2015 IL App (1st) 131876-U

FOURTH DIVISION
September 17, 2015

No. 1-13-1876

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 3755
	)	
MICHAEL CEPHUS,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Ellis concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Trial court did not abuse its discretion in denying defendant a continuance on the second day of a jury trial; 14-year sentence was not excessive; judgment affirmed.

¶ 2 Following a jury trial, defendant Michael Cephus was found guilty of residential burglary and sentenced to 14 years' imprisonment. On appeal, he contends that the court erred in denying his request for a continuance to obtain the testimony of Theophilus Wright. He also contends that his sentence is excessive.

¶ 3 The record shows that defendant and Wright, who is not a party to this appeal, were charged with the January 25, 2012, residential burglary of the dwelling of Pamela Atkins. Defendant's case was set for trial on August 21, 2012, and on that date, counsel informed the court that he needed a continuance to contact two witnesses. A continuance was granted and on the next court date, September 18, 2012, counsel informed the court that there were two additional witnesses he needed to find, and the matter was continued again. On October 19, 2012, counsel asked for a jury trial date, and the matter was continued to December 10, 2012, when both the State and counsel asked for a continuance. Counsel also informed the court that he had a witness, Theophilus Wright, who was in boot camp, and requested the court to sign an order to allow him to go to boot camp with an investigator to interview him. The court noted that Wright was the codefendant and granted counsel's request. Further continuances were granted on February 21, 2013, and April 19, 2013.

¶ 4 A jury trial commenced on April 22, 2013. During his opening statement, counsel informed the jurors that he would prove through the testimony of Theophilus Wright, who had already pleaded guilty in this matter, that defendant "had nothing to do with this case."

¶ 5 Pamela Atkins then testified that she and her husband reside at 11801 South Vincennes Avenue in Chicago. On January 25, 2012, her husband left for work at 5:20 a.m. and she left for work 10 minutes later. When she left her house, there was no damage to her doors, but when she returned, her entry door was slightly damaged, and items in her house were rearranged. She did not give defendant or anyone permission to move any of her belongings, or to enter her house.

¶ 6 Mary Jarnegan testified that she knew Atkins, who lived across the street just to the left of her. Shortly after 1 p.m. on January 25, 2012, she looked out her window, and saw two men, defendant and Wright, coming out of the side door of Atkins' home, and asked her husband to call 911. She could clearly see the men, then grabbed her digital camera and took pictures of them. The pictures, however, were not clear because they were taken through the screen.

¶ 7 Jarnegan further testified that defendant and Wright were entering different driveways and looking around before they walked directly in front of her house, at which time she saw both of their faces. The police arrived a minute after she initially observed them, and defendant and Wright fled. After their apprehension, she identified both as the men she had seen exiting Atkins' home minutes before. Jarnegan further testified that she was 150% sure that defendant was one of the persons she saw coming out of Atkins' home. She also stated that she did not notice any police vehicles while she observed the two men.

¶ 8 The trial was continued to 10:30 a.m. the next day; however, counsel did not appear at that time, but called to inform the court that he was looking for Wright. Counsel arrived in court at 2 p.m., and apologized for being late, but Wright was not with him. The court pointed out that counsel had held the court and the jurors hostage. The court stated that it had been sitting in the courtroom since 10:30 a.m. because counsel told them he was going to do something that it is not going to be done as he did not issue a subpoena for Wright. Counsel told the court that Wright knew the trial date, that he (counsel) had spoken to the State to writ defendant in, and the State submitted the paperwork to have him brought to the court from boot camp. Counsel explained that he called the sheriff's office that day to find out if Wright was on house arrest, then went to

Wright's neighborhood and house but did not find him. Counsel learned from the sheriff's office that Wright was still in the boot camp program, but was not in the sheriff's custody. Since he did not have a curfew, he could go wherever he wanted during the day, but had to check in with his counselor, Bob Collins. Counsel contacted Collins and left a message for him, and was waiting for a return call. In light of these facts, counsel asked the court for a continuance so that he could serve Wright with a subpoena.

¶ 9 The court denied that request, explaining that this case had been set for a jury trial four times, noted that Wright was a codefendant and should have been subpoenaed already, and that counsel had held the jurors hostage for three and a half hours. The court stated that it had told the jurors the trial would end today, that it was not punishing defendant, but that there must be a consequence, and that was to deny the continuance. Counsel then requested the court to admonish the jurors that Wright was not available and for them not to consider what his testimony may have been. The court stated that it would admonish the jurors that Wright was not here and that his absence could not be held against defendant in any way. The court then had the jury brought into the courtroom.

¶ 10 Trial resumed and Chicago police officer Robert Quintero testified that on January 25, 2012, he was working and driving a marked police vehicle while in uniform. Just after 1 p.m., he responded to a call of a burglary in progress at 11801 South Vincennes Avenue. He left his vehicle a little north of that address, approached the location on foot, and saw defendant and Wright walking down the side stairs of the house in question. When defendant and Wright saw him, they went towards the alley. Officer Quintero moved quickly to cut them off, but did not see

them when he got there. He then walked down the alley, looked back towards Vincennes, and saw the men walking back and forth on the sidewalk. As they ran southbound towards 119th Street, Officer Quintero ran parallel to them through the alley.

¶ 11 Officer Quintero briefly lost sight of them a few times, but defendant was apprehended by Officer Sawicki, who arrived on the scene, and he then apprehended Wright. The officers brought the two men back to the scene of the offense, and Jarnegan identified defendant as one of the offenders. Officer Quintero further testified that when he returned to the house on Vincennes, he noticed that the door had been kicked or forced open.

¶ 12 At the close of evidence, the jury found defendant guilty of residential burglary. Counsel filed a motion for a new trial, alleging, in relevant part, that the court erred in denying his motion for a continuance to subpoena Wright. Counsel alleged that on April 9, 2013, Wright was at boot camp, and on April 22, 2013, the State made calls for Wright to be brought to court for trial. On April 23, 2013, the Sheriff's office informed the State that Wright was no longer in their custody, and when counsel went to Wright's home on the morning of April 23, 2013, he was unable to serve him with a subpoena. Counsel alleged that since he had told the jury that Wright would testify, defendant was unfairly prejudiced by not having this testimony presented.

¶ 13 At the proceeding on this motion, counsel told the court that when he interviewed Wright at boot camp, he told him that defendant did not commit this crime with him, and restated his efforts to have him brought to the courtroom to testify. Counsel alleged that defendant was unfairly prejudiced by his absence, and that he only asked for a short continuance to subpoena Wright.

¶ 14 The State also noted that it accommodated counsel's request to writ Wright in, but that he was never in custody. The State claimed that counsel was the one who was supposed to follow up on a more timely basis, and that he only attempted to subpoena Wright on the second day of trial. The State also noted that counsel had not indicated what Wright would testify to, nor provided any signed statement or report indicating that his testimony was compelling. The State further informed the court that Wright pleaded guilty on April 9, 2012, and was "sworn to the facts" that defendant was involved. Therefore, if he came to trial and testified that defendant was not involved, he would be impeached by this substantive evidence, and, accordingly, defendant was not prejudiced by Wright's absence.

¶ 15 The court denied defendant's motion for a new trial. In doing so, the court stated that on October 9, 2012, defendant's case was set for a jury trial, then again on December 10, 2012, and February 21, April 19 and April 22, 2013. After multiple failed attempts to have a jury trial for defendant, it denied counsel's motion for a further continuance. The court also noted that codefendant Wright was sworn to the facts in this case, and it had no reason to believe that his testimony would be any different at trial. Wright was not issued a subpoena and after costing the taxpayers money by failing to have the trial multiple times, it was the court's duty to bring the case to trial, especially where the only witness was defendant's codefendant, who was already convicted in this case.

¶ 16 At the sentencing hearing, the State informed the court that defendant was a Class X offender based on his prior convictions for residential burglary, criminal trespass to land, and possession of a controlled substance, and also pointed out that he has a misdemeanor conviction

for obstructing a police officer, and two burglary convictions. The State alleged that defendant has been given many opportunities to comply with the rules of society, *i.e.*, respect for other people and their property, but that he has not done so, and requested a sentence in excess of 20 years.

¶ 17 In mitigation, defense counsel noted that defendant's family was present, including his wife who came to every court date. Prior to his arrest, defendant lived with his wife, 11-year-old son and two stepsons, but after his arrest, his family broke up, he was incarcerated for four months, and afterwards, lived with his mother. For the past four years, defendant was employed as a ceramic tile installer and used the money to support his son, and wife, and also gave money towards his mother's household while he was living with her. Counsel further noted that defendant has a high school diploma, and that two family members had written letters expressing the role that defendant plays in their family life. As for the nature of the offense, counsel observed that no items were taken, no one was hurt or at home, his most recent sentence was two days, and in 2009, he was sentenced to one-year of imprisonment.

¶ 18 In allocution, defendant told the court that he did not understand how he was proved guilty because he was not even at the Vincennes address. Defendant stated that he was stopped by police while entering a barbershop, and they searched him, finding $900 in his pocket. They told him that he fit the description, and arrested him for the residential burglary. Defendant then asked the court for leniency in sentencing, noting that he has a baby on the way.

¶ 19 The court sentenced defendant to 14 years' imprisonment, followed by a three-year term of mandatory supervised release. In doing so, the court stated that it had considered the factors

brought in aggravation and mitigation, and the presentence investigation report (PSI), which showed that defendant had a "very checkered" criminal history, but had periods of time in between crimes where he was at least being a more effective member of society. The court also noted that defendant's family loved him. However, the court observed that defendant had five felony convictions spanning over 15 years, that Jernigan's testimony was highly probative, and that the court was not here just to make sure justice was done for defendant, but also for the people who reside where defendant committed the residential burglary. The court noted that defendant's allocution was more of a denial, which was fine, but it did not hear any remorse. The court then questioned how effective a person defendant would be in society, and consequently sentenced him to 14 years' imprisonment.

¶ 20 Defendant filed a motion to reconsider sentence, alleging, in relevant part, that his sentence was excessive in light of the evidence presented at trial. The trial court denied the motion.

¶ 21 On appeal, defendant first contends that the court erred in denying his motion for a continuance to obtain the testimony of Wright, who would have testified that he had nothing to do with this offense. As an initial matter, the State contends that defendant waived this issue because he did not make a contemporaneous objection at trial. We disagree.

¶ 22 The supreme court has stated that its forfeiture rules exist to encourage defendants to raise issues in the trial court, thereby ensuring both that the trial court has an opportunity to correct any errors prior to appeal and that defendant does not obtain a reversal on his own inaction. *People v. Denson,* 2014 IL 116231, ¶13. Here, defendant raised a contemporaneous

objection at trial to the denial of his request, and also raised the issue in his post-trial motion. The trial court was thus given a full and fair opportunity to consider and rule upon the issue, and we find that nothing more was required. *Denson*, 2014 IL 116231, ¶13.

¶ 23 The State further contends that defendant has failed to comply with section 114-4 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-4 (West 2012)), which requires that a motion for a continuance to obtain a witness to testify at trial which is made more than 30 days after arraignment, be in writing and supported by an affidavit. Since defendant failed to do so here, the State claims that the court had discretion to deny the continuance based on defendant's failure to procedurally comply with this statute even if the court reached its ruling without relying on that ground. *People v. McClain*, 343 Ill. App. 3d 1122, 1131-32 (2003).

¶ 24 Although that is possible, we find for the reasons to follow that the trial court did not abuse its discretion in denying defendant's request for a continuance on the second day of trial. *McClain*, 343 Ill. App. 3d at 1130. In reviewing the denial of a request for a continuance sought to secure the presence of a witness the factors to be considered are: 1) whether defendant was diligent in his attempt to secure the witness, 2) whether defendant has shown that the testimony was material and might have affected the jury's verdict, and 3) whether defendant was prejudiced. *McClain*, 343 Ill. 2d at 1130.

¶ 25 The record here supports the conclusion that defendant was not diligent in his attempt to procure the testimony of Wright. Although counsel had ample time to obtain a subpoena for Wright prior to trial, and was granted a number of continuances to pursue this known witness, counsel waited until the second day of trial to attempt to locate Wright. Counsel's effort proved

to be unsuccessful, and, in the process, the court and the jury were forced to wait several hours for the trial to resume. *People v. Sargent*, 184 Ill. App. 3d 1016, 1023 (1989). The composite of these factors clearly shows a lack of diligence to secure Wright's presence at trial. *People v. Rivera*, 64 Ill. App. 3d 49, 52 (1978); *People v. Timms*, 59 Ill. App. 3d 129, 135 (1978).

¶ 26 Defendant also failed to show that Wright's testimony was material or might have affected the verdict. As noted, Wright was convicted of this offense after pleading guilty, and swore to the facts of the case which involved defendant as a participant. Therefore, Wright's testimony would have been severely impeached (*People v. James*, 348 Ill. App. 3d 498, 504-06 (2004)), and given the testimony the disinterested eyewitness, Jenargen, who was 150% sure that defendant was one of the offenders, we cannot say that Wright's testimony would have impacted the jury's decision. *McClain*, 343 Ill. App. 3d at 1133.

¶ 27 As a consequence, we also find that defendant cannot demonstrate that he was prejudiced by Wright's absence and that the result of the proceeding would have been different. *McClain*, 343 Ill. App. 3d at 1133-34. Jenargen identified defendant as an offender minutes after seeing him exit Atkins' home, and passing directly in front of her house where she had a good view of his face. Her testimony was corroborated by Officer Quintero, who arrived on the scene within minutes and apprehended the offenders. Under these circumstances, it is impossible to say that Wright's testimony would have altered the result of the trial (*McClain*, 343 Ill. App. 3d at 1134), and, accordingly, we find that defendant cannot establish the requisite prejudice (*People v. Ford*, 368 Ill. App. 3d 562, 569 (2006)) to reverse the court's decision.

¶ 28 The fact that defense counsel told the jurors that Wright would testify when he ultimately did not, does not alter our conclusion. The jury was admonished by the court that Wright was not present, that his absence cannot be held against defendant in any way, and that arguments are not evidence. The jury is presumed to understand the instructions provided (*People v. Modrowski*, 296 Ill. App. 3d 735, 743 (1998)) and follow them (*People v. Sutton*, 353 Ill. App. 3d 487, 505 (2004)), and here, the record discloses no deviation from that presumption. In addition, when the State argued in rebuttal that defendant "said he's going to prove this and that, he's proved nothing," the court sustained defendant's objection to this argument. Given the strength of the evidence against defendant and the curative effect of the admonishments by the court, we find no prejudice accruing to defendant. *McClain*, 343 Ill. App. 3d at 1133-34.

¶ 29 Defendant next contends that his 14-year sentence was excessive given the nature of the offense, his background and his strong potential for rehabilitation. The State initially contends that defendant forfeited his claim that his sentence was excessive based on his background because he did not include this specific assertion in his post-trial motion to reconsider sentence. We find that defendant sufficiently apprised the court of his objection to his sentence to preserve it for appeal where he alleged in his motion that his sentence was excessive in light of the evidence presented at trial and to the court. *People v. Latto*, 304 Ill. App. 3d 791, 804 (1999). Thus, the issue is not waived. *Latto*, 304 Ill. App. 3d at 804.

¶ 30 Turning to the substantive matter, we observe that there is no dispute that defendant's mandatory Class X sentence of 14 years' imprisonment fell within the statutory sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25 (West 2012). As a result, we may not

disturb that sentence absent an abuse of discretion. *People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002).

¶ 31 The transcript of the sentencing hearing shows that the trial court considered the PSI report, including the mitigating factors presented and cited again here (*People v. Burke*, 164 Ill. App. 3d 889, 902 (1987)), and determined that his background, which included numerous prior felony convictions (*People v.Evangelista,* 393 Ill. App. 3d 395, 398-99 (2009)) weighed against imposing the minimum sentence (*People v. Hunzicker*, 308 Ill. App. 3d 961, 966 (1999)). A trial court is not required to give greater weight to defendant's rehabilitative potential than to the seriousness of the offense (*People v. Phillips*, 265 Ill. App. 3d 438, 450 (1994)), which, in this case, involved the burglary of a home of a neighbor in broad daylight. On this record, we find no abuse of sentencing discretion in the 14-year term imposed (*Bennett*, 329 Ill. App. 3d at 517), and thus have no basis for disturbing the sentence imposed by the court (*People v. Almo,* 108 Ill. 2d 54, 70 (1985)).

¶ 32 Although defendant cites a number of cases in which defendants' sentences were reduced, we will not engage in cross-case comparative sentencing. *People v. Fern*, 189 Ill. 2d 48, 55 (1999). Moreover, in this case, unlike the cases cited, defendant had five prior felony convictions in 15 years; and, given his criminal background and commission of this offense against a neighbor, the court questioned how effective a person he would be in society, a further reflection on his rehabilitative potential.

¶ 33 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.