2015 IL App (1st) 131478-U

THIRD DIVISION
September 23, 2015

No. 1-13-1478

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 11 CR 15073
	)	
EDWARD HARDIN,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: (1) In aggravated battery case, evidence was sufficient to prove defendant intended to harm the victim where defendant was angry with the victim, called her over to where he was sitting, drew a gun, and shot her in the neck. (2) Where defendant voluntarily withdrew his pretrial motion for substitution of counsel, the trial court was not required to consider it on the merits.

¶ 2 Defendant Edward Hardin appeals from his conviction for aggravated battery with a firearm. Evidence at Hardin's bench trial showed that on the evening of August 22, 2011, Hardin called the victim over to the driver's side window of a car he was driving, and when she leaned into the window, Hardin shot her in the neck. On appeal, Hardin argues that (1) the

evidence was insufficient to convict him of aggravated battery with a firearm, (2) the trial judge erroneously ignored Hardin's pretrial request for new counsel, and (3) the trial judge erred by not holding a posttrial hearing, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), on Hardin's claims that his trial counsel failed to communicate with him or let him see discovery. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 Hardin was charged with attempted murder, aggravated battery with a firearm, and aggravated discharge of a firearm in connection with the shooting of the victim, Diane Jones. On October 15, 2012, the trial court set the case for trial on November 28, 2012. Defense counsel indicated for the record that she had declined to file certain motions that Hardin had prepared. About three weeks before the scheduled trial date, on November 5, 2012, Hardin filed a *pro se* motion for substitution of counsel in which he alleged that his counsel was "adversarial" and did not have his best interests at heart. He asserted that counsel "lack[s] the temperament to discuss my case with me" and there had been a "total breakdown of communication" between them. He also speculated that counsel might lack the physical ability to properly research his defense, based on the fact that she complained of knee pain and headaches. He therefore requested that the court "[e]nter an Order for [a] Bar Association Lawyer."

¶ 5 On November 28, 2012, the trial was postponed to January 19 because of a scheduling conflict. Hardin's motion was not discussed. On January 19, 2013, before Hardin's bench trial began, the following dialogue occurred:

> "THE COURT: Mr. Hardin is before the court. Did we handle this as *pro se* motion for appointment for an association lawyer? Mr. Hardin, you will not be allowed to file your own motion and you cannot file motions, counsel, that being the case.

MS. SIMS [defense counsel]: Judge, Mr. Hardin indicates he was withdrawing that motion.

THE COURT: All right. Withdrawn."

Hardin was present during this exchange but said nothing. The case then proceeded to trial.

¶ 6 At trial, Diane testified that on August 22, 2011, around 11:30 p.m., she was walking to a gas station with five or six of her friends, including her friend Charone Jones. Outside the gas station, Diane saw Hardin, whom she recognized as a friend of her uncle Coney. He was sitting in the front passenger seat of a green Toyota. Diane wanted to borrow the car and joked with Hardin about driving off with the car. Hardin then exited the car and began playfully flirting with one of Diane's friends, Felicia Ball. Words were exchanged between Hardin and Ball, and a disturbance ensued. Police arrived at the gas station and ordered Hardin and Diane's friends to "leave each other alone."

¶ 7 Diane and her friends left the gas station and walked to Charone's house. They were standing outside when the green Toyota pulled into the alley behind the house. Hardin was driving, and Coney was in the front passenger seat. Diane heard someone say, "Diane, come here." She ran quickly toward the car, hoping that Coney was going to let her borrow the car. She stood "kissing close" to Hardin at the driver's side of the car. Diane observed that Coney was not holding anything in his hands, but she was not paying attention to Hardin's hands. Then Diane heard a "pow" and felt something warm like blood on the left side of her neck. She told her friends that she had been shot. An ambulance arrived and took her to the hospital.

¶ 8 At the hospital, Diane spoke to Detective Joaquin Mendoza, who showed her various photographs. Diane identified Hardin as the man who shot her. Two days later, on August 24, she went to view a lineup at the police station and again identified Hardin as the shooter.

¶ 9 Charone, who was also present at the gas station that evening, testified that as she exited the convenience store at the station, she saw Hardin leaning out of the passenger side of a green Toyota and trying to grab one of Charone's friends in a flirty manner. Charone's friend responded rudely. Hardin got out of the car and pushed her. Then "all of the rest of the girls, you know, it was just a big old yelling and screaming type of thing." Police arrived on the scene and escorted Charone and her friends away from the area.

¶ 10 The group walked to Charone's house, where they stood outside talking. A short time later, the green Toyota pulled into the nearby alley. Hardin was driving and Coney was sitting in the front passenger seat. Hardin shouted from the open window, "Do you want the keys now?" Diane ran to the driver's side of the car. Hardin reached his right hand over the left portion of his body and shot out the open window. Charone did not see the gun, but she saw a flash outside the car and heard a sound like a firework. Diane ran past Charone, saying that she had been shot. Police and an ambulance were called. Two days later, on August 24, Charone viewed a lineup at the police station and identified Hardin as the shooter.

¶ 11 Coney testified that on August 22, 2011, he was partying and drinking with his friend Hardin. The two of them drove to a gas station in a green Toyota. Coney went inside to pay for the gas while Hardin stayed outside. When Coney came out of the gas station, he saw Hardin with "quite a few" women, including Diane. People were yelling at each other and one of the women hit Hardin with a bottle.

¶ 12 Coney and Hardin left the gas station and drove back to Coney's house, which was two blocks away. Hardin went to his house across the street, got some beers, and then said, "Let's take a little ride." They got back into the car. Hardin drove; Coney "was loaded" and dozed off. When he awoke, the car was stopped. He saw the women from the earlier gas station incident

standing in the middle of the street. Diane came up to the driver's side of the car, where Hardin was. Coney was "just kind of kicked back." He heard arguing and then "a lot of scratching and squealing." He saw Hardin put his arm up and heard a noise, and then the women scattered and Hardin drove away. Coney stated that he did not see Hardin holding a gun. He did not know how Diane was shot but denied being the one who shot her.

¶ 13 Later that night, police came to Coney's house and brought him to the police station, where a detective showed him an array of photographs. Next to Hardin's photo, Coney wrote, "This is the guy I saw shot [*sic*] Diane." Coney also gave a statement to an assistant state's attorney. In that statement, Coney said that on the night of the shooting, when he and Hardin left the gas station, Hardin appeared to be angry at Diane. Coney drove the two of them back to Coney's house. Hardin left and returned about eight minutes later, saying, "let's go, let me drive." They got in the car, and Hardin said, "let's go scare them little motherf---ers." Hardin drove to Laflin Street, where Diane and her friends were standing outside talking. Coney saw Hardin quickly pull a gun out of his left pocket and shoot it. He thought that Hardin shot the gun in the air. The girls ran, and Hardin drove away. Coney stated that he had no idea that Hardin was going to shoot anyone; he thought that they were driving by Diane's location "as a scare tactic." He did not know that Diane had been shot until the police came to his house.

¶ 14 The defense did not call any witnesses, and the trial court found Hardin guilty on all counts.

¶ 15 Hardin filed a posttrial motion to vacate the finding of guilt or, in the alternative, for a new trial. Hardin did not raise any ineffective assistance claims in that motion. Prior to arguments on the motion, the following dialogue occurred:

"THE COURT: Did I rule on your motion to substitute counsel, Mr. Hardin?

MS. SIMS [defense counsel]: That was withdrawn, Judge, on a previous court date.

THE COURT: All right.

MS. SIMS: It's in the beginning of this transcript.

THE COURT: All right. Yes. Okay. So I usually don't allow *pro se* motions when you're represented by counsel, but this one was for substitution and it was *** withdrawn."

The trial court then heard arguments from the parties and denied Hardin's posttrial motion.

¶ 16 Hardin filed a motion to reconsider, arguing that the State failed to prove the specific intent requirement for attempted murder. The trial court agreed and vacated the attempted murder counts. What remained were the counts for aggravated battery with a firearm and aggravated discharge of a firearm, which merged. The court sentenced Hardin to 10 years' imprisonment.

¶ 17 ANALYSIS

¶ 18 Hardin raises three arguments on appeal: (1) the evidence was insufficient to sustain the verdict, (2) the trial judge erroneously ignored Hardin's request for substitution of counsel, and (3) the trial judge erred by failing to conduct a posttrial *Krankel* hearing on Hardin's pretrial request for substitution of counsel.

¶ 19 Sufficiency of the Evidence

¶ 20 Hardin's first contention is that the evidence was insufficient to convict him of aggravated battery with a firearm, since the State did not prove that he shot Diane intentionally rather than accidentally.

¶ 21 Where a defendant challenges the sufficiency of the evidence, the reviewing court must determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). We draw all reasonable inferences from the record in favor of the prosecution, keeping in mind that it is the role of the fact-finder to assess the credibility of witnesses and resolve any conflicts in the evidence. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009); *People v. Collins*, 106 Ill. 2d 237, 261-62 (1985). Moreover, " 'a fact finder need not accept the defendant's version of events as among competing versions.' " *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001) (quoting *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001)).

¶ 22 A person commits aggravated battery when, in committing a battery, he knowingly discharges a firearm and injures another person. 720 ILCS 5/12-3.05(e)(1) (West 2012). Hardin does not dispute that he fired the gun that injured Diane, but he claims that he lacked the requisite intent to be convicted of the crime. He posits that it is consistent with the evidence at trial that he only intended to scare Diane, not to injure her, but she startled him when she approached the car and he accidentally shot her.

¶ 23 Hardin's argument is without merit. Where a defendant denies intent to commit a crime, the State may prove intent through circumstantial evidence. *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009); see also *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 44 (whether a defendant intended to inflict bodily harm is often proved by circumstantial evidence rather than by direct proof). Intent may be inferred both from the defendant's conduct surrounding the act and from the act itself. *Phillips*, 392 Ill. App. 3d at 259. Both of these factors are pertinent in this case. The evidence shows that, on the night of the incident, Hardin had an altercation with Diane and her friends and was angry at Diane. Such conduct gives rise to an inference of intent.

See *id.* (jury could easily infer defendant's intent to commit battery from defendant's expressions of anger made immediately prior to the battery). The fact that Hardin shot Diane at close range as she leaned into the car he was driving is also probative of his intent to injure her. See *People v. Vasquez*, 315 Ill. App. 3d 1131 (2000); *cf. People v. Barnes*, 364 Ill. App. 3d 888, 896 (2006) (defendant's act of firing at victims and hitting two of them was sufficient to prove element of intent for attempted murder). Taking these facts into account, a rational trier of fact could certainly have found that Hardin intended to injure Diane when he called her over to the car, pulled out a gun, and shot her in the neck.

¶ 24 Hardin argues that he might only have intended to scare Diane, not to injure her, based on his statement to Coney that he wanted to "scare them little motherf---ers." But as noted earlier, nothing compels a factfinder to accept a defendant's version of events when the evidence supports more than one reasonable inference. The trial court was not required to accept Hardin's theory of the case in light of the foregoing evidence of intent.

¶ 25 Hardin also claims that Coney's custodial statement further supports Hardin's version of events, in that Coney initially thought that Hardin shot the gun in the air and did not realize that Diane had been shot. Hardin argues that if he shot the gun in the air, it follows that he must not have intended to injure Diane. This argument ignores the fact that Coney was proved wrong on this point by the other testimony at trial. Hardin did not shoot the gun in the air; rather, he shot Diane in the neck. As noted, Hardin does not dispute the fact that he shot Diane, nor could he reasonably do so, given the overwhelming evidence at trial. Thus, Coney's demonstrably inaccurate statement that Hardin shot the gun in the air does not provide grounds to reverse Hardin's conviction.

¶ 26 Finally, Hardin argues that he might have been startled when Diane approached the car, which could have caused his finger to slip on the trigger. This argument is specious. Both Diane and Charone testified that Hardin called Diane over to the car. Having seen Diane and asked her to approach, Hardin could hardly have been startled when she did as he asked. Moreover, Charone testified that after Diane approached the car, Hardin reached his right hand over the left portion of his body and shot out the open window. She saw the flash of the gun coming from outside of the car. This testimony, when viewed in the light most favorable to the prosecution (*Cardamone*, 232 Ill. 2d at 511), indicates that Hardin's finger did not merely slip on the trigger as Diane approached; on the contrary, a rational trier of fact could have found that Hardin reached out of the car in order to fire at Diane.

¶ 27 In this regard, the present case is analogous to *Vasquez*, 315 Ill. App. 3d at 1133-34, where the court found the evidence sufficient to sustain defendant's conviction for aggravated battery with a firearm. The victim in *Vasquez* was walking home when a car stopped around 10 feet from him. *Id.* at 1132. Defendant was the front passenger in the car. The victim saw the defendant reach across the driver, point a gun at him, and fire five shots, three of which hit him. *Id.* In his defense, the defendant testified that the victim had been demanding money from him and kicking the car, and defendant merely fired his gun in the air in an attempt to scare the victim away. *Id.* at 1133. Notwithstanding this testimony, the *Vasquez* court affirmed defendant's conviction, stating:

> "A person acts knowingly if they are consciously aware that their conduct is practically certain to cause great bodily harm. [Citation.] Defendant contends that he acted recklessly, but not knowingly, in firing the gun. Based on the testimony presented,

> however, the circuit court reasonably could conclude defendant acted with knowledge that [the victim] would be harmed." *Id.*

Similarly, in this case, a rational trier of fact could certainly have found that Hardin acted with knowledge that Diane would be harmed, despite his assertion on appeal that he only intended to scare her.

¶ 28 Substitution of Counsel

¶ 29 Hardin next argues that the trial court violated his constitutional right to counsel by not properly considering his pretrial motion for substitution of counsel. The State argues that this issue is forfeited and, in any event, Hardin acquiesced in defense counsel's withdrawal of his motion.

¶ 30 It is well settled that criminal defendants do not have the right to choose appointed counsel. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989); *People v. Lewis*, 88 Ill. 2d 129, 160 (1981). Additionally, "the sixth amendment guarantee of counsel does not also guarantee a 'meaningful relationship' or rapport between an accused and his counsel." *DeRossett*, 262 Ill. App. 3d at 544 (citing *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983)); see *People v. Pope*, 284 Ill. App. 3d 330, 335 (1996) (defendant's "bad rapport" and arguments with counsel did not deprive him of his sixth amendment right to counsel). Hardin acknowledges these principles but nevertheless cites several federal circuit court decisions for the proposition that, under the federal constitution, a judge must consider a defendant's timely request for new counsel and grant the request if the defendant shows "good cause." See *United States v. Welty*, 674 F.2d 185, 187-88 (3d Cir. 1982). Hardin further argues that he alleged good cause in his pretrial motion for substitution of counsel, where he stated that there had been a "total

breakdown of communication" between him and his attorney. See *id.* at 188 (a "complete breakdown in communication" constitutes good cause).

¶ 31 Initially, the State points out that Hardin forfeited this claim by failing to include it in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (issues not raised in a posttrial motion are forfeited); see *People v. DeRossett*, 262 Ill. App 3d 541, 543 (1994) (defendant forfeited claim regarding pretrial request for appointment of different counsel where he did not raise it in posttrial motion). Hardin argues that forfeiture does not apply, since he has raised a constitutional issue that, if not raised on direct appeal, could be later raised in a postconviction petition. See *People v. Cregan*, 2014 IL 113600, ¶ 16 (recognizing constitutional-issue exception to forfeiture rule). But Hardin's complaints about his counsel do not rise to the level of a constitutional violation, since he voluntarily withdrew his request for appointment of new counsel before it could be considered by the trial court. Hardin was present during the exchange between his lawyer and the trial judge in which his lawyer informed the court that Hardin "indicate[d]" that he was withdrawing his *pro se* motion. Hardin said nothing when his lawyer conveyed his decision to withdraw his motion.

¶ 32 Since Hardin voluntarily withdrew his motion before the trial court could consider it, Hardin cannot now claim that the trial court's failure to consider his motion constitutes reversible error. Under the doctrine of acquiescence or invited error, a defendant cannot request to proceed in a certain manner and then contend on appeal that the court's action was improper. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (defendant's agreement to a procedure later challenged on appeal " 'goes beyond mere waiver' " (quoting *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001))); see *In re Detention of Swope*, 213 Ill. 2d 210, 218 (2004) (appellate court erred in reaching merits of constitutional issue where defendant acquiesced in the challenged procedure).

In accordance with this principle, this court has held that "[e]ven if a defendant has given some indication that he wishes to represent himself, he may later acquiesce in representation by counsel by vacillating or abandoning an earlier request to proceed *pro se*." *People v. Span*, 2011 IL App (1st) 083037, ¶ 61 (citing *People v. Burton*, 184 Ill. 2d 1, 23 (1998)). Similarly, even though Hardin initially requested alternate counsel, he later acquiesced in representation by his appointed counsel by allowing her to withdraw his motion without any objection.

¶ 33 Hardin argues that there was no waiver because, prior to his counsel's withdrawal of the motion, the judge stated, "Mr. Hardin, you will not be allowed to file your own motion and you cannot file motions, counsel, that being the case." Hardin argues that this statement was tantamount to a denial of his motion. We disagree. Hardin's interpretation does not make sense in context, since the judge's statement was addressed both to Hardin and to Hardin's counsel (who had no motions pending at the time). A more reasonable interpretation of the trial court's comments, made at the commencement of Hardin's trial, is that neither Hardin nor his counsel would be allowed to file any further motions until Hardin's motion for substitute counsel was resolved. After making this statement, the judge had no opportunity to consider the merits of Hardin's motion, because Hardin immediately withdrew it.

¶ 34 This interpretation is supported by the judge's posttrial comments on Hardin's motion. The judge told Hardin, "So I usually don't allow *pro se* motions when you're represented by counsel, but this one was for substitution and it was *** withdrawn." In this statement, the judge indicated that (1) although she typically would not permit *pro se* motions by defendants who were represented by counsel, motions for substitution of counsel were an exception, and (2) Hardin's motion was not ruled on but, rather, it was withdrawn. Thus, the record does not

support Hardin's assertion that his motion "fell on deaf ears" or that the judge effectively denied the motion before its withdrawal.

¶ 35 Hardin additionally argues that regardless of what the judge intended to say, her pretrial comment might have misled Hardin into believing that his motion would not be considered by the court. But, as noted, the judge clarified her stance after trial in Hardin's presence. Neither Hardin nor his counsel raised any objection to the judge's statement that he withdrew his motion. Accordingly, we find that Hardin acquiesced in the withdrawal of his motion and in his continued representation by appointed counsel. See *Harvey*, 211 Ill. 2d at 385 (on appeal, defendant cannot challenge a procedure to which he agreed in the trial court).

¶ 36 *Krankel* Hearing

¶ 37 Hardin's final argument is that the trial court was required under *Krankel*, 102 Ill. 2d 181, to hold a posttrial hearing on Hardin's pretrial complaints about his counsel. The State argues that *Krankel* only applies where a defendant makes a posttrial claim of ineffective assistance of counsel. In this case, Hardin not only withdrew his pretrial motion for substitution of counsel, but he made no effort to bring any complaints about his counsel to the court's attention during posttrial proceedings. Under such circumstances, the State argues that the trial court was under no obligation to *sua sponte* revive Hardin's ineffective assistance claims. We agree.

¶ 38 In *Krankel*, the defendant raised a *pro se* posttrial challenge to his attorney's competence at trial. The *Krankel* court held that the trial court should have appointed counsel, other than defendant's originally appointed counsel, to represent defendant at the posttrial hearing regarding his claim of ineffective assistance. *Id.* at 187-89. Illinois courts have interpreted *Krankel* as follows: when a defendant presents a *pro se* posttrial claim of ineffective assistance, the trial court should first examine the factual basis of the defendant's claim (*People v. Moore*, 207 Ill. 2d

68, 77-78 (2003)); if the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, the court may deny the *pro se* motion (*id.* at 78); but if the allegations show possible neglect of the case, the court should appoint new counsel for defendant and conduct a hearing (commonly called a *Krankel* hearing) on defendant's claim. *Id.* No inquiry is required unless the defendant brings his ineffective assistance claim to the attention of the trial court. *People v. Jocko*, 239 Ill. 2d 87, 93-94 (2010); *People v. Zirko*, 2012 IL App (1st) 092158, ¶ 70.

¶ 39 Hardin cites *Jocko* for the proposition that under certain circumstances, a defendant's *pretrial* claim of ineffective assistance of counsel may trigger a trial court's duty to conduct a *posttrial Krankel* inquiry. Prior to trial, the *Jocko* defendant filed a *pro se* motion and a non-file-stamped "affidavit" in which he expressed concerns about his counsel. *Jocko*, 239 Ill. 2d at 89. The court was never made aware of these documents and never considered them. On appeal, the *Jocko* court held that the trial court did not have a duty to conduct a pretrial inquiry into defendant's claims because it is impossible to tell before trial whether an attorney's actions have prejudiced the defendant. *Id.* at 93. The *Jocko* court further stated:

> "Generally a *pro se* defendant is not obligated to renew claims of ineffective assistance once they are made known to the circuit court [citation], and there is, of course, nothing to prevent a circuit court from addressing, at the conclusion of trial, a *pro se* claim of ineffective assistance that was previously raised by the defendant." *Id.* at 94.

See also *People v. Washington*, 2012 IL App (2d) 101287, ¶ 22 (holding that, under *Jocko*, a trial court is required to conduct a posttrial *Krankel* analysis of a defendant's pretrial ineffective assistance claim). Nevertheless, the *Jocko* court found that the trial court did not err in failing to

conduct a posttrial inquiry into defendant's claims where it had not been made aware of them. *Id.* at 94.

¶ 40 Likewise, in the present case, we find that the trial court did not err in failing to inquire into Hardin's claims where Hardin voluntarily withdrew them prior to trial. Although the trial court was initially aware of Hardin's claims, it was also aware that Hardin explicitly abandoned those claims and chose not to renew them at any point, even when the trial court discussed them in Hardin's presence after trial. Under these circumstances, we cannot fault the trial court for not pursuing Hardin's *pro se* claims further. See *Harvey*, 211 Ill. 2d at 385 (defendant cannot acquiesce in procedure and then challenge it on appeal).

¶ 41 CONCLUSION

¶ 42 We find that the evidence was sufficient to convict Hardin of aggravated battery, notwithstanding Hardin's argument that he might only have intended to scare the victim when he shot her in the neck. We also find that the trial court was not required to consider Hardin's motion for substitution of counsel where he voluntarily withdrew that motion, nor was the trial court required to conduct a posttrial *Krankel* hearing on that withdrawn motion. Consequently, the judgment of the trial court is affirmed.

¶ 43 Affirmed.