2013 IL App (2d) 110344-U
No. 2-11-0344
Order filed June 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of DuPage County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-3227
JERRY L. LOCKHART,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred by admitting evidence of a knife found in defendant's jacket because its prejudicial effect was outweighed by its probative value; however, the error was harmless due to the overwhelming evidence presented against defendant.

The trial court properly admitted a secretly-obtained sound recording of defendant and codefendant because it was relevant regarding the nature of their relationship, and whether they could have had a common criminal plan or purpose and the jury could have inferred that defendant did not want the codefendant to incriminate himself because he would have also incriminated defendant.

A sound recording of defendant and a codefendant was not created in violation of the Illinois Eavesdropping Statute (720 ILCS 5/14-2(a)(i), 14-5 (West 2008)), because defendant was aware that he was being recorded.

Defendant's conviction and sentence for armed robbery must be vacated where defendant was convicted of and sentenced for felony murder predicated on the armed robbery offense. Murder conviction affirmed; armed robbery conviction vacated.

¶ 2 In the direct appeal of his first-degree murder and armed robbery convictions, defendant, Jerry L. Lockhart, raises three issues. The first is whether the trial court erred by admitting evidence that a knife, which was not the murder weapon, was found in defendant's jacket pocket. The second issue is whether the trial court erred by admitting a secretly-obtained audio recording of a conversation between defendant and a codefendant. The third issue is whether the armed robbery conviction should vacated and merged with the murder conviction. We affirm the murder conviction and vacate the armed robbery conviction.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with two counts of armed robbery (720 ILCS 5/18-2(a)(1) (West 2012)) and six counts of first degree murder (720 ILCS 5/9-1(a)(1), 5/9-1(a)(2) (West 2012)), including felony murder (720 ILCS 5/9-1(a)(3) (West 2012)), based on the underlying felony of armed robbery.

¶ 5 Before the defendant's jury trial, the State filed a motion *in limine* seeking admission of a knife police found in a jacket during a consensual search of defendant's home. The trial court granted the State's motion over defendant's objection. The State also filed a motion *in limine* seeking the admission of a sound recording of a conversation between defendant and Dewaun Tate while they were in custody two days after the alleged occurrence. Defendant objected, arguing that the recording was irrelevant and prejudicial. The trial court granted the State's motion.

¶ 6 At the jury trial Seneca Berry testified as follows. In November 2008, Berry was 15 years old and lived in Hanover Park, next door to Dewaun Tate. On November 20, Tate came over to

Berry's house, said something about stealing and told Berry to meet him in defendant's garage. When Berry arrived at defendant's garage, Tate and defendant were already there. Defendant had a box cutter and Tate had a knife with a black handle. Defendant told Berry and Tate that the three of them were going to go to a nearby Dollar Store, where Berry and Tate would lure the cashier away from the cash register while defendant took the money. Defendant said they were not going to use the knife or the box cutter, but they were going to scare the cashier. Defendant also said that after the robbery they would meet up back at defendant's garage to "split up" the money.

¶ 7 Berry also testified as follows. As he walked to the Dollar Store with Tate and defendant, they saw a police car. Defendant told Berry and Tate to "keep going," and defendant "turned around and walked back toward the alley." Defendant told Berry and Tate that he was "going to wait in the garage for us." Berry and Tate continued walking and Tate said that he was going to distract the cashier while Berry took the money. Tate went into the store first and Berry followed. Berry saw a customer with a child and a cashier. Tate asked the cashier about some hooks and the customer pointed to an aisle. The customer paid for her items and left the store. The cashier went to the aisle where Tate was. The cashier said, " Oh, no, what are you doing? I'm calling the police." The cashier came up the aisle with Tate behind her. Tate made a stabbing motion at the cashier and the cashier screamed. The cashier "kept going toward the door, and she was like inside the store, but outside the door, and I seen [Tate] do another stabbing motion, and the lady went out the door." Tate opened the cash register and "we started grabbing money."

¶ 8 Berry continued to testify as follows. Berry and Tate returned to defendant's house where defendant was waiting for them in the kitchen. Berry and Tate took the money out of their pockets and placed it on the kitchen counter. Tate placed the knife on the counter and left the kitchen. The

knife had a black handle, three screws, and "ridges going through it." Defendant took some bills from a "wad" of money and gave Berry some. Berry started walking toward the front door and defendant told him, "Don't tell nobody, don't say nothing to nobody." Berry testified that if defendant found out that Berry said something to anybody, "[defendant] was going to blame it all on me." Berry used the money to buy marijuana. The next day, Berry was arrested and taken to the police station. Initially, he denied knowing anything about the incident. Later, Berry told the police that he had seen Tate with a lot of money, Tate had admitted to Berry of stabbing the cashier, and someone might mistake Berry for Tate from behind. The police told Berry that defendant told them a different story about where Berry was on the day of the incident. After further questioning, Berry told the police that he just happened to be walking toward the Dollar Store when the crime occurred. Then, Berry told the police that he went to the store with defendant, Tate and Quinton Kelly and that Berry and defendant were lookouts while Tate and Quinton went into the store. The police told Berry that Quinton could not have been there because he was in school that day. On cross-examination, Berry agreed with defense counsel that he was "a liar."

¶ 9 Berry testified that he entered into a plea agreement with the State in which the murder charge was dropped and in exchange he was convicted of armed robbery and sentenced to a 17-year prison term for his involvement in the incident. The agreement required Berry to testify truthfully against Tate and defendant. When Berry pled guilty, he made a proffer under oath, in which he stated that Tate's knife had only two "screws."

¶ 10 Monisa Syed testified as follows. On the day in question, Syed dropped her child off at day care at 1:00 p.m. and then went to the nearby Dollar Store. She had shopped there before and was familiar with the store. While Syed was checking out, she saw a man, whom she later identified as

Tate, ask the cashier for hooks. The cashier did not seem to understand Tate, so Syed directed him to the back of the store and then Syed exited the store. Syed's receipt was admitted into evidence. The time indicated on the receipt is 1:28 p.m.

¶ 11 Hanover Park police officer Jason Harden testified as follows. A few days after the murder,Syed viewed two physical lineups. She did not pick out anyone from the first lineup she was shown, which included Berry. A few hours later, Syed viewed the second lineup and identified Tate by sight and voice as the man she saw in the Dollar Store.

¶ 12 Hanover Park police officer Victor Di Vito testified as follows. At approximately 1:43 p.m. on the day of the incident, he received a dispatch that there was an unresponsive woman lying in the parking lot outside of the Dollar Store. When he arrived, the woman, later identified as the cashier at the Dollar Store, Vatsala Thakkar, was not breathing and "there was a heavy amount of blood around her." An ambulance took her to a nearby hospital where she was pronounced dead upon arrival.

¶ 13 Forensic pathologist Nancy Jones testified that the cause of the victim's death was multiple stab wounds. She could not say whether the stab wounds were caused by a serrated or flat blade.

¶ 14 Hanover Park police evidence technician, Henry Czepczynski, testified as follows. Czepczynski took photographs of the Dollar Store after the incident. The photos shows that in the north aisle there were some hooks on the wall. In that same aisle there were two drops of blood on the floor. There was also some blood at the back of the store. The parties stipulated that DNA testing revealed that the blood matched the victim's blood.

¶ 15 Hanover police officer Steven Stotz testified as follows. On November 21, 2008, Stotz conducted a consent search of defendant's home. Stotz found a knife in the pocket of a jacket that was hanging on a coat rack.

¶ 16 Hanover Park police detective William Weil testified as follows. On November 23, 2008, defendant and Tate were in custody in the Hanover Park police station. On that day, Weil put a hand-held digital recording device in a small gap between two jail cells. The device could not be seen from either cell. Defendant and Tate were placed in the two separate cells. The recording device was recording when defendant and Tate were in their cells and Weil listened through an intercom as they spoke. Two portions of the recording were played for the jury and the jury was given a transcript of the recording without objection from defense counsel.

¶ 17 The jury found defendant guilty of one count of first degree murder and one count of armed robbery. The trial court sentenced defendant to 30 years' imprisonment for the first degree murder conviction and 10 years for the armed robbery conviction, both sentences to be served concurrently. Defendant filed a motion to reconsider his sentence. The trial court denied defendant's motion to reconsider on April 4, 2011. Defendant filed his notice of appeal on April 18, 2011.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues that the trial court erred by admitting a knife that was found in defendant's jacket, but was not the murder weapon. Defendant argues that the knife was inadmissible because it was not relevant and its prejudicial effect outweighed any probative value. The State argues that the trial court properly exercised its discretion by admitting the knife because there was evidence connecting the knife to the murder.

¶ 20 A weapon is generally not relevant and, thus, is inadmissible if it is not connected to both the defendant and the crime. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 102. Generally, where direct evidence shows that the weapon was not used in the commission of the offense, it is not admissible. *People v. McQueen*, 115 Ill. App. 3d 833, 839 (1983). Admission of unconnected weapons is improper since they only serve to arouse the jury and prejudice the defendant's position. *People v. Evans*, 373 Ill. App. 3d 948, 960 (2007).

¶ 21 In this case, it is undisputed that the knife found in defendant's jacket in his home was not the murder weapon. The State acknowledged during the hearing on the motion in *limine* that the knife found in defendant's jacket was a flat blade knife, while Barry told the police that Tate had a serrated blade knife. However, the State argued, then and now, that the knife found in defendant's jacket was relevant because its handle was similar to the handle of the knife used to stab the victim and, thus, it could have been from a set of knives belonging to defendant.

¶ 22 Although both knives had black handles and silver rivets, no other similar knives were found in defendant's home or possession. Thus, the while the defendant's knife may have had some insignificant probative value, it was grossly outweighed by the almost certainly extreme prejudicial effect its admission had on the jury. However, even if the admission of the knife found in defendant's jacket was error, such error was harmless in light of the overwhelming evidence of defendant's guilt. See *id*. See also *People v. Alvarez*, 344 Ill. App. 3d 179, 192 (2003).

¶ 23 The jury heard Berry testify that defendant instructed Berry and Tate to rob the Dollar Store armed with a knife and that Berry saw Tate stab the store cashier during the commission of the offense. The jury also heard that Syed directed a man, whom she later identified as Tate, to the back of the store moments before the stabbing occurred. Further, the victim's blood was located in the

area where Syed directed Tate. In addition, Berry testified that the three men met back at defendant's house and shared in the proceeds of the offense. Therefore, the evidence overwhelmingly supported defendant's convictions of armed robbery based on accountability and felony murder. Accordingly, any error resulting from the admission of the knife found in defendant's jacket was harmless.

¶ 24 Next, defendant argues that the trial court erred by admitting a secretly-obtained sound recording of a conversation between defendant and codefendant Tate because it was irrelevant and unduly prejudicial.

¶ 25 The parties dispute the standard of review. The State contends that we should review the trial court's decision to admit the sound recording under an abuse of discretion standard. Defendant contends that we should review the trial court's decision to admit the sound recording *de novo* because "the court heard no live testimony before deciding it would admit the recording."

¶ 26 The law is well settled that a trial court's decision regarding the admission of a sound recording will not be disturbed absent an abuse of discretion. *People v. Hunt*, 234 Ill. 2d 49, 66 (2009). Defendant cites *People v. Munoz*, 348 Ill. App. 3d 423 (2004), to support his argument that we should review *de novo* the trial court's admission of the sound recording. In *Munoz*, the trial court based its ruling exclusively on the submission of documents and did not assess the credibility of any witnesses. *Id.* at 432-33.

¶ 27 In this case, the trial court heard the testimony of Weil regarding how and when the recordings were obtained and where defendant and Tate were located in their jail cells. Weil also testified that the recording device was working properly and that he was listening to the conversation in real time. Thus, unlike the court in *Munoz*, the trial court based its decision, in part, on its assessment of the credibility of a witness. Accordingly, *Munoz* is distinguishable from this case and

we will apply the conventional standard of abuse of discretion to review the trial court's decision to admit the sound recording.

¶ 28 In his brief, defendant cites the transcript from the first portion of the recording which reads as follows:

"[Defendant]: Who that?

[Dewaun] Tate: It's foe [sic] right here, dude.

[Defendant]: Foe [sic] who?

D. Tate: It's D.

[Defendant]: What up, man?

D. Tate: What up, cuz?

[Defendant]: Um, don't' talk to, um they listenin'.

D. Tate: Well, they already know, I already told 'em [indiscernable].

[Defendant]: Take care of your business, man. Do what you do.

D. Tate: God damn, man.

Defendant also cites the transcript from the second portion of the recording which reads as follows:

"D. Tate: [Indiscernible]. I'm just gonna tell you like this, I know they listenin', and I don't give a f**k. I'm [indiscernible] Santana's crib. [Indiscernible] I love.

[Defendant]: You what?

D. Tate: I'm clappin' for a crib.

[Defendant]: How you clappin' for a crib?

D. Tate: You [interrupted].

[Defendant]: I don't even want to talk like—don't talk to me like that.

D. Tate: Yeah.

[Defendant]: Don't talk to me like that. I don't even know what you mean.

D. Tate: Yeah.

[Defendant]: But a, cuz you know, its all a big ol' mix up. I, I I don't know.

[Pause]

[Defendant]: Only Santana going home?

D. Tate: Um, yeah.

[Defendant]: Huh?

D.Tate: Yeah.

[Defendant]: Okay

D. Tate: Think about it [interrupted].

[Defendant]: No, cuz they eh, I don't know, [indiscernible] they, I don't know. I'm through talking. They put us here for a reason.

D. Tate: Yeah.

[Defendant]: But, a, just don't incriminate yourself. I don't know nothin'. I just know I voluntarily down winding up here. Uh, they still investigating, uh, on a murder case? I mean come on, man, I wouldn't hurt a mother f***in'....

D.Tate: I just came back from the city and s**t.

[Defendant]: We need a just, I don't know, let's go, just, leave me, let me, let me get in my zone. Leave me be for a minute, man.

D. Tate: All-right [sic].

[Defendant]: Leave me be."

¶ 29 "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). "A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature." *Id*.

¶ 30 The facts at issue in this case were whether defendant instructed Berry and Tate, who were much younger than defendant, to commit an armed robbery at the Dollar Store and then meet back at his garage to share in the proceeds. The recording of defendant and Tate were relevant regarding whether defendant and Tate were familiar with each other, the nature of their relationship, whether Tate would follow instructions from defendant and whether they could have had a common criminal plan or purpose. Further, the jury could have inferred from the conversations that defendant did not want Tate to incriminate himself because Tate could have also incriminated defendant. Thus, the recording was relevant.

¶ 31 Defendant argues that, even if the recording was relevant, it was inadmissable because it was unduly prejudicial as it suggested an improper basis to find defendant guilty; *i.e.*, that defendant was not saying anything because he had something to hide. Defendant contends that the prosecutor added to the prejudicial nature of the recording when he stated during closing argument, "Why would an innocent man *** tell [Tate] don't talk, they're listening?" Defendant cites Illinois Pattern Jury Instruction, Criminal, No. 2.04 (4th ed. 2000), which provides, "[t]he fact that [(a) (the)] defendant[s] did not testify must not be considered by you in any way in arriving at your verdict." That prosecutor's comment addressed defendant's instruction to Tate not to speak, it had nothing to do with the fact that defendant did not testify at trial. Further, defendant did not remain silent

during the recording, rather he made an exculpatory statement saying that he "wouldn't hurt a mother F***in'..." In addition, defendant denied his involvement in the offense when he stated, "I don't know nothin" and repeatedly refused to adopt Tate's statements. Thus, the prejudicial effect of the recording did not outweigh its probative value. Accordingly, the trial court did not abuse its discretion by admitting the recording.

¶ 32 Assuming, *arguendo*, the trial court erred by admitting the recording, its admission was harmless error due to the overwhelming evidence of defendant's guilt beyond a reasonable doubt.

¶ 33 Next, defendant argues that the sound recording was inadmissable because it was created in violation of the Illinois Eavesdropping Statute (Eavesdropping Statute) (720 ILCS 5/14-2(a)(i), 14-5 (West 2008)). Defendant concedes that, at trial, he failed to include a violation of the Eavesdropping Statute as a basis to his objection to the admission of the sound recording. Thus, defendant has forfeited this issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review, a defendant must offer a specific objection at trial). Nevertheless, defendant urges this court to review the issue under the plain-error doctrine.

¶ 34 Under the plain-error doctrine, this court will review forfeited challenges when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). In undertaking this review, we first determine whether error occurred at all. See *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 35 We determine that no error occurred in this case regarding the issue of whether the recorded statements were admitted in violation of the eavesdropping statute. The conversation indicated that defendant and Tate were aware that they were being monitored, and, therefore, they consented for purposes of the statute. See *People v. Ceja*, 204 Ill.2d 332, 346-51. (2003). For this reason, we conclude that because there was no error, plain error review is inapplicable. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (to employ plain error review, there must first be error).

¶ 36 Defendant's final argument is that defendant's conviction and sentence for armed robbery should be vacated because defendant was convicted of and sentenced for felony murder predicated on the armed robbery offense. The State agrees with defendant. It is well settled that where a defendant is convicted of felony murder, the predicate forcible felony is a lesser-included offense and the conviction and sentence must be vacated. *People v. Smith*, 233 Ill. 2d 1, 17 (2009). Accordingly, we vacate defendant's conviction of and sentence for armed robbery.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm defendant's murder conviction and vacate the armed robbery conviction and its associated sentence.

¶ 39 Affirmed in part and vacated in part.