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2013 IL App (3d) 110433-U

Order filed March 28, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS, ) Appeal from the Circuit Court  
 ) of the 12th Judicial Circuit,  
Plaintiff-Appellee, ) Will County, Illinois,  
 )  
v. ) Appeal No. 3-11-0433  
 ) Circuit No. 10-CF-459  
CHRISTIAN D. NOEL, )  
 ) Honorable  
Defendant-Appellant. ) Edward A. Burmila, Jr.,  
 ) Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) It was not reversible error for the State to call a witness, when it knew that he was reluctant to testify out of fear for his life. (2) The trial court erred by failing to conduct a preliminary inquiry into defendant's *pro se* claim of ineffective assistance of counsel.

¶ 2 Defendant, Christian D. Noel, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and sentenced to 55 years' imprisonment. Defendant appeals, arguing that: (1) he was denied a fair trial when the State called a witness, knowing he would refuse to testify, and the trial

court elicited testimony that the witness refused to testify out of fear for his life; and (2) this cause should be remanded for further proceedings because the trial court failed to conduct an inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel. We remand for an inquiry into the allegations of ineffective assistance, but otherwise affirm.

¶ 3

### FACTS

¶ 4 Defendant was charged by indictment with first degree murder. 720 ILCS 5/9-1(a)(2) (West 2010). The charge alleged that on February 26, 2010, defendant shot Conley Ratcliffe with a handgun.

¶ 5 Prior to opening statements, the trial court admonished the jury that what the attorneys stated was not evidence in the case. During opening statements, the prosecutor informed the jurors that Clifton Williams, a former cellmate of defendant, would testify. Williams' testimony would reveal that defendant admitted to shooting Ratcliffe. The prosecutor further stated that defendant told Williams he thought no witnesses would come forward at his trial because defendant "would have his people talk to those witnesses or pay them off."

¶ 6 At trial, Phillip Martin, a Joliet police officer, and Chris Bourg, a Joliet firefighter and paramedic, testified that at approximately 10:45 a.m. on February 26, 2010, they responded to a shooting at Susana's convenience store on Woodruff Street. Ratcliffe was found bleeding inside a silver vehicle near the store. Ratcliffe was transported to the hospital.

¶ 7 Two patrons from Susana's testified that they saw Ratcliffe inside the store on the morning of the incident. When Ratcliffe exited the store, they soon heard multiple gunshots fired outside. Thereafter, they saw Ratcliffe lying on the ground bleeding.

¶ 8 William Sitarz, who was delivering to Susana's on the day of the incident, heard four or five

gunshots at approximately 10:45 a.m. After a few seconds, Sitarz heard another two or three  
gunshots, and later saw an injured person.

¶ 9 Jimmy Myers, who had a felony conviction, testified that he was a friend of Ratcliffe. On  
the day of the incident, Myers was with Ratcliffe, who drove his silver Dodge Avenger to Susana's.  
Ratcliffe went into the store while Myers stayed in the vehicle and spoke briefly with Patrick Taylor.  
Myers saw Ratcliffe exit the store and start walking toward the vehicle, and then Ratcliffe began  
running away from the store. Myers saw a tall, "dark skinned black" man with dark clothes come  
up behind Ratcliffe and fire a gun. Myers heard three to five gunshots and saw Ratcliffe fall to the  
ground. The tall man then fired another two to four shots at Ratcliffe. Myers ran behind the store  
for approximately 30 seconds and when he came back out, the shooter was gone. Myers drove the  
Avenger to where Ratcliffe was lying. Myers and two other men placed Ratcliffe partially inside the  
Avenger, and the police and fire department later arrived.

¶ 10 Anthony Edwards, Ratcliffe's cousin, testified that he was serving a prison sentence at the  
time of trial. Edwards testified that on the day of the incident he was picked up by Taylor.  
Thereafter, defendant, who was wearing dark clothing, also asked Taylor for a ride. Defendant got  
into the passenger seat, and Taylor drove to Susana's. When Edwards got out of the vehicle and  
approached the store, he saw Ratcliffe exiting the store. Edwards then heard defendant and Ratcliffe  
get into an argument. A few seconds later, defendant pulled out a gun, and everyone began to flee  
the area, leaving only defendant and Ratcliffe outside of the store. Edwards saw Ratcliffe put his  
hands up and attempt to back away from defendant. Defendant fired one gunshot straight up in the  
air and then shot three or four times at Ratcliffe as he ran away. Ratcliffe was struck by one of the  
shots and started to limp. Edwards then heard another three or four shots fired and saw Taylor's

vehicle drive down Woodruff Street and turn left on Magnolia Street. At that point, Edwards helped Myers and another man lift Ratcliffe into the rear seat of someone's vehicle. Edwards testified that he viewed a photographic lineup on February 28, 2010. Edwards identified defendant as the shooter.

¶ 11 Taylor testified that he was serving a prison sentence at the time of trial. On the morning of February 26, 2010, Taylor was driving his cousin home when Edwards flagged him down and asked for a ride. Taylor dropped off his cousin, at which point defendant asked for a ride. Taylor agreed and drove Edwards and defendant to Susana's. When Taylor parked the vehicle, he left it running and went into the store. Defendant and Edwards were still in the vehicle.

¶ 12 When Taylor entered the store, he saw Ratcliffe leaving. About a minute or two later, Taylor heard gunshots fired nearby, but did not see the shooter. When Taylor exited the store, he saw Ratcliffe run in the direction of Woodruff Street, but he fell down near the church next door. When Taylor saw people running to their vehicles and leaving the area, he went to his vehicle, and so did defendant. Taylor drove away before any emergency vehicles responded. Taylor drove only a few feet out of Susana's parking lot when he noticed for the first time that defendant had a gun in his possession. Taylor ordered defendant out of the car, and defendant got out. Defendant called Taylor later that night and asked Taylor not to tell the police that they were together that morning. Taylor also testified that he viewed a photographic lineup on February 28, 2010. Taylor identified defendant as the person he picked up and drove to Susana's.

¶ 13 Raymond Morgan, a witness to the shooting, testified that he saw two black males near the convenience store having an argument. One male was tall, slender and wearing black clothing, and the other male was shorter—approximately five feet, nine or ten inches tall. The shorter man was backing up toward the church, and the taller man was walking toward him. The taller man then

raised his arm, pointed a gun at the shorter man, and shot approximately four rounds. The shorter man, who had his hands in the air, fell back onto the ground. The taller man then fired another four rounds at the shorter man on the ground. The shooter then walked toward the parking lot and out of Morgan's sight. Morgan was shown a photographic lineup, but he could not conclusively identify the shooter. Detective Moises Avila testified that Morgan picked two men that resembled the shooter, one of which was defendant.

¶ 14 Joseph Brown, a friend of defendant, testified that at 10:50 a.m. on the morning of the incident, he received a telephone call from defendant asking for a ride. Brown went to the area near Woodruff Street, where he had to bypass emergency vehicles near Susana's, to pick up defendant a few blocks away. Defendant was wearing a black shirt and pants.

¶ 15 On the third day of trial, the State informed the court, outside the presence of the jury, that their next witness, Williams, was reluctant to testify against defendant, because he feared for his life. Williams' attorney confirmed that if Williams was called to the stand, he would only state his name and refuse to answer any further questions. The State argued that Williams was not legally justified in refusing to answer questions. The court stated that Williams' fear did not legally release him from the State's subpoena, and if he refused to answer questions, the court would impose sanctions on Williams.

¶ 16 The jury was brought into the courtroom, and the State called Williams to the stand. Williams stated his name, but refused to answer any further questions. The court asked Williams to state his reason for refusing to answer. Williams responded that he feared for his life. The court ordered Williams to answer, but he refused. The jury was excused, and the court found Williams in direct criminal contempt of court. The court stated its intention to instruct the jury that Williams'

refusal could not be attributed to defendant. Defense counsel agreed with this instruction.

¶ 17 The jury was recalled, and the court admonished the jury that it was prohibited from attributing Williams' refusal to testify or his reason for not testifying to defendant. The court further stated that from a legal perspective, Williams' refusal to testify had nothing to do with defendant and could not be held against him. The State then proceeded with its evidence.

¶ 18 Dr. Scott Denton, who performed the autopsy, testified that Ratcliffe died from internal and external bleeding caused by eight gunshot wounds to his pelvis and leg area. Approximately half of the gunshots were fired into the backside of Ratcliffe, consistent with someone who was running from the shooter. The gunshots in the front of Ratcliffe's body were consistent with someone shooting Ratcliffe while standing near his feet. Ratcliffe weighed 197 pounds and was six feet, one inch tall. The parties stipulated that the eight .40-caliber cartridge casings from the scene were fired from the same firearm.

¶ 19 Detective Carlos Matlock testified that he responded to the shooting at Susana's and was the lead detective on the investigation. Matlock arrested defendant on March 5, 2010. While defendant was being booked, he asked Matlock whom the police had spoken with and if he had spoken with Taylor. When Matlock informed defendant that he had spoken with Taylor, defendant replied, "I knew that mother fucker was going to run his mouth but that's okay, this shit ain't going to stick[.]"

¶ 20 The State rested, and defendant presented no evidence on his own behalf. Before deliberations, the jury was instructed that opening statements were not evidence, and that any statement or argument made by an attorney which is not based on the evidence should be disregarded. Illinois Pattern Jury Instructions, Criminal, No. 1.03 (4th ed. 2000). The jury found defendant guilty of first degree murder.

¶ 21 On March 30, 2011, defense counsel filed a motion for new trial, arguing that the court erred in allowing Williams to testify and questioning him in front of the jury. On April 6, 2011, defendant filed a *pro se* motion for new trial, alleging, in part, that he had ineffective trial counsel.

¶ 22 At sentencing, the trial court denied defense counsel's motion for new trial, but did not address defendant's *pro se* motion or his claim of ineffective counsel. Defendant was sentenced to 55 years' imprisonment. Defendant appeals.

¶ 23 ANALYSIS

¶ 24 I

¶ 25 Defendant first argues that the trial court erred in allowing Williams to take the stand, knowing that he would refuse to testify out of fear for his life, and eliciting such testimony in front of the jury. Defendant argues that Williams' assertion that he feared for his life, combined with the State's reference to Williams' alleged testimony in opening statements, deprived him of a fair jury trial.

¶ 26 The State claims that defendant invited this error because he agreed with the manner in which the trial court proceeded. *People v. Carter*, 208 Ill. 2d 309 (2003) (a defendant may not request to proceed in one manner, then later contend on appeal that the course of action was erroneous). We do not believe that defense counsel's agreement with the court's instruction to the jury bars defendant from raising this issue on appeal. However, it is undisputed that defendant has forfeited this issue by failing to raise a timely objection to the alleged error at trial. See *People v. Enoch*, 122 Ill. 2d 176 (1988). Nevertheless, defendant requests that we review his unpreserved issue under the plain error doctrine. See *People v. Hillier*, 237 Ill. 2d 539 (2010). Before invoking the plain error exception, however, we must first determine whether a clear or obvious error occurred. See *id.*

¶ 27 It is not automatically error for the State to call a witness to the stand with advance knowledge that the witness will invoke the fifth amendment. *People v. Crawford Distributing Co., Inc.*, 78 Ill. 2d 70 (1979). It is considered reversible error if the State makes a conscious and flagrant attempt to build its case out of inferences arising from the use of testimonial privilege or if the witness's refusal to testify adds critical weight to the State's case. *People v. Calabrese*, 398 Ill. App. 3d 98 (2010). In this case, Williams did not invoke his fifth amendment when he refused to testify. Nonetheless, we agree with defendant that the legal analysis is the same as in cases in which the fifth amendment was invoked; therefore, we will apply this analysis to the instant case.

¶ 28 To determine whether it was error for the State to call a witness to the stand with advance knowledge that he will invoke the fifth amendment, we must consider: (1) the prosecutor's motive in calling the witness; and (2) the likelihood of the jury drawing unwarranted inferences against defendant from the witness's refusal to testify. See *Crawford*, 78 Ill. 2d 70.

¶ 29 First, it does not appear that the State intended to call Williams simply to bolster its case with his refusal to testify. See *id.* The State called Williams to the stand after the court informed Williams that his fear did not legally justify his refusal and warned him that it would impose sanctions. It was likely that the State called Williams thinking he would testify when ordered to do so by the court. See *id.* (finding that the error was not reversible where the prosecutor did not believe the witness could claim the privilege due to the immunity granted, and thus expected the witness to testify under compulsion by the court).

¶ 30 It was also likely that the State called Williams because the jury would have questioned why the State promised his testimony during opening statements, when it was unaware of his reluctance to testify, and then failed to deliver at trial. *Cf. Calabrese*, 398 Ill. App. 3d 98 (noting that the State

presented a witness, when it knew he could invoke the fifth amendment, because it wanted to refute defendant's implication, during opening statements, of the witness's involvement in the crime). Moreover, it was not the State's intent to build its case out of inferences drawn from Williams' refusal to testify, because the State limited such impact by not referring to Williams during the remainder of the trial. *Cf. People v. Mullen*, 141 Ill. 2d 394 (1990) (finding reversible error where the State made unsubstantiated remarks during closing arguments that its witness was reluctant to testify out of fear).

¶ 31 Second, the likelihood of the jury drawing unwarranted inferences against defendant from Williams' single statement that he feared for his life was alleviated when the court offered a curative instruction to the jury after Williams' testimony and again before jury deliberations. *Cf. People v. Taylor*, 166 Ill. 2d 414 (1995) (stating that the jury is presumed to follow the instructions given to it by the court). In light of the considerable evidence the State presented of defendant's guilt, Williams' isolated comment, even combined with the prosecutor's reference to his testimony during opening statements, did not add critical weight to its case so as to deny defendant a fair trial. See *Calabrese*, 398 Ill. App. 3d 98. Therefore, we find that it was not reversible error to allow Williams to take the stand or elicit that he feared for his life. Without error, the plain error exception does not apply, and we must therefore honor defendant's procedural default. See *Hillier*, 237 Ill. 2d 539.

¶ 32

## II

¶ 33 Defendant next argues that this cause should be remanded for further proceedings because the trial court did not conduct a preliminary inquiry into his *pro se* posttrial allegation of ineffective assistance of counsel.

¶ 34 When a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the

trial court must conduct some type of inquiry into the factual basis of defendant's claim. *People v. Moore*, 207 Ill. 2d 68 (2003). If, after a preliminary investigation into the allegations, the court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny defendant's motion. *Id.* However, if the allegations show possible neglect of the case, the trial court should appoint new counsel to argue defendant's ineffective assistance claims. *Id.* The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* allegations of ineffective assistance of counsel. *Id.*

¶ 35 In this case, the State admits that the trial court did not conduct an inquiry into defendant's posttrial claim of ineffective assistance of counsel. The State argues, however, that defendant's claim did not trigger the court's duty to inquire because he failed to raise a specific allegation of counsel's deficient performance.

¶ 36 Our supreme court has held that to raise an ineffective assistance of counsel claim, a *pro se* defendant is not required to do any more than bring his claim to the trial court's attention. *Moore*, 207 Ill. 2d 68; *People v. Taylor*, 237 Ill. 2d 68 (2010). Here, defendant brought his claim to the trial court's attention by filing a posttrial motion; however, the court made no inquiry into the claim, thereby depriving defendant of the opportunity to specify and support his complaint. See *People v. Robinson*, 157 Ill. 2d 68 (1993); *People v. Remsik-Miller*, 2012 IL App (2d) 100921. Although a fair degree of specificity is usually required to obligate the trial court to inquire regarding a particular subject, when faced with a general allegation of ineffectiveness, the court should at least ask defendant how counsel was ineffective. See *People v. Bolton*, 382 Ill. App. 3d 714 (2008). If after this general inquiry defendant fails to provide support for his claim, no further inquiry by the court

is required. *People v. Munson*, 171 Ill. 2d 158 (1996) (noting that the trial court made every effort to ascertain the nature and substance of defendant's ineffectiveness claim and then concluded the claim was without merit); *Bolton*, 382 Ill. App. 3d 714.

¶ 37 Accordingly, we must remand the cause to the trial court for a preliminary investigation into the factual basis of defendant's allegation to determine whether the appointment of new counsel to present defendant's claims is appropriate and necessary. See *Moore*, 207 Ill. 2d 68.

¶ 38 CONCLUSION

¶ 39 This cause is remanded to the circuit court of Will County for an inquiry into the factual basis underlying defendant's allegation of ineffective assistance of counsel, but we affirm the judgment in all other respects.

¶ 40 Affirmed and remanded with directions.