

2015 IL App (1st) 130701-U
No. 1-13-0701
September 29, 2015

SECOND DIVISION

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellee,)	Of Cook County.
v.)	No. 06 CR 24305
ANTHONY GAVIN,)	The Honorable
Defendant-Appellant.)	Thomas M. Tucker,
	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court, in a bench trial, admitted into evidence hearsay concerning peripheral issues, and the hearsay did not have any significant prejudicial effect, it did not warrant reversal of the defendant's conviction. The failure to admonish the defendant about the penalties he faced before permitting him to represent himself at argument on his posttrial motion required reversal of the conviction and remand for further posttrial proceedings.

¶ 2 The trial court found Anthony Gavin guilty of first degree murder. In this appeal, we hold that the prosecution presented sufficient evidence to sustain the conviction, and any error in permitting the prosecution to impeach two of its witnesses had no significant

prejudicial effect. However, we find that the trial court committed reversible error when it failed to admonish Gavin properly before permitting him to represent himself in posttrial proceedings. We reverse the judgment and remand for further proceedings in accord with this order.

¶ 3

BACKGROUND

¶ 4

Around 1 p.m. on September 20, 2006, Maywood police officers responded to a report of shots fired on South Third Avenue. Near the street officers found the body of Eugene Winters, dead from multiple gunshot wounds, with a broken cell phone nearby.

¶ 5

A bullet fell out of Winters's clothing as the medical examiner prepared for the autopsy. The medical examiner removed several bullets from Winters's corpse and sent them, along with the loose bullet, to a police lab for analysis. The medical examiner found that the loose bullet did not cause any of Winters's bullet wounds. The police lab found that the loose bullet was a .9 millimeter bullet, while the bullets from the corpse were all .32 millimeter.

¶ 6

After police officers spoke with witnesses near the scene of the shooting, an officer put out a bulletin that officers should stop a blue Mercury Grand Marquis. Officer Dustin Beck saw a car matching that description the following day, September 21, 2006. Beck turned on his siren and ordered the driver of the blue Mercury to stop. He arrested the driver, Harvey Bowen. The Maywood Police Department took custody of the Mercury. A police lab discovered gunshot residue in the Mercury, indicating that a discharged firearm had come into contact with the Mercury's seats.

¶ 7 Anthony Gavin went to Aaron Smith's home on September 21, 2006, and asked if he could spend the night there. Smith allowed Gavin to stay. The next day Gavin asked Smith to drive him to a bus stop. Smith stopped at a gas station on the way. Police cars surrounded Smith's car. Officers arrested Gavin and Smith. Police officers went to Smith's home, where they found a coat with a .9 millimeter gun in its pocket. Tests showed that the gun fired the bullet found in Winters's clothing. The .9 millimeter gun did not fire any of the bullets found in Winters's corpse, as the .9 millimeter gun could not fire .32 caliber bullets.

¶ 8 Prosecutors charged Gavin and Bowen with the murder of Winters. The trial court granted the defendants' motion for severance of the trials.

¶ 9 At Gavin's trial, prosecutors tried to establish a connection between Winters's death and an incident that occurred the day before, on September 19, 2006. Grant Mason, the nephew of Winters's fiancé, Valerie Mason, testified that on September 19, 2006, someone shot three bullets into his car while he was driving it. He called police and police officers came to the home Grant shared with Valerie and Winters.

¶ 10 Grant testified that he did not see the faces of the persons who shot at his car, and he did not remember what the car in which the shooters rode looked like. Grant testified that he did not tell officers he saw or recognized the shooter. In response to the prosecutor's question, "Did you tell the detective[] *** Randy Brown *** that Harvey Bowen and Anthony Gavin drove past you in a light-colored Oldsmobile?," Grant answered, "I don't remember telling them that."

¶ 11 Brown testified that he spoke with Grant about the bullet holes in Grant's car. Gavin's attorney objected to the hearsay. The court permitted Brown to testify about the conversation, but only as impeachment of Grant's testimony. Brown testified that Grant said he saw Gavin and Bowen shoot at Grant's car while they rode in a light-colored Oldsmobile on September 19, 2006.

¶ 12 Melvin Holmes testified that he lived on South Third Avenue in Maywood. On September 20, 2006, he heard gunshots outside his home. He saw a man shooting Winters. The shooter got into the back seat of a blue Mercury which a driver drove away. Holmes asked his father to call an ambulance while Holmes went out to see if he could help Winters. Winters asked Holmes to get Winters's keys from his van, parked nearby.

¶ 13 Holmes testified that he got the keys and returned to Winters, but then he saw that the blue Mercury had returned. The shooter got out of the car and walked towards Winters. Holmes backed away. Holmes saw Winters pull out a cell phone and start talking. The shooter said, "[W]ho the fuck you talking to?" The shooter took the phone and shot Winters repeatedly in the head.

¶ 14 Holmes went to the police station to view a lineup on September 21, 2006. He identified Bowen as the driver of the blue Mercury. In court he identified a picture of the blue Mercury police impounded as a photograph of the car he saw Bowen driving on September 20, 2006, when Bowen drove the shooter away from the scene.

¶ 15 Valerie testified that on September 20, 2006, around 1 p.m., she received a phone call from Winters. Winters said, "Val, come get me. This guy Ant shot me in the face." Several witnesses testified that people in the neighborhood knew Gavin by his nickname, Ant.

¶ 16 Detective Lawrence Connor of the Maywood Police Department testified that on September 20, 2006, when he responded to the call of shots fired, he saw Bowen driving a blue Mercury Grand Marquis a few blocks from the scene of the shooting. He also saw Gavin in the car. Connor heard the dispatch instructing officers to stop the blue Marquis shortly after it passed him, but he could not find it again.

¶ 17 Denzel Edwards testified that he did not remember anything about September 20, 2006. He did not remember whether he spoke to police officers about that day. The prosecutor presented to Edwards a written statement with a signature, and some photographs attached to the statement. Edwards admitted that the signature looked like his, but he did not remember signing the statement or the pictures attached to the statement.

¶ 18 Maureen O'Brien, an assistant State's Attorney, testified that she spoke with Edwards on September 22, 2006, and then she wrote a summary of what he told her. O'Brien testified that Edwards said that on September 20, 2006, Gavin came to Edwards's home around 10 a.m. Gavin and Edwards walked to Gavin's home. Bowen drove up in a blue Marquis. Bowen said someone had threatened to kill him. Gavin and Edwards got into the Marquis and Bowen started to drive them to Bowen's home. On the way, they saw Winters driving his van. Bowen said that Winters was the person who threatened to kill him. Winters made a u-turn and started following the Marquis. Bowen stopped on Third Avenue. Winters

stopped behind the Marquis and got out of the van while Bowen and Gavin got out of the Marquis.

¶ 19 According to the written statement, Edwards told the assistant State's Attorney that Winters asked Gavin and Bowen who shot at Grant on September 19, 2006. Gavin and Bowen said they did not shoot at Grant. Edwards then got out of the Marquis, but Winters told him to walk away. Edwards started walking. Less than a minute later, he heard a gunshot and saw Winters on the ground. Gavin had a .9 millimeter gun and Bowen held a .32 millimeter revolver. Edwards heard more shots as he walked away. He heard the Marquis pull away. He also saw the Marquis return, and then he heard some more shots before he ran from the scene.

¶ 20 Cortez Henderson testified that on September 20, 2006, after 1 p.m., he heard some gunshots on Third Avenue. He did not remember anything about the incident. He did not recall whether he spoke to police officers about the incident or whether he viewed a photo array. He did not remember whether he signed a statement at the police station. He agreed that the documents prosecutors showed him in court appeared to have his signature written on them. He did not remember viewing a lineup.

¶ 21 Officer Jeremy Pezdek of the Maywood Police Department testified that he spoke with Henderson at the police station on September 20, 2006. Over objection, the court allowed Pezdek to testify about the conversation to impeach Henderson's testimony. Pezdek testified that Henderson said he saw Gavin shoot Winters. He identified a photograph of Gavin as a

picture of the shooter, and he identified a picture of Bowen as a picture of the driver of the car that took Gavin from the scene.

¶ 22 Aaron Smith testified that after police officers arrested him and Gavin at the gas station on September 22, 2006, the officers beat Smith and Gavin. Police officers forced Smith to sign papers, telling him the papers were a search warrant for Smith's home. The officers seized a coat in Smith's closet. Smith did not know who owned the coat. Officers found a gun in the coat's pocket. Smith knew nothing about the gun or how it got into his closet. Smith did not remember what he said to police officers or the assistant State's Attorney. The prosecutor showed him a written statement that apparently bore Smith's signature. Smith denied making the statements attributed to him in the document the assistant State's Attorney wrote out.

¶ 23 O'Brien read into the record the statement she wrote out after she spoke with Smith. She swore the written statement accurately recorded the substance of what Smith told her. According to O'Brien, Smith said that when Gavin came to his home on September 21, 2006, Smith noticed Gavin's coat lying on a couch. Smith picked it up to hang it up. He found a gun in the coat's pocket. He put the gun back in the pocket and hung up the coat. Smith told officers about the gun when they arrested Gavin and Smith. Smith told O'Brien that he consented to the search of his home.

¶ 24 In closing argument, the prosecutor referred to Pezdek's testimony about Henderson's statement as substantive evidence concerning the shooting. The prosecutor also used Brown's testimony about Grant's out of court statements as substantive evidence that Gavin

and Bowen shot at Grant's car on September 19, 2006. The trial court did not make any explicit findings of credibility and the court did not explain what evidence it found persuasive. The court simply said that it found that the evidence proved Gavin guilty of first degree murder beyond a reasonable doubt.

¶ 25 Gavin's attorney filed a motion for a new trial. At the date set for a hearing on the motion, Gavin told the court that he wanted to represent himself and argue the motion for a new trial, because his attorney refused to include in the motion the issues Gavin sought to raise. This colloquy followed:

"THE COURT: So you are asking to have your lawyer taken out?

THE DEFENDANT: Yes, sir.

THE COURT: You want to go on your own?

THE DEFENDANT: Yes, your honor.

THE COURT: You understand that if you go on your own like that, you will not have any help?

THE DEFENDANT: Yes, your honor.

THE COURT: It is up to you to make the decisions, that I cannot help you and tell you.

THE DEFENDANT: Yes, your honor.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, your honor.

THE COURT: Do you understand the importance of having a lawyer to help you?

THE DEFENDANT: I do, your honor.

THE COURT: And it's important that – the lawyer that you have in front of you is a very good lawyer, and she has discussed it with you and helped you throughout.

Do you still want to be pro se?

THE DEFENDANT: Yes, your honor, I do.

THE COURT: Understanding that you will be all on your own and you will not have any help?

THE DEFENDANT: Yes, your honor.

THE COURT: You may step back. You are done.

[Defendant's trial attorney]: Okay.

THE COURT: I am going to allow you to be pro se."

¶ 26

Gavin presented his own written motion for a new trial as a supplement to the motion his attorney filed. Gavin argued the motion for new trial. His trial counsel appeared at the hearing on the motion, at the prosecutor's request. Gavin asked the court to give him leave to speak to his former counsel about the statement Edwards apparently signed at the police station. His former counsel said,

"Judge, I don't represent Mr. Gavin anymore. My understanding is he's made allegations against me and my office, so in my opinion, has waived any attorney/client privilege. He's not my client, and I think he's put me – us in an adversary position at this point. He's going pro se. He made that decision. I don't think I can talk to him."

¶ 27 The court denied Gavin's request for leave to speak with his former counsel.

¶ 28 Gavin argued several issues in his posttrial motion, including ineffective assistance of trial counsel. The court asked his former counsel to respond to the argument about ineffective assistance, and she defended her work and the work of the public defender's office on Gavin's behalf. She explained strategic reasons for several decisions that Gavin characterized as ineffective assistance of counsel. The court then gave Gavin an opportunity to respond to his former counsel's argument. The court denied Gavin's motion for a new trial.

¶ 29 Gavin asked the court to appoint counsel to assist him for sentencing. The court again appointed the public defender's office, who gave Gavin a different attorney. Gavin's counsel emphasized Gavin's youth – he was 17 at the time of the shooting – and the statements from the people who presented letters to the court on Gavin's behalf. The court sentenced Gavin to 50 years in prison. The court denied Gavin's motion for reconsideration of the sentence. Gavin now appeals.

¶ 30 ANALYSIS

¶ 31 Sufficiency of the Evidence

¶ 32 The state appellate defender presented a brief on Gavin's behalf. This court granted Gavin leave to file a supplemental brief in which he challenged the sufficiency of the evidence. We will reverse a conviction for insufficient evidence if, viewing the evidence in the light most favorable to the prosecution, we find that no reasonable trier of fact could have

found all of the elements of the offense proven beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 33 Gavin argues that, in court, the eyewitnesses (Holmes, Edwards and Henderson) did not identify Gavin as a person they saw at the scene of the shooting. However, Gavin concedes that section 115-10.1 of the Code of Criminal Procedure (Code) permitted the court to consider the written statement apparently bearing Edwards's signature as substantive evidence. 725 ILCS 5/115-10.1 (West 2012). According to that statement, Edwards saw both Gavin and Bowen shoot Winters. While Edwards said that Bowen held the .32 that killed Winters, his statement provides grounds for holding Gavin accountable for Bowen's actions.

¶ 34 Section 115-12 of the Code permits substantive use of Henderson's identification of Gavin as a shooter. 725 ILCS 5/115-12 (West 2012); *People v. Bowen*, 298 Ill. App. 3d 829, 833 (1998). Neither Edwards nor Henderson directly contradicted most of the out of court statements attributed to them. Both said that they could not remember the events of September 20, 2006, and they did not remember what they told police and the assistant State's Attorney about the events of that day.

¶ 35 Holmes only identified Bowen as the driver of the blue Mercury, but he said that a different man, who left the scene in the Mercury, shot Winters. Connors saw Bowen driving a blue Mercury away from the scene of the shooting, minutes after the shooting, and Connors testified that he saw Gavin riding in Bowen's car. Connors's testimony, viewed in conjunction with Holmes's testimony, supports an inference that Gavin shot Winters.

¶ 36 Police officers found a .9 millimeter gun in a coat in Smith's closet. Tests showed that the gun fired the bullet Winters carried in his clothing when he died. Smith did not know how the gun or the coat came to his closet, and he swore he did not own either. The coat and the gun appeared in Smith's closet the day after Gavin slept overnight at Smith's home. The evidence supports an inference that Gavin brought the .9 millimeter gun into Smith's home.

¶ 37 Finally, Valerie testified that Winters called her and said Ant shot him. Several witnesses said Gavin had the nickname "Ant." We find the evidence sufficient to support the conviction of Gavin for first degree murder.

¶ 38 **Prior Statements**

¶ 39 Gavin's appellate counsel argues that the trial court erred when it permitted the prosecution to impeach Henderson and Grant with prior statements they made to police officers. We will not disturb the trial court's evidentiary rulings unless the trial court abused its discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). "Moreover, even where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the record indicates the existence of substantial prejudice affecting the outcome of the trial." *In re Leona W.*, 228 Ill. 2d 439, 460 (2008).

¶ 40 We find that even if the trial court should not have admitted the prior statements into evidence, no substantial prejudice resulted from the error. Grant testified that someone shot at his car on September 19, 2006. O'Brien testified that Edwards told her that Winters, the fiancé of Grant's aunt, confronted Gavin and Bowen on September 20, 2006, and questioned them about shooting at Grant's car. At the time of that confrontation, Winters had in his

clothing a .9 millimeter bullet discharged from a gun found in Smith's home after Gavin slept in that home. Although Grant testified that he did not see the shooters, the other admissible evidence supports the inference that Winters believed Gavin and Bowen had shot at Grant.

¶ 41 Grant testified that on September 19, 2006, at the time someone shot at his car, he did not see a light-colored Oldsmobile. Prosecutors impeached him with evidence that Grant told an officer that the shooters rode in a light-colored Oldsmobile, and Grant saw the shooters, Bowen and Gavin. The evidence used to impeach Grant added very little to the case against Gavin for the murder of Winters. The State's case rested primarily on the out of court statements of Winters, Edwards and Henderson, bolstered by the testimony of Holmes and Connor. Prosecutors sought to use Grant's out of court statement to show a motive arising from a prior conflict between Bowen and Grant. Edwards's statement showed that possible motive, and the prosecutors did not need to prove any motive to sustain the convictions. See *People v. Huckstead*, 91 Ill. 2d 536, 548 (1982).

¶ 42 Pezdek testified that Henderson, out of court, identified Gavin as the person who shot Winters. Henderson did not recall making the identification, and he remembered nothing about the incident apart from hearing gunshots. The court properly admitted the testimony concerning the identification of Gavin as the shooter, in accord with section 115-12 of the Code. 725 ILCS 5/115-12 (West 2012). We find that the impeachment of other aspects of Henderson's testimony had no significant prejudicial effect. Therefore, assuming that the trial court abused its discretion when it permitted the prosecution to impeach Grant and

Henderson with their prior statements, we find that the error did not substantially prejudice Gavin, and it does not provide grounds for reversing the conviction.

¶ 43 Admonishments for a *Pro Se* Defendant

¶ 44 Gavin sought to represent himself for his posttrial motion. His appellate counsel, on his behalf, now contends that the trial court committed reversible error when it failed to admonish him properly before permitting him to act *pro se*. The State contends that Gavin waived the issue by failing to raise it in the motion for a new trial that he filed *pro se*.

¶ 45 We find that the reasoning of *People v. Whitfield*, 217 Ill. 2d 177 (2005), applies here. In *Whitfield*, Whitfield pled guilty, and on appeal he claimed that the trial court failed to admonish him in accord with Supreme Court rules before accepting his guilty plea. The State argued that Whitfield waived the issue by failing to raise it in the trial court. The *Whitfield* court said:

"We find *** that there was no procedural default under the facts of this case. Pursuant to *** Rule 402, every defendant who enters a plea of guilty has a due process right to be properly and fully admonished. *** It is undisputed that the circuit court failed to admonish defendant in accord with the rule. Under the circumstances, it would be incongruous to hold that defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court's failure to admonish him. To so hold would place the onus on defendant to ensure his own admonishment in accord with due process." *Whitfield*, 217 Ill. 2d at 188.

¶ 46 The State here similarly seeks to place the burden on Gavin of ensuring his own admonishment in accord with Supreme Court rules and the requirements of due process, by raising the issue of insufficient admonishments in his *pro se* motion for a new trial. We find no procedural default under the facts of this case.

¶ 47 Supreme Court Rule 401(a) provides that a trial court "shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands *** the nature of the charge [and] the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences." S. Ct. R. 401(a) (eff. July 1, 1984). Our supreme court adopted the rule "to ensure that a waiver of counsel is knowingly and intelligently made." *People v. Haynes*, 174 Ill. 2d 204, 241 (1996). "[C]ompliance with Rule 401(a) is required for an effective waiver of counsel." *Haynes*, 174 Ill. 2d at 236. If the defendant did not have the assistance of counsel at a critical stage of the proceedings against him, when he had not made an effective waiver of counsel, we must reverse the judgment and remand for further proceedings in compliance with Supreme Court rules. *People v. Campbell*, 224 Ill. 2d 80, 87 (2007); *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 39. We review *de novo* the question of whether the trial court complied with Rule 401(a). *Campbell*, 224 Ill. 2d at 84.

¶ 48 The State concedes that argument on the posttrial motion counts as a critical stage of the proceedings against a defendant in a criminal prosecution. See *People v. Finley*, 63 Ill. App.

3d 95, 103 (1978). The State suggests that we need not review the admonishments because Gavin's trial counsel filed a posttrial motion for a new trial and appeared at the hearing on Gavin's motion. However, trial counsel reminded the court that, at the time of the hearing on the posttrial motion, she no longer represented Gavin. She contributed to the hearing on Gavin's motion only to actively oppose the motion insofar as Gavin asserted that she had provided ineffective assistance of counsel. We find that Gavin represented himself, without assistance of counsel, at a critical stage of the proceedings against him.

¶ 49 Before permitting Gavin to represent himself, the trial court asked whether Gavin understood the importance of having a lawyer, and the court told Gavin it would not help him. The court made no effort to comply with the strictures of Rule 401. The court did not remind Gavin of the nature of the charges or the range of permissible penalties before permitting him to proceed *pro se*. See *People v. Langley*, 226 Ill. App. 3d 742 (1992). The trial court's nonfeasance is particularly troubling because of Gavin's age. Accordingly, we must reverse the trial court's judgment and remand for proper admonitions and new posttrial motions. *Campbell*, 224 Ill. 2d at 87.

¶ 50 We will address Gavin's sentencing issues only if they arise again following remand.

¶ 51 CONCLUSION

¶ 52 Finally, the State presented sufficient evidence to prove Gavin guilty of murder, either as the person who fired the fatal shots or as one accountable for Bowen's actions. The admission into evidence of out of court statements by Grant and Henderson had no significant prejudicial effect. The trial court committed reversible error when it failed to

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admonish Gavin in accord with Rule 401 before permitting him to represent himself at the hearing on his motion for a new trial. Accordingly, we reverse the trial court's judgment and remand for proper admonishments and further proceedings on the posttrial motions.

¶ 53 Reversed and remanded.