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2015 IL App (3d) 120756-U

Order filed June 16, 2015  
Modified Upon Denial of Rehearing August 24, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0756 Circuit No. 10 CF 724
SKYLAR JORDAN,	)	The Honorable Timothy M. Lucas, Judge, Presiding.
Defendant-Appellant.	)	

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PRESIDING JUSTICE McDADE delivered the judgment of the court.  
Justices Schmidt and Wright concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Defendant's conviction is affirmed. Defense counsel was deficient in eliciting other crimes testimony and failing to impeach a witness during trial. Defendant, however, was not unfairly prejudiced by those errors because the evidence is otherwise sufficient to support his conviction.
- ¶ 2 Defendant, Skylar Jordan, was charged with first-degree murder of Anthony Johnson and attempted first-degree murder and aggravated battery with a firearm of Angela Johnson and Justin Stanley in relation to a shooting that occurred on July 18, 2010. After a jury trial, Jordan

was found guilty of first-degree murder and two counts of attempted first-degree murder and aggravated battery with a firearm. He was sentenced to 120 years' imprisonment. He appealed the conviction arguing ineffective assistance of counsel. In an order issued June 16, 2015, we affirmed the trial court and found that though defense counsel was deficient in eliciting other crimes testimony and failing to impeach a witness during trial, defendant was not unfairly prejudiced by those errors because the evidence was otherwise sufficient to support his conviction.

¶ 3 The petitioner has filed a petition for rehearing raises two issues with this court's decision: (1) the Collins standard is inapplicable as the court was charged with determining whether the evidence was closely balanced not if there was sufficient evidence to support defendant's conviction and (2) the evidence was closely balanced allowing the improperly admitted evidence to tip the scale of justice against defendant. The petition is denied with slight modification of the order. We accept defendant's contention that the Collins standard is inappropriate. However, we still find that it is the trier of fact's responsibility to assess credibility. Additionally though defense counsel committed errors, defendant was not unfairly prejudiced as the evidence is not closely balanced. The trial court's ruling remains affirmed.

¶ 4 **FACTS**

¶ 5 **The Shooting**

¶ 6 The following facts concerning the day of the shooting were adduced at Jordan's trial.

¶ 7 On the morning of July 18, 2010, Ondrea and Angela Johnson were gathered in front of their home on Frink Street with Ondrea's brother, Anthony Johnson, and nephew, Justin Stanley. Anthony and Justin were very intoxicated and joking loudly. Anthony was in the driveway shouting various things.

¶ 8 Taurean Gregory, Jordan's friend of six years, testified that on the same morning, he and Jordan were riding around in a gray car. Gregory asserted that he was in the front passenger seat and Jordan was driving.

¶ 9 When on Frink Street, Gregory said a man in a driveway shouted a word in their direction. Jordan stopped the car in front of the house and got out while Gregory stayed in.

¶ 10 Ondrea testified he told the driver<sup>1</sup> not to pay attention to Anthony and Justin because they were drunk. Presumably while still in the car, Gregory stated he spoke with the man who was trying to hold the loud man back. He recalled giving a thumb up and saying, "[w]e're cool." The driver then raised a gun, held it straight out, and opened fire. Gregory testified Jordan fired two gunshots; then they drove off.

¶ 11 Angela was grazed in the lower abdomen. She ran into the house. Anthony was shot in the chest and foot and fell to the ground in the driveway. Justin was struck in the shoulder.

¶ 12 Angela testified that she was not sure when the police arrived at her house because she had run back inside after she was shot. When she came back out of the house at Ondrea's instruction, she gave CPR to Anthony. Ondrea, however, testified that Angela did not perform CPR on Anthony but that neighbors did. Officer Shannon Parnell, who responded to the scene, also stated others, not Angela, were performing CPR on Anthony.

¶ 13 After being transported to St. Francis Hospital where she was treated for her graze wound, Angela met there with police officers who were responding to the shooting incident. She told them that she saw the face of the shooter and described him as dark skinned with braids. She

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<sup>1</sup> We refer to the driver of the vehicle as "the driver" and not "Jordan" because defendant challenges here on appeal, as he did at his trial, the sufficiency of the evidence and the witnesses' testimony to identify him as the driver and thus the shooter.

then picked Jordan out of a photo array as the shooter. She could not identify the passenger because she did not clearly see him. She described the gun as large and silver with a long barrel.

¶ 14           Ondrea testified that after the shooting, he was taken to the police station to give a statement. When asked at the station, he told them that he did not know if he could identify the shooter because it all happened very quickly, but he did give the police a general physical description of the shooter. In court, Ondrea said he described the shooter to the police as a black male approximately 5 feet 9 inches or 5 feet 10 inches with dark skin and braids. He identified Jordan in court as the shooter. Ondrea said he also described the passenger to the police as a black male, but lighter skinned.

¶ 15           Gregory testified that at the time of the shooting, he had very short hair and gold teeth. He had the same look at the time of the trial.

¶ 16           Officer Chad Batterham testified that while responding to the call for the shooting, he saw a silver car that matched the description of the car at the scene. Batterham followed and then approached the car, which had pulled over to the side of the road. The driver, however, quickly drove away after Batterham got out of his car and told him to put his hands out of the car. Batterham pursued. The car crashed at Lincoln Middle School. Batterham saw and radioed in that two individuals were running away from it. One of the individuals, later identified as Gregory, ran northeast into the woods; the other, later identified as Jordan, ran east towards Monroe Street through the school's parking lot. Batterham chased Jordan into an apartment building where he caught him and took him into custody.

¶ 17           Officer Shawn Meeks responded to the scene of the car crash. He searched the woods and talked Gregory out. Meeks took Gregory into custody and he was later interviewed.

¶ 18 Detective Mary Robinson testified that she also responded to the scene of the car crash. She located a jammed .45 caliber gun—subsequently identified as the murder weapon—in the grass about five to ten feet from the crash. It was north of the vehicle, in the direction of the woods.

¶ 19 Motive

¶ 20 The following relevant facts regarding incidents related to Gregory's motive to implicate Jordan were adduced at a pre-trial discovery hearing and during Jordan's trial.

¶ 21 During the pre-trial hearing, defense counsel informed the court that Gregory had recently been shot and that the person convicted of the shooting was Jordan's brother. Defense counsel also informed the court that he was made aware that during the course of the investigation into that shooting, Gregory participated in a videotaped interview where he made statements revealing Jordan was not involved in the shooting on July 18, 2010. Defense counsel requested a copy of the video to review for possible evidence to impeach Gregory. The State informed the court it had reviewed the video and found nothing material or relevant to the present case, but was willing to tender the video to defense counsel. The court noted the State's tender of the video to defense counsel. The following day after having reviewed the recording, defense counsel informed the court it agreed with the State that there was nothing of value to Jordan on it.

¶ 22 Later at Jordan's trial, on cross-examination, Gregory stated he and Jordan were no longer friends because Jordan "did something" to no longer be his friend. After a litany of reasons proffered by defense counsel and denied by Gregory, counsel asked if the friendship ended because Jordan had shot at Gregory. Gregory responded, "[n]o, he sent somebody else for that." Defense counsel asked Gregory, for clarity, if Jordan sent someone else to shoot him. Gregory

said "[y]eah." Defense counsel's additional questions further referenced the change in the friendship status. At one point, Gregory stated he "[didn't] really care for [Jordan]" now.

¶ 23 Defense counsel also attempted an inquiry into Gregory's relationship with the prosecution. The State objected. At a sidebar, the prosecutor explained that Gregory had been housed in a hotel for two nights because the trial was taking longer than expected. The prosecutor reminded the court that Jordan's brother had shot at Gregory and noted that Gregory had received threats from Jordan's family. The court sustained the State's objection.

¶ 24 Defense counsel then questioned Gregory about his videotaped interview with the police following his arrest. When questioned, Gregory admitted to initially saying that he was intoxicated and did not see anything. He later changed his statement, described the incident, and identified Jordan as the shooter. At one point, defense counsel asked Gregory if the officer told him to, "[m]ake it look good for you." The State objected on hearsay grounds. In a sidebar, defense counsel explained that he wanted the officer's suggestion to Gregory before the jury because "it's going to go down to his motive to change his comments." The State said it had no objection to what Gregory said, but the out-of-court statement by the officer would have to come in through the officer. Defense counsel contended that if he brought it in through the officer "that doesn't give him room to even give a response. The officer has to say what he said. Then we got to recall [Gregory] in rebuttal." Defense counsel further argued, "If I don't ask him this question, how can I ask the officer did you say blank blank [sic] to him and get his response. They are going to call it hearsay at that point and say wait a minute, hold on. He didn't ask him directly. It's improper impeachment." The court sustained the objection. Defense counsel concluded his cross examination of Gregory.

¶ 25 Following the close of the State's case, the court denied defense counsel's motion for a directed verdict. The defense rested without calling any witnesses.

¶ 26 The State then filed, before closing arguments, a motion *in limine* requesting that defense counsel not comment on the State's decision to not charge Gregory with murder or other crimes related to this case. The court ruled that counsel was permitted to argue reasonable inferences, but not any choices that were made by the State.

¶ 27 In closing, the State stressed that the witnesses all identified Jordan as the shooter and specifically noted that there was no testimony that impeached Gregory's identification of Jordan as the shooter. Defense counsel argued that the "wrong man got charged," pointing out that Gregory was the only one interacting with the people outside the house on Frink Street, and that he was in an intoxicated state that day and stated in his police interview that he did not see anything. Counsel also noted the inconsistencies in Angela's testimony and reminded the jury that Ondrea testified he told the police he did not know if he could identify the shooter as the incident happened so quickly. Counsel further asserted that the murder weapon was recovered from Gregory's flight path after the car crash, not Jordan's.

¶ 28 During deliberations, the jury sent out several notes. In one note, the jury asked, "If there was a police report that documents Ondrea's verbal description of the shooter?" The court responded, "it is your duty to determine the facts and to determine them only from the evidence in this case." In another note the jury asked, "Can we have a transcript of Andrea's [sic] testimony?" The jury was given copies of the transcript of his testimony.

¶ 29 The jury found Jordan guilty of first-degree murder of Anthony Johnson and guilty of two counts of attempted first-degree murder and aggravated battery with a firearm of Angela Johnson and Justin Stanley. Defense counsel then orally moved for a new trial and judgment

notwithstanding the verdict. The court denied the motions but without prejudice to filing written motions.

¶ 30 Post-trial Proceedings

¶ 31 After the jury trial, Jordan sent letters to the court asking for a new trial and for defense counsel to be removed. In the letters he stated defense counsel "did not call any of [his] witnesses like [he] asked him to do" and "did not prepare a proper defense." Jordan also submitted his own amended motions for judgment notwithstanding the verdict or, alternatively, a new trial. He argued, *inter alia*, that defense counsel provided ineffective assistance in failing to investigate, impeach witnesses, and play Gregory's videotaped statement from the investigation into Gregory's shooting by Jordan's brother so as to show Gregory's inconsistent statements and state of mind.

¶ 32 By this time, defense counsel had also filed motions for judgment notwithstanding the verdict and a new trial. He then sought and was granted leave to withdraw as counsel. The court appointed another public defender as Jordan's new post-trial defense counsel.

¶ 33 The post-trial defense counsel filed and argued another motion for new trial. Counsel asserted that previous defense counsel did not adequately develop or explore uncertainties in the case. He also claimed that previous defense counsel did not adequately explore inconsistent facts proffered by various State witnesses and that the court erred in sustaining the State's hearsay objection during defense counsel's cross-examination of Gregory. The court denied the motion.

¶ 34 Jordan was sentenced to a total of 120 years' imprisonment. The court denied Jordan's motion to reconsider the sentence. This appeal timely followed.

¶ 35 ANALYSIS



¶ 36 Jordan argues his defense counsel provided ineffective assistance when his cross-examination of State's witness, Gregory, elicited prejudicial other crimes testimony. He further asserts that counsel was ineffective when he failed to deliver on promises made to the jury in his opening statement. Counsel stated he would impeach Gregory by showing that Gregory's motive to implicate Jordan was based on the police officer's suggestion to him during his custodial interview after the shooting that he "make it look good for [himself]" and "be a witness and not a suspect". He asserts that trial counsel failed to utilize proper evidentiary rules and procedures for the impeachment.

¶ 37 The State argues that Jordan has waived these issues on appeal as they were not a part of any post trial motion for a new trial. Thus they can only be reviewed for plain error. The State further asserts that even reviewed under the plain error doctrine Jordan's arguments on appeal fail. It contends that the questioning that led to the other crimes testimony was part of defense counsel's trial strategy. Counsel was attempting to show that Gregory's motive to implicate Jordan was their discontinued friendship that resulted from Jordan sending his brother to shoot Gregory. The State also asserts that defense counsel's failure to provide specific evidence promised during opening statements was remedied by counsel's other questions that effectively brought out the fact that Gregory had changed his statement during his interview. The failure was further neutralized when the trial court instructed the jury to make its ruling on the evidence presented and not on anything stated during opening statements.

¶ 38 We first address the State's argument that Jordan has forfeited these issues on appeal. The State asserts that Jordan's post-trial counsel failed to preserve the issues by not raising them in his motion for a new trial. Jordan counters that his latter point of contention was preserved as it was one of the issues asserted in post-trial counsel's motion for a new trial.

¶ 39 Where a defendant has post-trial counsel different from his trial counsel and that post-trial counsel files a post-trial motion containing allegations of ineffective assistance of counsel, specific matters not raised in that motion are forfeited for consideration on appeal. *People v. Salgado*, 366 Ill. App. 3d 596, 607 (2006) (citing *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988)). However, our court can review issues raised for the first time on appeal under the plain error doctrine. *People v. Laugharn*, 297 Ill. App. 3d 807, 810-11 (1998).

¶ 40 The record shows Jordan forfeited both issues. His post-trial counsel generally argued trial counsel did not adequately develop or explore uncertainties in the case. It then narrowed the argument to assert that trial counsel should have impeached other witnesses, conducted further questioning of Gregory, and that the trial court erred in sustaining the State's hearsay objection. None of these arguments is the same as Jordan's second issue here on appeal. Thus a review under the doctrine of plain error is appropriate.

¶ 41 However, in this case, such a differentiation is not necessary as the closely balanced evidence prong of the plain error doctrine is similar to an analysis for the ineffective assistance of counsel due to evidentiary error.

"[A] defendant in either case must show he was prejudiced: that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, i.e., that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial [citation] [plain error]; or that there was a 'reasonable probability' of a different result had the evidence in question been excluded [citation] [ineffective assistance of counsel]." *People v. White*, 2011 IL 109689, ¶ 133.

¶ 42 With respect to both issues, "[t]he constitutional guarantee of effective assistance of counsel requires a criminal defense attorney to use the applicable rules of evidence to shield his client from a trial based upon unreliable evidence." *People v. Fillyaw*, 409 Ill. App. 3d 302, 315 (2011). Such unreliable evidence would include the admission of other crimes testimony that is not part of a continuing narrative and is distinct and "undertaken for different reasons at a different place at a separate time." *People v. Adkins*, 239 Ill. 2d 1, 32-33 (2010) (quoting *People v. Lindgren*, 79 Ill. 2d 129, 139-40 (1980)). This unreliable evidence could also include testimony that an effective attorney would have been expected to impeach using proper evidentiary procedures. See *People v. Fillyaw*, 409 Ill. App. 3d 302, 315 (2011).

¶ 43 We believe that defense counsel's elicitation of other crimes testimony and failure to employ proper evidentiary procedures during trial to impeach Gregory based on counsel's theory that Gregory changed his statement at the suggestion of the officer were objectively unreasonable. With particular regard to the other crimes testimony, it appears that counsel's strategy was to show that Gregory had a grievance with Jordan that was egregious enough to cause him to falsely accuse his former close friend of murder. That strategy provided the jury with the information that Jordan had sent his brother to shoot, presumably to kill, Gregory, that the brother had in fact shot him, and the brother had been convicted for doing so. That information of Jordan's solicitation of another crime of violence was inherently prejudicial to Jordan. However, we conclude counsel's errors were not unfairly prejudicial to defendant. See *People v. Walker*, 211 Ill. 2d 317, 334-43 (2004) (noting our courts' allowance of prejudicial evidence so long as it is not unfairly prejudicial).

¶ 44 In conducting a commonsense assessment of the evidence in this case, we find it was not closely balanced as there is ample evidence in the record outweighing defense counsel's errors

allowing a reasonable jury to convict Jordan. See *People v. White*, 2011 IL 109689, ¶ 139. In understanding that nearly all of the evidence involved testimony from the State's witnesses, we note that the determination of witness credibility is the responsibility of the trier of fact. *People v. Manning*, 182 Ill. 2d 193, 210 (1998).

¶ 45 In addition to Gregory, two other State witnesses, Angela and Ondrea, independently described and identified Jordan as the shooter. Angela identified Jordan as the shooter from the photo array presented to her at the hospital only hours after the shooting and affirmed in open court that Jordan was the shooter. Ondrea gave a description of the shooter to police at the police station hours after the shooting and identified Jordan in open court as the shooter. Both Angela and Ondrea described the shooter as dark-skinned with braids. Ondrea testified that the passenger was a lighter skinned man. The jury was able to see both Jordan and Gregory and assess for themselves who better fit each description.

¶ 46 Additionally, the jury was aware of the inconsistencies and contradictions in the testimony of the State's witnesses. The fact that Angela did not give Anthony CPR and that her description of the gun did not match the actual murder weapon was brought to its attention.

¶ 47 The jury knew that when Ondrea was questioned at the police station he initially stated he was not sure if he could remember what the shooter looked like. Although, as previously noted, he actually provided a description of the shooter at that time, no tangible evidence of that contemporaneous description was admitted into evidence.

¶ 48 This jury also heard Gregory testify that he heard Jordan fire two shots but it had already been made aware of the fact that the victims were, collectively, shot four times. They also knew the murder weapon was found in Gregory's flight path, not Jordan's.

¶ 49 Such testimony and admissions were aimed at undermining the credibility of these witnesses. However, they never deviated from their independent identifications of Jordan as the shooter prior to and during Jordan's trial.

¶ 50 Further, defense counsel's closing argument emphasized Gregory's lack of credibility. Counsel reminded the jury of Gregory's intoxicated state the day of the shooting and that he initially told the police officers during his custodial interview he had not seen anything during the shooting. He then abandoned that position to recount a version of events that implicated Jordan as the shooter.

¶ 51 The record supports a fair conclusion that the jury considered all of the evidence and a strong inference that the jury relied particularly on Ondrea's testimony, and not Gregory's. Two of their several notes sent to the court during deliberation sought clarification of Ondrea's testimony and description of the shooter.

¶ 52 Considering the totality of the evidence, even if portions of defense counsel's assistance were objectively unreasonable, the result at trial is still a verdict worthy of confidence.

¶ 53 **CONCLUSION**

¶ 54 For the foregoing reasons the defendant's convictions are affirmed.

¶ 55 Affirmed.