesses’s statements to police was bolstered by admission of evidence that he attempted to suppress that testimony. The State had the opportunity to bolster the credibility of its evidence while simultaneously destroying defendant’s credibility. Defendant’s inability to impeach Williams and Sanders left the trier of fact with seemingly credible evidence inculcating defendant and no evidence exculpating him, even though such evidence did exist.

As demonstrated above, the general rule is that the trial court should permit impeachment of an absent witness without requiring the proponent of the statement to lay the usual foundation. Even considering the exception to that rule, prohibiting impeachment based on misconduct, the facts of this case favor allowing the impeachment. Therefore, in this case, the trial court abused its discretion in refusing to permit defendant to impeach Williams’ and Sanders’ statements with

their earlier, inconsistent statements. This analysis is supported by Illinois Rule of Evidence 806 which was adopted by the Illinois Supreme Court on September 27, 2010, as a modernization of existing law and made effective January 1, 2011. See Illinois Rule of Evidence 806 (“When a hearsay statement, ***, has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain”).

The error in refusing the impeachment was not harmless beyond a reasonable doubt because the conviction rests on a determination of the witnesses’s credibility. The trial court’s erroneous denial of an opportunity to challenge the credibility of the witnesses resulted in the evidence relating to credibility being one-sided against the defendant. Where the credibility of the witnesses was so crucial to the State’s case, given the lack of physical evidence, the only possible outcome was an unfair trial.

CONCLUSION

For all of the foregoing reasons, the judgment of the circuit court of Peoria County convicting defendant of first degree murder is reversed, and the cause remanded for a new trial.

Reversed.