2012 IL App (1st) 093274-U

THIRD DIVISION
May 16, 2012

No. 1-09-3274

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 17520
	)	
DARNELL LANE,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

O R D E R

¶ 1 *Held*: No error occurred at defendant's jury trial for first-degree murder when the prosecution introduced as substantive evidence both the prior written statements and grand jury statements of two prosecution witnesses where all of the prior statements, though consistent with each other, were inconsistent with their trial testimony.

¶ 2 Following a jury trial, Darnell Lane, the defendant, was convicted of first-degree murder and sentenced to 45 years in prison. On appeal, defendant contends that reversible error occurred when the State introduced as substantive evidence the prior grand jury testimony of two witnesses that was

inconsistent with the witnesses' trial testimony but consistent with the witnesses' prior written statements and impermissibly repetitive. We affirm.

¶ 3 Shortly after 1 a.m. on July 2, 2006, Charles Young was shot to death on a sidewalk on South Damen Avenue in Chicago. Defendant was arrested and charged with Young's murder. At defendant's trial, Tatiana Mason testified for the State that in the early morning hours of July 2, 2006, she heard that Young, her cousin, had been shot. She arrived at 5416 South Damen after the shooting. Mason testified she knew defendant by the nickname Dinky, but she did not see him at the crime scene.

¶ 4 Mason acknowledged going to the police station later on the day of the shooting and giving a written statement to a detective and an assistant State's Attorney, but she testified she had no memory of what she told them. The State questioned Mason in depth about the six-page statement she had given at the police station, which was signed by a detective and an assistant State's Attorney and signed on every page by Mason.

¶ 5 In the statement, Mason said that at about 1 a.m. that day, she was on the porch at 5416 South Damen when she saw defendant come out of a gangway. He was wearing a black long-sleeve shirt and black jogging pants. Defendant lifted his arm and pointed it in the direction of Young, who was standing across the street near the curb. Mason heard two shots fired from where defendant was standing and she ran into the house. A short time later, she saw Young lying on the ground, but she did not see the defendant.

¶ 6 At trial, Mason testified she had no recollection of having made the comments in the statement.

¶ 7 The State also questioned Mason about her statement before the grand jury on July 21, 2006. Mason testified there that when she saw defendant raise his arm and point toward Young, "I knew what was going to happen because they had had a fight. *** That he was going to -- fixin' to shoot."

¶ 8 Mason's grand jury testimony was substantially the same as her previous written statement.

¶ 9 At trial, Mason testified she had no recollection of testifying before the grand jury.

¶ 10 Richard Sims, a friend of both Charles Young and defendant, testified for the State that early on the morning of July 2, 2006, he was outside in the 5400 block of South Damen with friends. He saw defendant, exchanged greetings with him and then went to the other side of the street. Sims also spoke with Young and then walked to a nearby restaurant. He saw defendant outside the restaurant with some other people. Defendant was upset about something. Sims heard from other people that defendant and Young had argued, and Sims concluded defendant was upset about that. Sims testified he did not witness the argument between defendant and Young. After Sims returned from the restaurant, he was standing on the east side of Damen near a vacant lot. Young was a house or two north of Sims, talking with another man. Sims heard two shots and he dropped to the ground. He saw Young lying on the ground and saw someone else, dressed in black, whose arms were "[c]oming down from like aiming." The man took off running and it appeared he had a gun in his hand.

¶ 11 Sims acknowledged that on the day after the shooting, he gave a written 11-page statement to a detective and an assistant State's Attorney. In the statement, Sims described in detail an argument he had witnessed between defendant and Young shortly before the shooting. Defendant and Young were pointing their fingers at each other and two other men stepped in and pushed them apart. At trial, Sims admitted giving the statement but insisted repeatedly that he did not actually witness defendant arguing with Young.

¶ 12 Sims was also confronted at trial with his prior grand jury testimony in which he detailed an argument he witnessed between defendant and Young about something that had occurred years earlier. Defendant was swearing at Young, who called defendant a "scary bitch." Sims testified at trial that he never actually heard the argument but heard about it from other people.

¶ 13 Several police officers testified about the apprehension of defendant and the collection of physical evidence at and near the scene of the crime. Officers Keim and Del Toro were on patrol in their squad car at 5300 South Damen at about 1:08 a.m. when they heard gunshots coming from south of their location. When they arrived at 54th and Damen, they saw a man running westbound across Damen. The man, whom they identified at trial as defendant, was dressed in black and held an object in his hand. Del Toro exited the police car to pursue defendant on foot and saw him run down a gangway. Keim drove the police car west to Seeley, left the police car, saw defendant emerge from a gangway onto Seeley, and took up the chase on foot. Keim saw defendant stop briefly next to a van parked on Seeley and place an object beneath the van. Defendant also removed his black shirt and threw it on a lawn before continuing to flee. Other police officers summoned to the area joined in the chase, and defendant was apprehended a short distance away.

¶ 14 Keim walked back to the van on Seeley and found beneath it a .380 caliber semi-automatic pistol containing four unfired cartridges. The black shirt defendant discarded on Seeley was also recovered. Evidence recovered at the crime scene included a fired .380 cartridge case. Shortly after defendant's arrest, a gunshot residue test was performed on his hands.

¶ 15 A medical examiner testified that the victim had been shot twice. One bullet entered the back of his head, with no exit wound. A .380 caliber bullet fragment was recovered from his brain and a jacket fragment was recovered from his scalp. The other bullet entered the victim's left upper back and exited from the left chest wall. There was no evidence of close-range firing.

¶ 16 A forensic scientist specializing in firearms and toolmarks identification testified that the .380 cartridge case found at the crime scene was fired from the Hi-Point CF-380 firearm that was recovered from beneath the van on Seeley. The fired bullet jacket found in Young's scalp was also fired from the Hi-Point firearm.

¶ 17 A trace evidence forensic scientist testified that she did an analysis of the gunshot residue test performed on defendant's hands and concluded defendant may not have discharged a firearm with either hand. She also testified gunshot residue is easily wiped or washed from the hands.

¶ 18 The State also presented the testimony of assistant State's Attorney Norton, who witnessed the written statements of Mason and Sims, and assistant State's Attorney Bagby, who presented the testimony under oath of those two witnesses to the grand jury. Defense counsel made no objection to the admission of the prior inconsistent statements of Mason and Sims.

¶ 19 The defense presented no testimony.

¶ 20 The jury returned a verdict finding defendant guilty of first-degree murder. Defendant filed a written motion for a new trial, but did not reference the admission in evidence of the prior inconsistent statements of Mason and Sims. The court sentenced defendant to 45 years in prison.

¶ 21 On appeal, defendant assigns error to the introduction at trial of the grand jury testimony of Mason and Sims. Defendant concedes that all of the prior statements of Mason and Sims were inconsistent with the witnesses' trial testimony and met the criteria of section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2008)). However, defendant asserts that the grand jury testimony of Mason and Sims was inadmissible under the common law prohibition against prior consistent statements, where the grand jury statement of each witness was consistent with his or her written statement to police and an assistant State's Attorney. Acknowledging this issue was not properly preserved, defendant requests that we review the issue for plain error.

¶ 22 The plain error doctrine permits a reviewing court to consider a trial error which was not properly preserved when (1) the evidence in a criminal case is closely balanced, or (2) the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial. *People v. Byron*, 164 Ill. 2d 279, 293 (1995). The first step of plain-error review is to determine whether any

plain error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). There can be no plain error where there is no error. *People v. Willhite*, 399 Ill. App. 3d 1191, 1197 (2010).

¶ 23 Evidentiary rulings are generally within the sound discretion of the trial court and will not be reversed unless the trial court abused that discretion. *People v. Johnson*, 385 Ill. App. 3d 585, 596 (2008). "An abuse of discretion occurs 'only where the ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Walker*, 392 Ill. App. 3d 277, 291 (2009), quoting *People v. Purcell*, 364 Ill. App. 3d 283, 293 (2006).

¶ 24 Consistent statements made prior to trial are inadmissible for the purpose of corroborating trial testimony or rehabilitating a witness. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). The purpose of the rule is that prior consistent statements unfairly enhance the credibility of the witness because a jury is more apt to believe something that is repeated. *People v. Maldonado*, 398 Ill. App. 3d 401, 422 (2010) (*rev'd and remanded on other grounds*). In the case of prior inconsistent statements, however, such evidence is properly admitted if it meets the criteria in section 115-10.1 of the Code, which provides in pertinent part:

> "§ 115-10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement –

> (1) was made under oath at a trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness, or
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or
>
> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording."

¶ 25 The parties on appeal agree that the prior written statements of both Mason and Sims were admissible as substantive evidence. Those statements were inconsistent with the trial testimony of the witnesses, who were subject to cross-examination at trial concerning their statements; the statements described events about which each witness had personal knowledge; and the State proved the witnesses signed the statements. The witnesses' grand jury statements were also admissible, as they were inconsistent with their trial testimony and the witnesses were subject to cross-examination at trial concerning their grand jury testimony, which in each case was shown to have been made under oath. Defendant does not dispute that the grand jury statements of the witnesses qualified as statements inconsistent with their trial testimony and were admissible under section 115-10.1.

¶ 26 Defendant asserts, however, that our analysis should not end there. He contends that, while both the written and grand jury statement of each witness qualified for admission under section 115-10.1, admission of the grand jury statements was error because those statements were consistent with the witnesses' prior written statements, creating the bolstering effect prohibited by the rule against the introduction of prior consistent statements. Defendant asserts that rule "forbids repetitive consistent statements of any form." But, defendant has failed to cite authority to support his position. The authorities he does cite relate only to prior statements that were consistent with, and erroneously corroborated, trial testimony. A contention that is supported by some argument but does not cite any authority does not satisfy the requirements of Supreme Court Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000).

¶ 27 Moreover, defendant concedes that this court has considered and rejected the identical claim in *People v. Johnson*, 385 Ill. App. 3d 585 (2008). There, we held that the introduction of prior statements that are inconsistent with a witness's trial testimony, whether or not the prior statements are consistent with each other, is proper. Accord, *People v. Harvey*, 366 Ill. App. 3d 910, 923 (2006); *Maldonado*, 398 Ill. App. 3d at 423; *People v. Santiago*, 409 Ill. App. 3d 927, 932-33 (2011).

¶ 28 Defendant asserts, however, that we should not follow the holding in *Johnson* because that opinion did not acknowledge or explain the "illogical distinction" that "the reliability of one form of substantive evidence – an out-of-court statement – may be bolstered without limit, while another form of evidence – trial testimony – cannot be bolstered by evidence that such witness said the same thing previously." Defendant contends that the logic of *Johnson* is flawed because a witness's prior inconsistent statement admitted as substantive evidence "has the same evidentiary value as if it constituted the witness's actual trial testimony." But that is exactly the purpose of section 115-10.1,

which the General Assembly enacted to permit the introduction as substantive evidence of prior *inconsistent* statements.

¶ 29 Defendant contends that section 115-10.1 does not purport to alter the common law rule against prior consistent statements. Indeed, section 115-10.1 has no connection with that common law rule, which applies only where the prior statement is consistent with the witness's trial testimony and is designed to avoid unfair enhancement of that trial testimony. *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000). Defendant "is confusing apples with oranges, or more specifically, *inconsistent* statements with *consistent* ones." *Johnson*, 385 Ill. App. 3d at 608. "Consistency is measured against a witness's trial testimony: inconsistent statements are inconsistent with trial testimony; consistent statements are consistent with it." *Johnson*, 385 Ill. App. 3d at 608. Because inconsistent statements cannot bolster a witness's trial testimony, the application of the rule against prior consistent statements makes no sense. *Johnson*, 385 Ill. App. 3d at 608.

¶ 30 Defendant also argues that the repetition of testimony through the multiple prior statements of Mason and Sims presents the danger that a jury will be over-persuaded as to their truth simply because the content has been repeated so often. In support of that proposition, defendant cites *People v. Fields*, 285 Ill. App. 3d 1020 (1996). There, one State witness gave three prior statements (one oral and one written statement at the police station and one before the grand jury) inconsistent with his trial testimony, and another State witness gave two prior inconsistent statements (one at the police station and one before the grand jury). While we noted in that case that the prior statements were unnecessarily repetitive and that needless repetition should be avoided, we concluded that all of the prior statements were sufficiently inconsistent with the witnesses' trial testimony so that the trial court did not abuse its discretion in admitting them in evidence, and that defendant was not prejudiced by the repetitive testimony. *Id*. at 1027-28. The same conclusion, that admission of all of the prior inconsistent statements was not an abuse of discretion, obtains in the present case.

¶ 31 We conclude that no error occurred when the court admitted the witnesses' prior inconsistent statements and grand jury testimony as substantive evidence. Because there was no error, there was no plain error, therefore, we will not ignore the defendant's forfeiture of this issue. See *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Accordingly, we affirm the judgment of the trial court.

¶ 32 Affirmed.