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3-09-0317

Order Filed March 23, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	For the 14th Judicial Circuit
)	Rock Island County, Illinois
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-903
)	
RAYMOND J. STINDE,)	
)	Honorable F. Michael Meersman,
Defendant-Appellant.)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

Held: Where defendant was charged under a theory of accountability, jury could have found defendant guilty beyond a reasonable doubt of murder committed during an attempted robbery. Defendant affirmatively waived the issue of whether the introduction of other crimes evidence introduced through his videotaped confession denied him a fair trial. Further alleged errors were forfeited.

Following a jury trial, defendant Raymond Stinde was convicted of first degree murder in connection with the shooting death of Gary Alonzo Bourrage. The charges against Stinde were based on accountability for a murder committed during a forcible felony (720 ILCS 5/9-1(a)(3) (West 2006)), in this case, robbery (720 ILCS 5/18-1(a) (West 2006)), and in a second count,

attempted robbery (720 ILCS 5/18-1(a), 5/8-4(a) (West 2006)). The jury convicted Stinde of first degree murder based on the second count, attempted robbery. The trial court denied Stinde's posttrial motions and sentenced him to 35 years' imprisonment. Stinde follows with this appeal. On appeal, Stinde argues the State failed to prove him guilty beyond a reasonable doubt because it failed to prove he was involved in an attempted robbery of the victim. Stinde also asserts he was denied a fair trial because of improper evidence introduced through the videotaped interrogation in which he participated. We affirm the trial court.

FACTS

Defendant Raymond Stinde was charged with first degree murder in connection with the shooting death of Gary Alonzo Bourrage. The charges against Stinde were based on accountability for a murder committed during a forcible felony (720 ILCS 5/9-1(a)(3) (West 2006)), in this case, robbery (720 ILCS 5/18-1(a) (West 2006)), and in a second count, attempted robbery (720 ILCS 5/18-1(a), 5/8-4(a) (West 2006)). A jury trial commenced and the following evidence significant to our analysis was presented.

Officer Tyson Nichols testified that in the early morning hours of September 13, 2008, he responded to the scene of a deceased individual in a vehicle parked in Rock Island. Nichols participated in a "canvas" of the surrounding neighborhood, however, no witnesses to the crime were located. The deceased individual was later determined to be Gary Alonzo Bourrage. Alonzo succumbed to a gunshot wound in the neck. The bullet passed through his neck in a downward trajectory. A 9mm projectile was recovered from the dashboard of the vehicle in which he was seated. A weapon was not recovered. Forensic evidence suggested the shot that killed Alonzo was fired from behind the driver through an open rear window. Blood stain pattern analysis indicated that

at the time Alonzo was shot, he was sitting in the driver's seat and there was no one sitting in the passenger seat.

Felicia Ann Stinde, Raymond Stinde's sister, testified that Alonzo had been her boyfriend. Felicia noted that her brother and Alonzo did not associate. The night before his death, Felicia spoke with Alonzo. He asked her where he could buy a 1/4 pound of marijuana. Felicia phoned her brother and related the request to him. After speaking with her brother, Felicia contacted Alonzo and told him Stinde could get the drugs but he needed a ride. Felicia gave Alonzo Stinde's phone number. Alonzo indicated he would pay no more than \$200 for the marijuana. She knew that some days prior to the shooting, Alonzo had \$300. Felicia never spoke with Alonzo again. Felicia recalled that at some point during her conversations with him about the drug buy, Stinde said to her, "I hope you don't like him." Felicia stated her brother routinely said "stupid things." Felicia also recalled that she told Stinde that Alonzo had a gun. Felicia described the phone calls as "phone tag" and admitted she was taking pain medication during the time she was conversing with Stinde and Alonzo. She stated that when she was interviewed by the police after the shooting, she told them it never occurred to her when she was setting up the connection between her brother and Alonzo that a shooting would be the result. Felicia stated there were people who disliked Alonzo and that he was "cautious."

Karen Hudson, Alonzo's aunt, testified that on the night of September 13, 2008, she overheard Alonzo arranging to buy some marijuana. It was her understanding that Alonzo was speaking to Felicia about her brother "setting something up with somebody for [Alonzo] to meet to get something." Hudson thought the arrangement was that Alonzo would pick up Stinde at Maple Ridge and then meet another person at Douglas Park. Hudson thought Alonzo had approximately

\$200 in his pocket.

_____Detective Leo Hoogerwerf testified that physical evidence collected from Alonzo after the shooting included \$126 in a wallet. Evidence collected from Stinde included a wallet containing \$200 and \$42 that was in his pants pocket.

Detective Shawn Slavish, the lead detective in the murder investigation, interviewed Stinde on September 16, 2008, for several hours at the Rock Island police station. A second interview took place the following day. Slavish stated that at one point during the interviews Stinde stated he was currently “high” on ecstasy. The interviews were audio and video recorded. Slavish testified that the recording introduced in the trial court did not contain the entire interview as the tapes were edited to remove portions the jury would not be permitted to hear under the rules of evidence. A transcript of the videotaped interview was published to the jury with the caveat, as explained by the trial court, that defense counsel could still object to any portion of the tape when it was played due to the possibility it had not been adequately “cleaned up.” The videotape was played for the jury. After the first tape was played, the jury was excused to lunch and the trial court, the State and the defense revisited the issue of the redacted portions of the tape. The trial court explained to Stinde that he had a right to include portions that had been excised with the understanding that redacted portions related to his prior record could be prejudicial to him if he waived the right to have those portions removed. The record does not indicate Stinde chose to reinsert any redacted portions of the tapes. Several audio misinterpretations were corrected in the transcript and portions of the interview that were missing from the tape were read into the record. The defense participated in the corrections and supplementation of the record.

The record indicates that during the taped interview, Stinde initially told the police that

although he knew who Alonzo was, he did not have a relationship with him, did not kill him and did not know anything about the crime. Stinde acknowledged that others were saying he was involved. Early in the questioning, the interrogating officer stated:

“I already know. Okay? I already know what went down and who was involved. ***What I need from you. Is why. Okay? *** Why did this go down the way it went down.” *** Maybe it’s because they were shooting at you the other day. Somebody was. Okay. *** Maybe that’s the reason. I don’t know. But you gotta tell me if that’s the case.”

Stinde posed the question: “So you think that I would kill a man? The officer responded: “I think you did. I think you did. I know you did. Okay?” The officer made other similar remarks.

Later in the interview, Stinde admitted Alonzo had called him to ask about “some weed.” Alonzo had received Stinde’s phone number from his sister. Stinde stated he referred Alonzo to someone else. Eventually, Stinde admitted Alonzo picked him up and they ostensibly went to buy marijuana from “weed man.” Stinde admitted he never connected with “the weed man” on Alonzo’s behalf and telling him he had was a ruse. Stinde stated that either “Gotti” or “Pills” came up to the vehicle and shot Alonzo. Stinde “jumped up and ran.” Shortly after this statement, Stinde admitted he knew Pills was going to take Alonzo’s money because Pills had stated that was the plan. Pills followed Alonzo and Stinde from Maple Ridge to an alley near the “weed man’s” house. Alonzo and Stinde were “waiting for the guy” when Pills came up and shot Alonzo. After the shooting, Stinde ran away from the scene, Gotti picked him up and they went to a hotel where they met with Pills. They argued with Pills about the shooting and whether it was necessary. Stinde stated he did not

know why Pills shot Alonzo, that it “wasn’t supposed to *** go down like that.” Stinde thought Pills was going to offer Alonzo some “bunk weed,” or inferior marijuana. Stinde knew that Pills was desperate for money and that his way of “hustling” was to rob and steal. When the interrogating officer suggested money in Stinde’s possession could have Alonzo’s fingerprints on it, Stinde said that \$80 he had on him was money he received from selling Alonzo crack cocaine. Stinde agreed to give up his clothing, which he indicated was the same outfit he wore on the night of the shooting. Stinde continued to rely on his last version of events despite repeated questioning by the officers. At one point, the questioning officer stated:

“You’re just going to rob him. *** If I’m going to trade him *** some bad weed for some money, I don’t care if he knows I’m in Maple Ridge. *** If I rob him, now it brings all the heat down. All right. So let’s get the hell away from there and let’s go somewhere else. *** I’ll ride with him. I’ll get him down here. You know, you guys come up and rob him.”

In a reference to Stinde’s family, the interrogating officer told Stinde:

“She said lately you’ve been robbing people. She said lately you’ve been talking about, you’ve been shooting at people.” *** She’s saying you’re out there just, you know, hitting licks.”

At the close of the evidence, the jury returned a verdict of not guilty on the charge of first degree murder based on robbery and guilty on the charge of first degree murder based on attempted robbery. During the hearing on Stinde’s posttrial motion, the defense argued the videotape was highly prejudicial and depicted Stinde as involved in “all kinds of criminal activity.” Examples of the statements to which the defense refers are Stinde’s own statement referring to when he “got out

of the joint,” and the interrogating officer’s reference to the fact that Stinde’s DNA was on file, together with numerous references to Stinde’s use of and sale of drugs. The defense admitted that the prejudice in the tape was “pervasive throughout it” and that the entire tape should have been excluded because it could not be cleaned up. To this portion of the defendant’s posttrial argument the trial court responded it considered the decision of the defense to allow the tape was a tactical decision to avoid having the defendant take the stand to rebut evidence of the interrogation being introduced through the officers’ testimony. The trial court denied Stinde’s posttrial motion and sentenced him to 35 years’ imprisonment. Stinde follows with this appeal.

ANALYSIS

On appeal, Stinde raises two issues. Stinde argues the State failed to prove him guilty beyond a reasonable doubt because it failed to prove he was involved in an attempted robbery of the victim. Stinde also asserts he was denied a fair trial because of improper evidence introduced through the videotaped interrogation in which he participated. We address Stinde’s arguments in order.

The first issue on appeal concerns whether the State provided sufficient evidence to prove that at the time of the murder Stinde was accountable for an attempted robbery. He asserts that at most, he was engaged in an attempt to commit a theft by fraud. When a defendant raises a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 366 Ill. App. 3d 885, 894 (2006). We will not set aside a criminal conviction on review unless the evidence is so improbable or unsatisfactory that a reasonable doubt of the guilt of the defendant remains. *People v. Green*, 339 Ill. App. 3d 443, 450 (2003). Determinations of the credibility of the witnesses, the weight to be

given their testimony, and the reasonable inferences to be drawn from the evidence are the province of the jury. *Green*, 339 Ill. App. 3d at 450.

The charge against Stinde for which he was found guilty reads, in part, as follows:

“[W]hile acting with another for whose conduct the defendant is legally responsible, without lawful justification, while attempting to commit a forcible felony, Robbery, *** shot Gary Alonzo Bourrage in the neck with a firearm and thereby caused *** [his] death.”

Under section 9-1(a)(3) of the Criminal Code of 1961 (Code), a person commits first degree murder if he kills an individual without lawful justification while “he is attempting or committing a forcible felony other than second degree murder.” (720 ILCS 5/9-1(a)(3) (West 2006). The forcible felony of robbery is the taking of property from the person or presence of another by the use of force or by the threat of the imminent use of force. *Collins*, 366 Ill. App. 3d at 894; 720 ILCS 5/18-1(a) (West 2006). A person commits attempted robbery when he, with specific intent, takes a substantial step toward the commission of a robbery. *Collins*, 366 Ill. App. 3d at 894; 720 ILCS 18-1(a), 5/8-4(a) (West 2006). Intent is a state of mind that, if not admitted, can be established by proof of surrounding circumstances. *Green*, 339 Ill. App. 3d at 451. It is for the trier of fact to determine the existence of the requisite intent and that determination will not be disturbed on review unless it clearly appears there is a reasonable doubt of the defendant’s guilt. *Green*, 339 Ill. App. 3d at 451. Similarly, what constitutes a substantial step toward the commission of an offense is determined by the facts and circumstances of each particular case. *People v. Hawkins*, 211 Ill. App. 3d 418, 423 (2000).

Accountability for a felony murder exists if the defendant is deemed legally responsible for the felony that accompanies the murder. *People v. Shaw*, 186 Ill. 2d 301, 325 (1998). Stinde argues the State proved neither that he intended to nor that he took a substantial step toward the underlying felony in this case, attempted robbery. However, Stinde was charged and tried under a theory of accountability. A person is legally accountable for another's criminal conduct when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2006). Any criminal act done in furtherance of the planned and intended act is conduct for which the accountable person will be held responsible. *People v. Kessler*, 57 Ill. 2d 493, 497 (1974). Moreover, proof that the defendant was present during the perpetration of the offense, that he fled from the scene, that he maintained a close affiliation with his companions after the commission of the crime, and that he failed to report the crime are all factors that the trier of fact may consider in determining the defendant's legal accountability. *People v. Redmond*, 341 Ill. App. 3d 498, 513 (2003).

Where a defendant has been charged under a theory of accountability, the State may prove the defendant possessed the intent to promote or facilitate the crime through evidence establishing beyond a reasonable doubt that either the defendant shared the criminal intent of the principal, or there was a common criminal design. *Redmond*, 341 Ill. App. 3d at 511. "When 2 or more persons engage in a common criminal design or agreement, any acts in furtherance of that common design committed by one party are considered to be the acts of all the parties *** and all are equally responsible for the consequences of those further acts." 720 ILCS 5/5-2(c) (West 2006). Once an underlying common design is established, no additional common designs need be established for all

of the individual acts committed during the commission of a planned offense. *Redmond*, 341 Ill. App. 3d at 514. Under Illinois law, one can be held accountable for a crime different than the one planned. *Redmond*, 341 Ill. App. 3d at 510.

In the instant case, Stinde acknowledged there was a plan or common design to relieve Alonzo of his money. Stinde admitted he engaged in a discussion about Alonzo and the marijuana deal with Pills and that he knew Pills was going to take Alonzo's money because Pills stated that was the plan. Stinde knew that Pills was desperate for money and that he used theft and robbery as a way to obtain money. Stinde's confession of involvement was supported by the testimony of Stinde's sister, Felicia, and Karen Hudson, who both indicated that a deal was struck between Stinde and Alonzo for the purchase of marijuana. Felicia testified that when she was arranging the meeting between Alonzo and Stinde, Stinde told her, "I hope you don't like him." Felicia also warned Stinde that Alonzo carried a gun. Once engaged in the common design or agreement, Stinde became responsible for the actions of Pills, who employed a weapon to commit the offense, making it an attempt to take Alonzo's property by the use of force or the threat of imminent force. Thus, by way of the proof of a common design, the jury could infer Stinde had the requisite intent to commit an attempted robbery.

Stinde admitted that in furtherance of the plan he made an arrangement with Alonzo and took him to the location of the planned crime where he waited with him for Pills. The act of "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission," is an act that constitutes a substantial step toward the commission of a crime sufficient to support an attempt conviction. Model Penal Code §5.01(2)(b), at 296 (1985); *Hawkins*, 311 Ill. App. 3d at 424 (in Illinois, courts rely on the Model Penal Code for guidance in determining

whether an accused has taken a substantial step toward commission of a crime). Furthermore, the State presented evidence to indicate Stinde was present at the scene, that he fled after Alonzo was shot, that he met up with the shooter later, and that he failed to report the crime, all factors that the jury may consider in determining the defendant's legal accountability. For these reasons we consider that under a theory of accountability, a rational trier of fact could have found beyond a reasonable doubt that Stinde had the intent to and did take a substantial step toward the commission of the offense of attempted robbery.

Stinde's second issue on appeal concerns whether several allegedly improper statements in the videotaped interrogation of Stinde made the admission of the videotape a violation of his constitutional right to a fair trial. Specifically, Stinde urges the videotape contains improper hearsay assertions and personal opinions stated by the interrogating officers as well as improper other crimes evidence. The State's first response to Stinde's argument is that he has waived any objection to the other crimes evidence because despite an invitation to participate in the redaction of the videotape for trial, he either declined to participate or did not make contemporary objections to the statements on the videotape, although he was aware of and had discussed the right to do so with the trial court. The State asserts that Stinde's voluntary relinquishment of his right to object results in an affirmative waiver, the remedy for which is a claim of ineffective assistance of counsel rather than the improper admission of evidence.

The common law doctrine of waiver bars a claim that could have been presented previously. *People v. Phipps*, 238 Ill. 2d 54, 62 (2010). Waiver is distinct from forfeiture. *Phipps*, 238 Ill. 2d at 62. Forfeiture applies to issues that could have been raised but were not, while waiver is the voluntary relinquishment of a known right. *Phipps*, 238 Ill. 2d at 62. As noted by the supreme court

in *People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005), “ “[w]hereas forfeiture is the failure to make the timely assertion of the right, waiver is the ‘intentional relinquishment or abandonment of a known right.’ ” ” (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). In determining whether a legal claim has been waived, courts examine the particular facts and circumstances of the case and construe waiver principles liberally in favor of the defendant. *Phipps*, 238 Ill. 2d at 62.

In the instant case, we consider Stinde has waived his argument that the introduction of other crimes evidence through his videotaped confession denied him a fair trial. The record indicates that there was extensive discussion over the videotaped statement and the efforts to redact portions of it to conform with the rules of evidence. The trial court, the State and the defense were involved in these discussions both before and during trial. The defense was offered an opportunity to review the tape to object to any portion of it. Before trial, the trial court explained to Stinde he had a right to redact portions of the videotape that referred to any previous crimes he had committed. During trial, the trial court explained to Stinde that he had a right to include portions that had been excised with the understanding that redacted portions related to his prior record could be prejudicial to him if he waived the right to have those portions removed. A transcript of the videotaped interview was published to the jury with the caveat, as explained by the trial court, that defense counsel could still object to any portion of the tape when it was played due to the possibility it had not been adequately “cleaned up.” We find the record indicates that with respect to the introduction of other crimes evidence through the videotaped confession defendant has waived his argument because he knowingly relinquished the right to object to the evidence.

The State further argues that Stinde’s hearsay and opinion testimony objections have been forfeited for his lack of contemporaneous and posttrial objections. See *People v. Enoch*, 122 Ill. 2d

176, 186 (1988) (to preserve an issue for appeal, a defendant must object at trial and raise the issue in a posttrial motion). A reviewing court may consider a trial error not properly preserved where the evidence is closely balanced or when the error is of such magnitude that the defendant was denied a fair and impartial trial and remedying the error is necessary to preserve the integrity of the judicial process. *People v. Nieves*, 192 Ill.2d 487, 502-503 (2000). As a threshold consideration, however, we must first find the issue presents a reversible error. *People v. Williams*, 193 Ill. 2d 306, 348-49 (2000) (absent reversible error there can be no plain error).

Stinde asserts the remarks of the officers during his interrogation regarding their opinion as to his guilt and the statements the officers attributed to others regarding his guilt were improperly admitted. As a general rule, a witness' opinion is not admissible in evidence because testimony must be confined to statements of fact of which the witness has personal knowledge. *People v. Crump*, 319 Ill. App. 3d 538, 542 (2001). Lay witness testimony is especially improper and prejudicial if it goes to the ultimate question of fact that is the province of the jury. *Crump*, 319 Ill. App. 3d at 452. Because a police officer is a figure of authority, his testimony is especially prejudicial if he informs the jury that it should believe a portion of the State's case. *People v. Munoz*, 398 Ill. App. 3d 455, 489 (2010).

In the instant case, one of the interrogating officers stated he believed Stinde killed Alonzo and both officers indicated they believed the killing started out as a robbery. The State asserts the officers' statements should be considered hypothetical scenarios. In *People v. Bryant*, 391 Ill. App. 3d 228, 244 (2009), the court found no error when the jury viewed a videotaped interrogation in which the interviewers posed hypothetical scenarios in an unsuccessful attempt to get the defendants to confess to the crime. The *Bryant* court found significant the trial court's *sua sponte* instruction

to the jurors that they were to view the hypothetical questions as designed to elicit responses from the defendants and not as evidence of what occurred. *Bryant*, 391 Ill. App. 3d at 244. In the instant case, no such instruction was given. Nevertheless, we consider in this case, when viewed as they were presented to the jury, in the context of the interrogation, the statements made by the interrogating officers were not in the nature of inadmissible opinion testimony. Neither the officers nor the others to whom statements of defendant's guilt were attributed testified at trial that they believed Stinde was guilty. See *People v. Hanson*, 238 Ill. 2d 74 (2010) (neither witness's nor detective's testimony offered to show present opinion of defendant's guilt or innocence, thus testimony was not improper opinion testimony). In this case, the officers' interrogation statements regarding their "beliefs" were in the nature of the hypothetical remarks made by the officers in *Bryant*.

The statements of others to which the officers referred were also, within the context of the interrogation, used by the officers only to elicit responses from Stinde. See *Hanson*, 238 Ill. 2d at 74 (detective's testimony regarding statement made by another that she believed defendant had committed the crime, which detective recited to the defendant, considered by the court as providing context for the investigation and evidence of defendant's state of mind given his actions in response to the statement). The State offered none of the statements for their truth. See *People v. Tenney*, 205 Ill.2d 411, 432 (2002) (hearsay evidence is generally improper if it is an out-of-court statement offered to prove the truth of the matter asserted). For these reasons, we do not consider any statements made on the videotape to which Stinde now offers his first objection should be considered reversible error. Stinde has therefore forfeited this issue for purposes of our review.

For the foregoing reasons, the judgment of the circuit court of Rock Island County is

affirmed.

Affirmed.