

SIXTH DIVISION

August 23, 2013

No. 1-10-0905

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.)	08 CR 4110
)	
CHARLIE MCDONALD,)	Honorable
)	Lawrence Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

ORDER

HELD: The evidence was sufficient to prove defendant guilty of first-degree murder beyond a reasonable doubt. There was no violation of defendant's due process rights under article 1, section 2, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. 1, § 2). The 25-to-life firearm sentencing enhancement provision found in section 5-8-1(a)(d)(iii) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(a)(d)(iii) (West 2010)), does not violate the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 11).

¶ 1 Following a jury trial, defendant Charlie McDonald was convicted of first-degree murder in the shooting death of Isaac Pink. Defendant was sentenced to 50 years' imprisonment, which sentence included a 25-year enhancement for personally discharging a firearm. Defendant raises a number of issues on appeal, none of which warrant reversal of his conviction or sentence.

¶ 2 At trial, the State presented the testimony of four eyewitnesses to the shooting -- Jason Robinson, Kendall Vinson, Travis Gordon, and a friend of defendant's, Jamale Tyus. The following evidence was adduced.

¶ 3 On November 19, 2007, at approximately 4:30 in the afternoon, Jason Robinson left his home to visit his friend Isaac Pink. On his way to Pink's house, Robinson met friends Paris and Leon. After Pink joined the group, they all walked toward a store to purchase a pack of blank compact disks (CDs). On the way to the store, the group ran into Travis Gordon and Kendall Vinson. As the group walked down the street, Robinson saw a group of three men approaching. He recognized one of the men as defendant and another man described as a "light-skinned guy," he recognized from school. Two weeks earlier, Robinson had been in an altercation with defendant.

¶ 4 As the two groups approached each other, Robinson saw one of the men in defendant's group pass him an object. When defendant came up to Robinson, he pulled a gun out of his pocket, pointed it at Robinson's stomach and announced it was a "stickup," and to "give me what you got." Robinson immediately put his hands above his head. Defendant pointed to Robinson's head and said, "you think I'm playing?" Robinson remained still and did not say anything. His friends were all standing on his right side.

¶ 5 Defendant turned to Isaac Pink and pistol-whipped him across the face. Pink responded by

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hitting defendant in the face with his fist. Defendant stumbled backwards, caught his balance, and shot Pink in the chest. Robinson testified he was standing about five inches from Pink when he was shot. Robinson ran toward his house and noticed the light-skinned guy was chasing him. Robinson made it home and telephoned Pink's house. No one answered.

¶ 6 Robinson went to Pink's house and saw people standing around, including Pink's mother and brother who were crying. Robinson spoke with police at the scene and informed them he had witnessed the shooting. Later that day, Robinson traveled to the police station where he identified defendant from a photo array as the shooter.

¶ 7 Kendall Vinson testified that on November 19, 2007, at approximately 4:30 in the afternoon, he and Travis Gordon left his home to go to Gordon's house located about six blocks away. On the way, they ran into Jason Robinson, Isaac Pink, and two other men Vinson did not know. The group began walking toward a library when Vinson saw a group of three men approaching from about three houses away. Defendant was in the group of three men. Vinson recognized defendant from the neighborhood. Vinson observed one of the men pass defendant an object and then saw defendant put the object in his pocket.

¶ 8 Defendant walked up to Vinson and his group and confronted Jason Robinson. Defendant said, "you know what this is," pulled a gun from his pocket and pointed it at Robinson's lower body. Defendant was approximately two feet from Robinson. Robinson responded that he did not have anything and put his arms in the air. Vinson believed defendant was trying to rob Robinson.

¶ 9 After Robinson put his arms up, defendant turned to Isaac Pink and repeated "you know what this is." Defendant hit Pink in his face with the gun. Vinson testified he did not actually see

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defendant strike Pink, but heard a smacking noise. Pink then punched defendant in his face. Defendant staggered backward, but did not fall or drop the gun. Defendant regained his balance and shot Pink. Vinson heard one gun shot and saw Pink fall to the ground.

¶ 10 Vincent ran to Travis Gordon's house and met him there. He remained at Gordon's house until approximately 7:00 or 8:00 that evening. The next day, Vincent and his mother went to the police station where he spoke with detectives and identified defendant as the shooter.

¶ 11 Travis Gordon testified that when defendant confronted Robinson with the gun, he ordered him to empty his pockets. Robinson raised his arms. Gordon testified that someone in his group made a remark which defendant believed came from Isaac Pink. Defendant hit Pink in his face with the gun after Pink tried to persuade him to put the gun down. Pink responded by punching defendant in his face. Defendant then shot Pink.

¶ 12 Gordon ran to his house where he met Vinson. Later that night, police came to the house and transported Gordon to the police station. He identified defendant from a photo array as the shooter.

¶ 13 Jamale Tyus testified that on November 19, 2007, at approximately 4:30 in the afternoon, he had just left the public library and was walking home when he ran into defendant. Tyus and defendant were friends and had known each other since grammar school. Defendant told Tyus "check it out," and then took a gun out of his pocket and showed it to Tyus. Tyus testified he took the gun and put it in his pocket.

¶ 14 As Tyus and defendant were walking down the street, Tyus observed a group of men approaching. Defendant told Tyus, "let me get that." Tyus returned the gun to defendant, who put it in his pocket. As the group of men approached, Tyus recognized Jason Robinson, Travis Gordon,

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and Paris. He did not recognize the other three men in the group.

¶ 15 Tyus shook hands with Paris. Defendant confronted Robinson and announced, "this is a stickup." Robinson put his arms in the air. Tyus testified he was unaware defendant was planning on robbing or shooting anyone. After Robinson put his arms up, defendant moved to Isaac Pink, who also put his arms up. Defendant pointed the gun at Pink's head and hit him in the face with the gun. Pink stumbled backwards and tried to grab defendant's arm holding the gun, but defendant blocked him. Defendant then shot Pink.

¶ 16 Tyus ran back towards the library and into a nearby park, where he saw defendant running across the park. Tyus continued running until he reached his house. He did not see or speak to defendant after the shooting. Tyus claimed he did not immediately tell police about the shooting because he was scared of defendant.

¶ 17 Defendant testified on his own behalf. He testified he had just left the public library when he ran into Tyus and a another man called "Bobo." Contrary to Tyus' testimony, defendant claimed the gun he was carrying belonged to Tyus and he did not know Tyus had the firearm when they met outside the library.

¶ 18 Defendant testified that at his suggestion, he, Tyus, and Bobo, agreed to walk to a neighborhood "corner store" to get something to eat, when he saw a group of men approaching. He recognized Jason Robinson, Travis Gordon, Kendall Vinson, Isaac Pink, and Paris. Defendant testified he said, "there goes Jason," whereupon Tyus handed him the gun, even though he did not ask for the firearm. Defendant put the gun in his pocket.

¶ 19 Defendant testified that once he met up with Robinson and his group, he confronted

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Robinson and pointed the gun at Robinson's stomach. Defendant claimed he asked Robinson "what he had in his pockets" because his hands were in his pockets. Defendant stated that Robinson took his hands out of his pockets and put them to his sides. According to defendant, Robinson never put his arms in the air. Defendant further testified he never asked Robinson, or anyone else in his group, for money or anything of value. Defendant testified he told Robinson he was confronting him about alleged threats Robinson had made following their fight several weeks earlier.

¶ 20 Defendant testified that as he was talking to Robinson, Isaac Pink came between them in an effort to break up the confrontation. Defendant attempted to backhand Pink with his gun, but Pink blocked him and then punched him in the face. Defendant stumbled back and Pink grabbed him and tried to twist him to the ground. Defendant maintained the gun accidentally discharged as he was struggling with Pink, trying to regain his balance. Defendant testified that during the struggle, he was holding the gun in his right hand and both of Pinks' hands were on him.

¶ 21 According to defendant, neither his nor Pink's fingers were on the trigger when the gun discharged. He maintained the gun (a revolver) malfunctioned and went off. After the gun discharged, Pink stumbled back and fell. Defendant ran from the scene and discarded the gun in a park. Defendant testified he did not immediately turn himself into the police because he was scared. Approximately two months after the shooting, defendant turned himself into the police. He was accompanied by his mother and his attorney.

¶ 22 The jury found defendant guilty of first-degree murder and also determined he personally discharged a firearm proximately causing the death of another person. Defendant was sentenced to 50 years' imprisonment, which sentence included a 25-year enhancement for personally discharging

a firearm. Defendant now appeals. For the reasons that follow, we affirm.

¶ 23

ANALYSIS

¶ 24 Defendant first contends the evidence was insufficient to prove him guilty of first-degree murder beyond a reasonable doubt. A criminal conviction will not be set aside on grounds of insufficient evidence unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). When reviewing the sufficiency of the evidence in a criminal case, we must determine "whether, after viewing 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. Cooper*, 194 Ill.2d 419, 430-31 (2000). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, it is for the trier of fact to determine the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 25 Defendant contends his first-degree murder conviction should be reduced to involuntary manslaughter on the ground that the evidence supports his version of events that the shooting was accidental. A defendant is guilty of first-degree murder if he performs an act which causes the death of another without lawful justification, and either intends to kill or do great bodily harm to the victim or knows that his acts create a strong probability of death or great bodily harm to the victim. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2004); *People v. Leach*, 405 Ill. App. 3d 297, 311 (2010). On the other hand, a defendant commits involuntary manslaughter if he unintentionally kills another without lawful justification by recklessly performing an act that is likely to cause death or great bodily harm

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to the victim. 720 ILCS 5/9-3 (West 2006).

¶ 26 The primary difference between these two offenses is the mental state accompanying the conduct resulting in the victim's death. *People v. Jones*, 404 Ill. App. 3d 734, 742 (2010). First-degree murder requires that the defendant act knowingly, while involuntary manslaughter requires only that the defendant acted recklessly. *People v. Givens*, 364 Ill. App. 3d 37, 44 (2005).

¶ 27 A defendant acts knowingly when he is aware his conduct is practically certain to cause a particular result. 720 ILCS 5/4-5(b) (West 2006); *Leach*, 405 Ill. App. 3d at 312. A defendant acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow * * * and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2006). Whether a defendant acted knowingly or recklessly may be inferred from circumstantial evidence, and "inferences as to [a] defendant's mental state are a matter particularly within the province of the jury." *People v. Lemke*, 384 Ill. App. 3d 437, 445-46 (2008) (quoting *People v. DiVincenzo*, 183 Ill. 2d 239, 252-53 (1998)).

¶ 28 As mentioned, defendant maintains his first-degree murder conviction should be reduced to involuntary manslaughter on the ground that the evidence supported his version of events that the shooting was accidental. In support of this argument, defendant points to the testimony of Dr. James Filkins, a deputy medical examiner, who conducted an autopsy on the victim's body.

¶ 29 Dr. Filkins opined the victim died from a gunshot to the chest and that the manner of death was homicide. The doctor testified the gunshot wound was a contact range wound, indicating the muzzle of the gun was touching the victim's body when the gun was fired.

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¶ 30 Defendant argues the medical examiner's testimony that the victim suffered a contact range gunshot wound is consistent with a struggle for the firearm. He claims that the medical examiner's testimony contradicts the State witnesses' versions of the shooting, and instead supports his version of events that the gun accidentally discharged as he and Isaac Pink struggled for control of the firearm. Defendant's argument is essentially no more than a credibility challenge to the testimony and evidence presented at trial.

¶ 31 Defendant and the witnesses for the State presented the jury with two conflicting versions of how the shooting occurred. The jury found the State witnesses' versions more credible. When a verdict is challenged for insufficiency of the evidence, it is not our function to reweigh the evidence or pass on the credibility of the witnesses. *People v. Sykes*, 341 Ill. App. 3d 950, 982 (2003). If the evidence, when considered in a light most favorable to the State, supports the verdict, it will not be disturbed on appeal unless the evidence is so " 'unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt.' " *Jackson*, 232 Ill. 2d at 281 (quoting *People v. Campbell*, 146 Ill. 2d 363, 375 (1992)).

¶ 32 Here, it is possible that after Isaac Pink punched defendant in his face causing him to stumble back, defendant regained his balance and was close enough to Pink when he shot him to cause the contact gunshot wound described by Dr. Filkins. In any event, it was for the jury to determine whether defendant's version of the shooting was believable or not.

¶ 33 Viewing the evidence in a light most favorable to the State, we find a rational trier of fact could find beyond a reasonable doubt that defendant either intended to kill or do great bodily harm to Isaac Pink, or that his acts created a strong probability of death or great bodily harm to Pink. In

sum, the evidence was not so unreasonable, improbable, or unsatisfactory that it raised a reasonable doubt of defendant's guilt.

¶ 34 Defendant next contends his due process rights under article 1, section 2, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. 1, § 2)¹ were violated when the trial court admitted evidence of an alleged crime, namely his attempted armed robbery of Jason Robinson, for which charges had been *nolle prosequied* or dismissed by the State prior to jury selection. Defendant argues that since the attempt armed robbery charge was *nolle prosequied* prior to jury selection, evidence relating to the charge should not have been admitted because it allowed the jury to conclude that he intended to kill Isaac Pink on the basis of inferences drawn from this evidence.

¶ 35 Defendant admits he failed to properly preserve the issue for appeal, but urges us to review it under the plain-error doctrine. Alternatively, he maintains his trial counsel rendered ineffective assistance by failing to object to the admission of the disputed evidence.

¶ 36 We find the trial court did not err in admitting the disputed evidence and therefore no plain error occurred. In addition, because we conclude there was no error in admitting the disputed evidence, defendant's assertions of ineffective assistance of counsel on this basis must also fail since he cannot show that counsel's alleged error affected the outcome of the case. In order for a defendant to prove ineffective assistance of counsel, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional

¹ Section 2 of article 1 of the 1970 Illinois Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Ill. Const. 1970, art. 1, § 2.

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norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001).

¶ 37 The admission of other crimes evidence is within the sound discretion of the trial court, whose ruling will not be disturbed absent an abuse of that discretion. *People v. Robinson*, 167 Ill. 2d 53, 62 (1995). An abuse of discretion occurs only when the ruling is arbitrary, fanciful, or unreasonable. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 38 Evidence of crimes other than those charged is generally inadmissible if the evidence is relevant merely to establish a defendant's propensity to commit crime. *Robinson*, 167 Ill. 2d at 62. This general rule is premised on the belief that such evidence may overpersuade a jury to convict a defendant solely because it believes he is a bad person deserving of punishment. *Id.* However, the rule has various exceptions. See *People v. Kimbrough*, 138 Ill. App. 3d 481, 484-86 (1985); *People v. Moser*, 356 Ill. App. 3d 900, 913 (2005).

¶ 39 One such exception is the "continuing-narrative" exception. Our courts have determined that "[w]hen facts concerning uncharged criminal conduct are all part of a continuing narrative which concerns the circumstances attending the entire transaction, they do not concern separate, distinct, and unconnected crimes." *People v. Collette*, 217 Ill. App. 3d 465, 472 (1991). Under this exception, evidence of another crime is admissible "if it is part of a continuing narrative of the event giving rise to the offense or, in other words, intertwined with the offense charged." *People v. Thompson*, 359 Ill. App. 3d 947, 951 (2005).

¶ 40 In this case, evidence concerning defendant's alleged attempted robbery of Jason Robinson

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was admissible as part of the continuing narrative of events that led to the charged offense since it explained how the altercation between Isaac Pink and defendant arose. The disputed evidence was relevant for a purpose other than to show defendant's propensity to commit crime and its admission did not violate his due process rights under article 1, section 2, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. 1, § 2). Accordingly, defendant's related claims of ineffective assistance of counsel must also fail.

¶ 41 Finally, defendant takes issue with the enhanced portion of his sentence. The trial court sentenced defendant to 25 years in prison for first-degree murder and added another 25 years to the sentence pursuant to section 5-8-1(a)(d)(iii) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(a)(d)(iii) (West 2010)), which provides in relevant part that 25 years of imprisonment be added to a sentence if, during the commission of the offense, defendant personally discharged a firearm that caused the death of another person. Defendant challenges the constitutionality of the 25-to-life firearm sentencing enhancement provision in section 5-8-1(a)(d)(iii) of the Code.

¶ 42 The question of whether a statute is constitutional is subject to *de novo* review. *People v. Graves*, 207 Ill. 2d 478, 482 (2003). Sentencing statutes, like all other statutes, are presumably constitutional (*People v. Carter*, 228 Ill. App. 3d 526, 532-33 (1992)) and the burden of rebutting that presumption rests on the party challenging the statute's validity. *People v. Greco*, 204 Ill. 2d 400, 406 (2003). "In construing a statute, this court has a duty to affirm the statute's validity and constitutionality if reasonably possible." *People v. Jeffries*, 164 Ill. 2d 104, 111 (1995).

¶ 43 Defendant argues that the 25-to-life firearm sentencing enhancement provision is unconstitutional because it violates the proportionate penalties clause of the Illinois Constitution, as

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well as the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. The proportionate penalties clause of the Illinois Constitution provides in part that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. 1, § 11. The eighth amendment to the United States Constitution provides that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

¶ 44 Our supreme court has recognized that our state constitution's proportionate penalties clause is coextensive with the eight amendment's cruel and unusual punishment clause. See *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006) (citing *People v. Sharpe*, 216 Ill. 2d 481, 517 (2005)). Both constitutional provisions incorporate the concept of "proportionality" in criminal sentencing. See *People v. Brown*, 2012 IL App (1st) 091940, ¶ 56 (citing *Graham v. Florida*, 560 U.S. 48, _____, 130 S. Ct. 2011, 2021 (2010)).

¶ 45 In evaluating an alleged proportionate penalties violation, we must determine whether the penalty at issue has been set by the legislature according to the seriousness of the offense. *People v. Harvey*, 366 Ill. App. 3d 119, 122-23 (2006); *People v. Cummings*, 375 Ill. App. 3d 513, 516 (2007). The legislature has the power to declare and define conduct constituting a crime and to determine the nature and extent of punishment for it. *People v. Powell*, 299 Ill. App. 3d 92, 96 (1998). Currently, there are two ways to determine whether a penalty violates the proportionate penalties clause: (1) whether the penalty is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community; and (2) whether offenses with identical elements are given different sentences. *Harvey*, 366 Ill. App. 3d at 123; *Cummings*, 375 Ill.

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App. 3d at 516.

¶ 46 Here, we are concerned with the first test, the disproportionate-penalty test. Defendant contends that the 25-to-life firearm sentencing enhancement provision violates the proportionate penalties clause because it allows for a harsher penalty than the underlying offense of first-degree murder itself. Defendant points out that the extended-term sentencing range for first-degree murder is 60 to 100 years in prison (730 ILCS 5/5-8-2(a)(1) (West 2004)), while the mandatory enhancement range for causing death with a firearm is 25 years to life in prison (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)), which exceeds the extended-term sentencing range for the underlying offense itself. Defendant maintains that imposing a harsher sentence on a defendant who used a firearm, rather than some other instrumentality of death, constitutes cruel and unusual punishment. We must disagree.

¶ 47 "The sentence enhancements were put into place because of the legislature's recognition of the significant danger posed when a firearm is involved in a felony." *People v. Sharpe*, 216 Ill. 2d 481, 524 (2005). Our supreme court in *Sharpe*, concluded that "it would not shock the conscience of the community to learn that the legislature has determined that an additional penalty ought to be imposed when murder is committed with a weapon that not only enhances the perpetrator's ability to kill the intended victim, but also increases the risk that grievous harm or death will be inflicted upon bystanders." *Sharpe*, 216 Ill. 2d at 525.

¶ 48 Our court has determined that the 25-to-life firearm sentencing enhancement provision found in section 5-8-1(a)(d)(iii) of the Code does not violate the proportionate penalties clause and is not so disproportionate to the offense of first-degree murder, by the personal discharge of a firearm causing injury or death, that it shocks the moral sense. See *People v. Sawczenko-Dub*, 345 Ill. App.

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3d 522, 531 (2003); *People v. Thompson*, 354 Ill. App. 3d 579, 592-94 (2004); *People v. Jones*, 357 Ill. App. 3d 684, 694-95 (2005). We see no reason to depart from these well-reasoned decisions. Defendant's enhanced sentence for first-degree murder, using a firearm in the commission of the murder, does not violate the proportionate penalties clause of the Illinois Constitution and it does not constitute cruel and unusual punishment under the state or federal constitutions.

¶ 49 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 50 Affirmed.