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2014 IL App (3d) 130312-U

Order filed July 9, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit
)	Peoria County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0312
v.)	Circuit No. 12-CF-254
)	
JUMAR ANTOINE HOUSE,)	Honorable
)	Kevin Lyons
)	Timothy M. Lucas
Defendant-Appellant.)	Judges, Presiding.

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

ORDER

¶ 1 *Held:* Defendant was proven guilty of attempted murder beyond a reasonable doubt where an eyewitness identified him as the shooter and the victim was struck in the shoulder with a bullet. Defendant was not denied ineffective assistance of counsel by his counsel's failure to ask certain questions to eyewitness and victim on cross-examination. Defendant was not denied a fair trial where a police officer who was a witness at defendant's trial made *ex parte* statements to the trial judge after defendant's trial.

¶ 2 Following a bench trial, defendant Jumar Antoine House was found guilty of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)), aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-

1.1(a) (West 2012)). He was sentenced to concurrent prison terms of 33 years for attempted murder and 8 years for unlawful possession of a weapon. On appeal, defendant argues that he (1) was not proven guilty of attempted murder beyond a reasonable doubt, (2) received ineffective assistance of counsel, and (3) was denied a fair trial. We affirm.

¶ 3 Defendant was charged with the attempted murder and aggravated battery of Norman Gates, as well as unlawful possession of a weapon by a felon, as the result of events that transpired during the early morning hours of February 17, 2012. Defendant waived his right to a jury trial. Judge Timothy Lucas presided over defendant's bench trial.

¶ 4 At trial, Peoria police officer Eric Esser testified that he was dispatched to Club Pounders, located 315 Main Street in Peoria, at 1:19 a.m. on February 17, 2012, after an officer heard shots fired in front of that location. As Esser walked toward Club Pounders, he observed bullet holes in two vehicles parked in front of the club, a Honda Accord and a BMW. Esser determined that Norman Gates was the owner of the BMW.

¶ 5 Later, at 3:09 a.m. on February 17, 2012, Esser was dispatched to Saint Francis Hospital in Peoria to speak with an individual who reported being shot inside or outside of Club Pounders. When Esser arrived at the hospital, he found Gates with a bullet wound to his right shoulder. Esser took pictures of the wound, which the State admitted into evidence.

¶ 6 Peoria police officer Scott Bowers testified that he received a call at approximately 2:15 a.m. on February 17, 2012, to report to the 300 block of Main Street. When he arrived, he was told that "two vehicles had been hit by gunfire." One of the vehicles was a Honda Accord, which had bullet holes in its front and back windshields. The other vehicle was a black BMW, which had bullet holes in the front, back and interior, including the driver's seat and backseat. Bowers took photographs of the vehicles. Later that same morning, Bowers went to Saint

Francis Hospital. The physician who treated Gates gave Bowers the bullet she retrieved from Gates' shoulder.

¶ 7 Scott Hulse, a Peoria police officer, reported to the 300 block of Main Street at 1:19 a.m. on February 17, 2012. While he was on the scene, Gates tried to drive away in his BMW, but Hulse stopped him. Gates never told Hulse that he had been shot. At approximately 3:30 a.m. on February 17, 2012, Hulse stopped defendant and arrested him for DUI. Hulse did not find any weapons on defendant or in his vehicle. A video of the traffic stop was admitted into evidence.

¶ 8 Dave Remington testified that he owns Richards on Main, a bar located next door to Club Pounders in Peoria. He has video surveillance on his property. He provided footage from the early morning hours of February 17, 2012, to police. A DVD containing the footage was admitted into evidence.

¶ 9 Nicholas Pannell testified that he was at Club Pounders on February 17, 2012. He left with Eddie Binion and Gates. Gates was driving his vehicle, a BMW. As Pannell approached Gates' vehicle to leave, he saw defendant walking from his car to the front of Club Pounders. Defendant said something to him, Binion and Gates. Pannell then turned around and saw defendant aiming a gun in his direction. When defendant fired toward Pannell, Binion and Gates, they ran.

¶ 10 Four days later, Detective Timothy Moore of the Peoria police department, came to Pannell's house and showed him a photo line-up. Pannell recognized the photo of defendant as the shooter. Pannell admitted that he has a criminal history and was awaiting sentencing for unlawful possession of a weapon by a felon at the time of defendant's trial.

¶ 11 On cross-examination, Pannell testified that he was six or seven feet away from defendant when he saw him on February 17, 2012. He did not remember where he had been

prior to the shooting or if he had been with Gates the entire night. He testified that he has known defendant since about 2003 and does not like him. Pannell admitted that he did not talk to the police at the scene and never sought out the police. He did not identify defendant as the shooter until four days after the shooting when a police officer came to his house. The photo line-up Moore showed him contained photos of other individuals he has seen, none of whom were his friends or acquaintances. Pannell denied initially telling police that he was not at Club Pounders at the time of the shooting.

¶ 12 Detective Moore testified that he went to Pannell's house on February 21, 2012, because he believed Pannell witnessed the February 17, 2012 shooting. Pannell initially told Moore that he was somewhere else on the night of the shooting, but when Moore told him that he had a video of the incident, Pannell told him what happened. Moore then showed Pannell a photo array with six photos. Pannell identified defendant as the shooter.

¶ 13 Gates testified that during the early morning hours of February 17, 2012, he was with Pannell and Binion at Club Pounders. When he was leaving Club Pounders and standing next to his car, he heard shots being fired and ran. He did not see who shot the weapon. When he returned to his vehicle, he attempted to leave the scene but was stopped by police, who wanted to process his vehicle. He did not tell the police that he had been shot at or injured. He did not realize he was injured until later. As soon as he discovered his injury, he drove himself to Saint Francis Hospital. No one else shot at him between the time he left Main Street and the time he went to the hospital.

¶ 14 On cross-examination, Gates explained that he did not go directly from Main Street to the hospital because he did not realize that he had been shot until he got home and took off his coat. He denied telling Pannell at the scene that he had been shot. When he arrived at the hospital, he reported that he had been shot but did not know who shot him.

¶ 15 The trial court ruled that the State proved defendant guilty of all three charges against him. The court explained that while Pannell’s testimony was impeached by prior convictions and prior inconsistent statements, the video evidence supported Pannell’s testimony and his identification of defendant as the shooter. The court explained that defendant’s stature, clothing and hair length, as seen on the video of defendant’s DUI arrest, were consistent with the shooter’s, as seen on the surveillance video.

¶ 16 At a court appearance prior to defendant’s sentencing, Judge Lucas notified both the State and defendant that while he was waiting in line for lunch, Moore approached him and thanked him for his ruling. Moore also told him that the ruling was “important.” Judge Lucas told Moore it was not appropriate for him to have further discussions about the case because it was still pending. After that, Judge Lucas retired, and a new judge, Kevin Lyons, presided over the remainder of defendant’s case.

¶ 17 Defendant filed a motion to reconsider and motion for a new trial, which the trial court denied. The court sentenced defendant to 33 years in prison on the attempted murder conviction to be served concurrently with 8 years in prison for his conviction of unlawful possession of a weapon by a felon.

¶ 18 I

¶ 19 First, defendant argues that he was not proven guilty of attempted murder beyond a reasonable doubt because the only evidence connecting him to the crime was Pannell’s testimony, which was not credible.

¶ 20 In reviewing the sufficiency of the evidence, the question is 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. Perkins*, 408 Ill. App.

3d 752, 757 (2011). A reviewing court does not retry the defendant and should not substitute its judgment for that of the trier of fact. *Id.*

¶ 21 The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *Id.* The trier of fact, who observes the witnesses firsthand, is in the best position to determine witness credibility and the weight to be given their testimony. *People v. Tamayo*, 2012 IL App (3d) 100361, ¶ 20. We will reverse a conviction on appeal only where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Bailey*, 374 Ill. App. 3d 608, 612 (2007).

¶ 22 Here, Pannell identified defendant as the shooter. The trial court acknowledged that Pannell's testimony was impeached but found Pannell truthful when he described the shooting and identified defendant as the shooter. Such a credibility determination is best made by the trier of fact who observed Pannell and his demeanor while testifying. See *Tamayo*, 2012 IL App (3d) 100361, ¶ 20. The court also found that Pannell's testimony was corroborated by video evidence. When viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that defendant committed attempted murder.

¶ 23

II

¶ 24 Next, defendant argues that he received ineffective assistance of counsel because his counsel (1) failed to cross-examine Pannell about his identification of defendant as the shooter, and (2) failed to cross-examine Gates about whether he and defendant exchanged words prior to the shooting.

¶ 25 In order to establish ineffective assistance of counsel, a defendant must demonstrate: (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's

alleged deficient performance prejudiced the defense. *Perkins*, 408 Ill. App. 3d at 760. To satisfy the prejudice prong, a defendant must demonstrate that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.*

¶ 26 We give great deference to an attorney's decisions as there is a strong presumption that an attorney has acted adequately. *Id.* A defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Id.* Every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* Because effective assistance refers to competent and not perfect representation, mistakes in trial strategy or judgment will not, by themselves, render the representation incompetent. *Id.*

¶ 27 The manner and extent of cross-examination is a matter of trial strategy that will not ordinarily support an ineffective-assistance-of-counsel claim. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32. The presumption that counsel's actions or omissions were the product of sound trial strategy may be rebutted only when the chosen strategy is so unsound that counsel completely fails to conduct any meaningful adversarial testing. *Id.*

¶ 28 Here, defense counsel extensively cross-examined Pannell, questioning him about his memory from the night of the shooting, his knowledge and opinion of defendant, his failure to talk to police on the night of the shooting, the photo array Moore showed him, and his statements to Moore. Defense counsel also asked Gates several questions, including what statements he made to police, why he did not immediately go to the hospital, when he realized he was injured, what he did after he left the scene and before he went to the hospital, and what he told hospital personnel. Defense counsel's cross-examination of Pannell and Gates subjected their testimony to meaningful adversarial testing. Defense counsel's decision to ask Pannell and Gates certain

questions and not others is a matter of trial strategy; it does not support defendant's ineffective assistance of counsel claim. See *Watson*, 2012 IL App (2d) 091328, ¶ 32.

¶ 29

III

¶ 30 Finally, defendant argues that he was denied his right to a fair trial based on Moore's *ex parte* statements to Judge Lucas.

¶ 31 A trial judge has an obligation to assure the public that justice is administered fairly and must avoid the appearance of impropriety. *In re Maher*, 314 Ill. App. 3d 1088, 1098 (2000). Judges are generally prohibited from *ex parte* communications. *Korunka v. DCFS*, 259 Ill. App. 3d 527, 530-31 (1994) (citing Ill. S. Ct. R. 63 (eff. 1991)). A trial judge should avoid *ex parte* communications with a testifying witness to avoid even the appearance of impropriety. *Id.*; *Maher*, 314 Ill. App. 3d at 1098. However, reversal is required only where actual prejudice is shown. *Korunka*, 259 Ill. App. 3d at 531; *Maher*, 314 Ill. App. 3d at 1098. A verdict will not be set aside where no harm or prejudice resulted from the *ex parte* communication. See *People v. Moffat*, 202 Ill. App. 3d 43, 56 (1990).

¶ 32 A trial judge is presumed to be impartial, and the party challenging the judge's impartiality bears the burden of establishing the judge's prejudice. *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 14. A trial judge is presumed to follow the law and consider only competent evidence. *Id.*; *People v. Thorne*, 352 Ill. App. 3d 1062, 1078 (2004). These presumptions are rebutted only when the record affirmatively demonstrates the contrary. *Cunningham*, 2012 IL App (3d) 100013, ¶ 14; *Thorne*, 352 Ill. App. 3d at 1078.

¶ 33 Parties are not entitled to have the same judge who presided over their trial rule on their posttrial motions. *In re Marriage of Zander*, 273 Ill. App. 3d 669, 673 (1995). When a trial judge becomes unavailable, it is the duty of another judge to decide posttrial motions and sentencing issues. *People v. Hampton*, 223 Ill. App. 3d 1088, 1096 (1991). While the new judge

did not hear the trial witnesses testify, he is qualified to review the record of the trial proceedings and assess the trial court's rulings. *Id.* A defendant is not denied a fair trial when posttrial motions and sentencing matters are heard by a different judge absent a showing that the second judge did not adequately review the trial evidence or understand the case. *Id.*

¶ 34 Here, after defendant's trial ended, Moore, who was a witness for the State, approached Judge Lucas in public and expressed his gratitude to Lucas for finding defendant guilty in an "important" case. Judge Lucas explained to Moore that he could not discuss the case because it was still pending. Judge Lucas notified both defendant and the State of his interaction with Moore. Soon thereafter, Judge Lucas retired and was replaced by Judge Lyons. Judge Lyons denied defendant's posttrial motions and sentenced him for his convictions.

¶ 35 At the time of Moore's *ex parte* communication, Judge Lucas had already found defendant guilty and made no more substantive rulings in defendant's case. Judge Lucas' rulings could not have been influenced by Moore's *ex parte* statements. Additionally, there is no evidence in the record suggesting that Judge Lyons was prejudiced against defendant or did not follow the law when he ruled on defendant's posttrial motions and sentenced defendant for his convictions.

¶ 36 Nevertheless, defendant contends that he was denied a fair trial because Judge Lyons, rather than Judge Lucas, ruled on his posttrial motion. Judge Lyons, as a sitting circuit judge, was qualified to review the trial court proceedings and evaluate Judge Lucas' rulings. See *Hampton*, 223 Ill. App. 3d at 1096. Defendant has failed to point to any evidence showing that Judge Lyons did not adequately review the trial evidence or understand his case. Absent such a showing, defendant was not denied a fair trial. See *id.*

¶ 37 The judgment of the circuit court of Peoria County is affirmed.

¶ 38 Affirmed.