FIRST DIVISION
May 7, 2012

No. 1-10-0173

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. 07 CR 11150
	)	
DOWAUN ANDREW,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant forfeited his claims of being denied a fair trial based on the State's improper elicitation of hearsay testimony from police, and the trial court's failure to provide a limiting instruction concerning the use of that testimony; claim of ineffective assistance of trial counsel rejected; judgment on convictions of first degree murder and aggravated discharge of a firearm affirmed.

¶ 2 Following a jury trial, defendant Dowaun Andrew was convicted of first degree murder and aggravated discharge of a firearm, then sentenced to consecutive, respective terms of 60 and 10 years' imprisonment. On appeal, defendant contends that he was denied a fair trial when the State elicited hearsay testimony concerning his identification as the offender.

¶ 3 At trial, Sharonda Jackson acknowledged that she had two prior 1997 convictions for possession of a controlled substance with intent to deliver. She testified that in July 2006, she resided in the corner lot house at 256 West 112th Street in Chicago with Yolanda Brooks and Brooks' children, Andre, Velma, Douglas, Deshawn, Raymond, Sharonda and Deonte Lucas. At 8 p.m. on July 27, 2006, Jackson was at home when Deshawn went to the nearby Walgreen's store at 111th Street and Michigan Avenue to pick up some medicine for Brooks. While Deshawn was at Walgreen's, he called home and said that some people were trying to "jump" him. Jackson went to Walgreen's with Velma, Andre and Velma's boyfriend, Dupry Steel. When they arrived there, she observed a crowd of people fighting, and her family joined in the fighting against 10 other people.

¶ 4 Jackson and her family then ran home, and when they arrived there, Dupry and Andre stood on the corner by the house, and Jackson stood in the doorway. While there, a man, later identified as Dujuan Trotter, walked up to them and asked if they had seen his brother, Darius. He then yelled, "bust," to another person who fatally shot Andre. Jackson identified defendant in court as the person who shot Andre.

¶ 5 On April 26, 2007, Jackson went to the police station where she identified defendant as the shooter in a lineup. Jackson testified that she had never seen defendant prior to the night in question, and provided police with a written statement in which she indicated that she did not get a look at the face of the guy who came up to Andre and talked to him. Jackson also testified that she did see the face of the guy who shot him, but did not recall telling police otherwise, and when shown her statement, she noted that it indicated that she did not get a good look at the shooter's face.

¶ 6 Velma Lucas testified that after the incident at Walgreen's, she went home with her siblings and cousin Jackson, and while she was on the porch, Trotter rode up on a bike and asked

her brother Andre and her boyfriend Dupry Steel if they had seen his brother. Velma recalled that he either identified his brother as "D dub" or "B dub," then said to two other guys who rode up on their bikes, "bust they ass," which meant to shoot. When one of the two guys began firing a gun at her brother Andre, Velma ran into the house, but looked through a window and observed the shooter, who fired his gun six times. Velma indicated that she had never seen defendant before the night in question, and identified him in court as the shooter. Velma further testified that when she met with police on September 12, 2006, she identified defendant as the shooter from a photo array, and again in a lineup on April 25, 2007.

¶ 7 Dupry Steel testified that he has a prior 2004 conviction for possession of a controlled substance with intent to deliver. Steel testified that after the incident at Walgreen's, he returned to the Lucas' home at 256 West 112th Street. He and Andre then stood outside the home on the street corner where there was a street light. While they stood there talking, Trotter rode up to them on his bike and asked them if they had seen his brother. They did not know this person and as they began to back away from Trotter, more guys started approaching them. Trotter then yelled, "bust," and another person, who Steel identified in court as defendant, fired his gun five times at them, fatally hitting Andre in the chest. Steel further testified that on September 12, 2006, he identified defendant as the shooter in a photo array, and on April 25, 2007, he identified defendant as the shooter in a lineup.

¶ 8 Chicago Police Officer Cedric Parks testified that he was assigned to investigate the homicide on the evening of July 27, 2006. When he arrived on the scene that night, he spoke to several investigators who had arrived there before him, and "a nickname was given to [him]. And it was D dub."

¶ 9 When Officer Parks was asked if he had information about who the shooter was in this case after Velma and Steel had identified Trotter, he stated, "[y]es. We had a nickname of D

dub." He then stated that he was given a description of the shooter as medium complected, 5'9" tall, and weighing 160 pounds.

¶ 10 Chicago Police Officer Oscar Arteaga testified that in September 2006 he was assigned to investigate the homicide of Andre Lucas. When he received the assignment, he had the nickname "D dub" as a possible shooter or offender in the case. His investigation led to an individual named Cedric Hammond, who informed him on September 12, 2006, that defendant was D-dub. Hammond, however, was not a witness to the murder. Officer Arteaga also interviewed eyewitnesses Steel and Deshawn, and based on those interviews, he put together a photo array with six photographs, including one of defendant. He showed that photo array to Velma and Steel, and they each identified defendant as the shooter from the photo array. At the close of evidence, the jury found defendant guilty of first degree murder and aggravated discharge of a firearm.

¶ 11 On appeal, defendant contends that he was denied a fair trial when the State improperly elicited hearsay testimony concerning his identification. He specifically maintains that the State elicited hearsay testimony from police that an unknown person stated that the nickname of the suspect was D-dub and that Hammond stated that defendant's nickname was D-dub. Defendant acknowledges that he did not preserve this issue for review by raising it before the trial court, but maintains that we may review it as plain error.

¶ 12 In order to preserve an issue for review, defendant must object at trial and raise the matter in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Reed*, 177 Ill. 2d 389, 393 (1997). Here, defendant did neither, and thus clearly failed to properly preserve the issue for appellate review. *People v. Bui*, 381 Ill. App. 3d 397, 426 (2008). As a consequence, we may review this claim of error only if defendant has established plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). To do so, defendant must first show that an error

occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 13 Defendant maintains that the State improperly elicited hearsay testimony from the officers regarding statements from an unknown person that the suspect's nickname was D-dub and from Hammond that defendant was D-dub. The State responds that this testimony was used to show police procedure, not to prove defendant's guilt, and, therefore, was properly presented.

¶ 14 We observe that an out-of-court statement is only hearsay if it is offered to prove the truth of the matter asserted. *People v. Pulliam*, 176 Ill. 2d 261, 273 (1997). Thus, police may testify about statements made by others, when such testimony is not offered to prove the truth of the matter asserted, but is instead used to show the investigative steps taken by the police leading to defendant's arrest. *Pulliam*, 176 Ill. 2d at 274. Defendant counters that the hearsay testimony identifying him as having the suspect's nickname bolstered the weak and unreliable identifications of him and cannot be explained away as police procedure. In making this argument, defendant relies on *People v. Escobar*, 77 Ill. App. 3d 169 (1979), *People v. Rivera*, 277 Ill. App. 3d 811 (1996), and *People v. Jura*, 352 Ill. App. 3d 1080 (2004), cases we find readily distinguishable from the one at bar.

¶ 15 In *Escobar*, only one of five occurrence witnesses was able to identify defendant in a lineup. *Escobar*, 77 Ill. App. 3d at 173, 176. That witness, Joseph Bradtke, identified defendant as the driver of a car that carried a gunman who fatally shot the victim. *Escobar*, 77 Ill. App. 3d at 172-73. Bradtke testified in court that he recognized defendant as an old acquaintance from high school whom he knew by the nickname "New York," that the letters "N.Y." were on the license plate of the car used during the shooting, and, over defense counsel's objection, that "everybody" present at the scene of the shooting "knew the defendant as New York." *Escobar*, 77 Ill. App. 3d at 172-73. On appeal, defendant argued that Bradtke's testimony that everybody knew defendant as New York, which presumably meant that his friends had been able to identify

defendant, was improper hearsay. *Escobar*, 77 Ill. App. 3d at 176. This court agreed that the testimony in question was hearsay, finding that the jury may have believed that the other witnesses kept quiet out of fear as the State had hinted in its closing, and that it must assume that the statement was prejudicial to defendant. *Escobar*, 77 Ill. App. 3d at 176-77. *Escobar* is thus clearly inapplicable to this case as the officers did not testify to what any occurrence witnesses believed, and three occurrence witnesses identified defendant as the shooter.

¶ 16 In *Rivera*, a detective testified that when defendant and two other men stepped out of a police car, people identified them as the offenders by saying, "yeh, that's them." *Rivera*, 277 Ill. App. 3d at 817. Although the jury was instructed to disregard that answer, the State immediately referred to it in its next question, and reminded the jury of it during its closing argument. *Rivera*, 277 Ill. App. 3d at 817-18. *Rivera* is thus clearly distinguishable from the case at bar where the hearsay testimony did not specifically indicate that defendant was the offender, but, rather, that his nickname was tied to the suspect. Moreover, the State did not repeatedly reference the testimony, did not refer to it in its opening or closing statements, and only referenced it in rebuttal argument in response to defendant's use of it in his closing argument.

¶ 17 Defendant specifically argued in his closing that police did not do anything to determine who D-dub was, and just found that he was D-dub based on Cedric Hammond's statement. Counsel also argued that "[w]e don't know if Cedric has a beef with [defendant]. We don't know the situation because guess what, Cedric doesn't take the stand. He doesn't tell us why he's saying it's [defendant]. He's the only link to D-dub between [defendant]." The State, in response to the comments made by defense counsel (*People v. Campbell*, 332 Ill. App. 3d 721, 727 (2002)), stated that Hammond was not an eyewitness, that he only told police defendant's nickname, and that defendant was charged based on his identification by three witnesses. Under these circumstances, there was no error.

¶ 18 In *Jura*, the hearsay statements elicited by the State included testimony by three police officers that they received a radio dispatch of a man with a gun, described as a white male with a teardrop tattoo on his face, and that defendant matched that description. *Jura*, 352 Ill. App. 3d at 1083-84. This court, in finding that the testimony did not meet the exception for the hearsay rule for investigatory procedure, emphasized that it could have accepted the State's argument that it used the hearsay merely to explain the investigation undertaken by police had it not repeatedly elicited the testimony from not one, but three witnesses, relied on it in opening statement, relied upon it in closing argument and repeated it after the court had sustained an objection on it. *Jura*, 352 Ill. App. 3d at 1088-89. In this case, the State did not repeatedly elicit the disputed hearsay regarding his name or identity, or use it in its opening or initial closing argument. *People v. Rush*, 401 Ill. App. 3d 1, 16 (2010). Instead, the State introduced it to explain to the jury the steps police took in the investigation of the crime, and how defendant came to be identified, arrested and charged with the crime several months after it occurred. *Rush*, 401 Ill. App. 3d at 15; *People v. Gully*, 151 Ill. App. 3d 795, 799 (1986). As there was no error, we honor defendant's forfeiture of this issue.

¶ 19 Moreover, even if this was determined to be error, it is not plain error as the evidence was not closely balanced. The evidence of defendant's guilt was overwhelming where three witnesses, Jackson, Velma, and Steel, identified him as the offender after observing him shoot the victim who was standing by a streetlight. The fact that two of the eyewitnesses, Jackson and Steel, had prior convictions does not render the evidence closely balanced (*People v. Edwards*, 343 Ill. App. 3d 1168, 1180-81 (2003)), especially where Jackson's prior convictions were more than a decade ago. Moreover, the improper admission of hearsay evidence has been deemed harmless if there is no reasonable probability that the verdict would have been different had the hearsay been excluded. *Rush*, 401 Ill. App. 3d at 16-17; *Gully*, 151 Ill. App. 3d at 799. Here,

any error in the admission of the alleged hearsay was harmless where three separate witnesses, who had no motive to lie, identified him as the offender in a lineup and in court (*People v. Martin*, 408 Ill. App. 3d 44, 52 (2011)); and, contrary to defendant's contention, the witnesses' failure to initially give a description of the shooter to police does not render their identification unreliable (*People v. Coli*, 2 Ill. 2d 186, 188-89 (1954)). To the extent defendant complains that the State's comments in its closing argument compounded any error, we observe, as noted previously, that defendant cannot complain of such as he invited the comments by the State in its rebuttal by raising the hearsay statements in his closing argument. *Campbell*, 332 Ill. App. 3d at 727.

¶ 20 Defendant also maintains that any error was compounded by the trial court not providing a specific limiting instruction to the jury as to the purpose of the testimony at issue. We observe, however, that defendant did not request such an instruction, and therefore, waived this matter. *Rush*, 401 Ill. App. 3d at 16.

¶ 21 In an attempt to overcome this waiver, defendant maintains that his trial counsel was ineffective for failing to request a limiting instruction on the State's use of the hearsay testimony. Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness and but for that deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, defendant cannot show that the result of the proceeding would have been different had counsel requested a limiting instruction on the hearsay or objected to the testimony as the evidence against him was overwhelming. *Pulliam*, 176 Ill. 2d at 278. Accordingly, his claim of ineffective assistance of counsel fails.

¶ 22 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.