2016 IL App (3d) 141012-U

Order filed December 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-1012
v.	)	Circuit No. 12-CF-149
	)	
LUTHER D. STARKEY,	)	Honorable
	)	Clark Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice O'Brien and Justice McDade concur in the judgment.

ORDER

¶ 1 *Held*: The videotaped identification of the victim was not unduly prejudicial.

¶ 2 Defendant, Luther D. Starkey, appeals from his conviction for first degree murder, attempted first degree murder, and aggravated battery with a firearm, arguing that the trial court erred in allowing the victim's videotaped identification of defendant to be shown at trial. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with a three-count indictment. Count I alleged that defendant committed first degree murder (720 ILCS 5/9-1(a)(2) (West 2012)) when he shot Tyrone Kennedy about the body, knowing the act created the strong probability of death or great bodily harm. Count II alleged attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(2) (West 2012)) in that defendant performed a substantial step toward commission of the offense by shooting Darrien Kennedy about the body with a firearm. Count III alleged aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) in that defendant knowingly and without legal justification caused injury to Darrien by discharging a firearm and shooting him about the body.

¶ 5 Immediately prior to defendant's jury trial, defendant objected to the introduction of Darrien's videotaped identification of defendant. Defense counsel stated:

> "Now, the video—apparently they interviewed him at the hospital in Chicago, a videotaped interview. That interview contains a lot of information. It's not just statements of identification. But as I understand it, they only plan on playing on the video the statement of identification, which I understand are not hearsay or subject to the hearsay rule, one of the two. And I'm not quarrelling with that. My problem is, though, they have—it's a videotape of him on a stretcher basically in a medical facility.
>
> My quarrel with that under [Supreme Court] Rule 403 [(Ill. S. Ct. R. 403 (eff. Jan. 1, 2011))] I think it's substantially outrageous probative value, especially in light of the fact that [Darrien] is going to testify. He's here. I just saw him in another room. If he's going to testify, it seems to me—typically statements of identification are offered by the officer who took the statement. I understand that. Officer will say, yeah, I showed him the picture. He picked out

> so-and-so. My quarrel is having the jury—the only purpose of having the jury view this particular video is to inflame their passion due to the fact he's on a stretcher at the hospital. There's no other—that's the only probative value they're offering it for. Because they have not only the officer who testified that he made the identification, which we can see. And they have the victim who actually made the identification who is going to say I made the identification, which we can see.
>
> My only concern, like I said, is playing a video of him on the stretcher in the hospital in Chicago. That part, under [Rule] 403, I think, is objectionable."

The court stated that it had not viewed the videotape, but denied defendant's objection as an untimely motion *in limine*.

¶ 6 The trial lasted for five days and included numerous witnesses. Darrien's testimony is the only evidence relevant for purposes of this appeal. Darrien testified that on March 10, 2012, he picked up his cousin, Tyrone, at 10 a.m. They drove around and saw defendant twice driving a brown Navigator. They then went to pick up Darrien's sister. As they were waiting outside his sister's house, defendant pulled up next to them in the Navigator. Darrien said, "I just saw a gun—he pulled up. I saw a gun. He let the window down, and he just started shootin'." Darrien heard 13 or 14 shots fired. He was shot a total of five times and a shot to his back resulted in paralysis. Tyrone was also shot and died shortly thereafter. Darrien was taken to the hospital and was later transferred to the Rehabilitation Institute in Chicago, where he spoke to the police in a videotaped statement.

¶ 7 Three portions of the videotaped statement were played in court depicting Darrien's identification of defendant, though it is unclear from the record which portions were viewed. The videotape shows Darrien sitting in a room on what appears to either be an upright stretcher or a

wheelchair with a headrest. He is not in a hospital bed or hooked up to any medical devices. There are no tubes, intravenous ports, or electrical leads. Darrien is completely covered with a blanket for the majority of the video, but in certain portions, he removes his arms from under the blanket and uses them while demonstrating his version of events. Once Darrien removes the blanket, there are a couple of bandages that can be seen, but no blood. He does not appear to be in any pain, but appears tired. The hospital gown and identification band that can be seen when Darrien removes the blanket are the only features identifying that the interview took place in a hospital. In the videotape, Darrien identifies defendant as the shooter.

¶ 8 During closing arguments, the State again played portions of the videotaped identification and said:

> "The nice thing about one particular piece of evidence in this case is you were able to see firsthand the strength of Darrien Kennedy's identification of the defendant from that photo lineup.
>
> (Videotape playing.)
>
> *** Ladies and gentlemen, you saw no hesitation, no doubt. He picked him out immediately. He also went on to say.
>
> (Videotape playing.)
>
> *** [He was a] hundred percent sure that he was the one shooting. There is no doubt in this case, ladies and gentlemen, no doubt at all."

¶ 9 The jury found defendant guilty of all three charges and further found defendant had discharged a firearm with respect to all three charges. Defendant filed a motion for a new trial alleging that under Rule 403, the videotape was prejudicial because its purpose was to inflame the passions of the jury by showing Darrien in a hospital setting. The motion was denied.

Defendant was sentenced to 50 years for first degree murder. The attempted first degree murder and aggravated battery with a firearm convictions merged for sentencing, and defendant was sentenced to 32 years on attempted first degree murder. The sentences would be served consecutively.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant's sole argument is that the trial court erred in allowing the jury to view Darrien's videotaped identification of defendant as it was unduly prejudicial. Specifically, defendant argues that the videotape only served "to inflame the passions of the jury." The admissibility of evidence at trial is a matter within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Such abuse of discretion will be found only where the trial court's decision was arbitrary, fanciful, or one that no reasonable person would make. *Id.* That standard has been met here, as it is clear that a reasonable person could find the videotape more probative than prejudicial.[1]

¶ 12 Hearsay is a statement, other than one made while testifying at trial, offered into evidence to prove the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Hearsay is not admissible in court unless an exception or exemption applies. Ill. R. Evid. 802 (eff. Jan. 1, 2011). Section 115-12 of the Code of Criminal Procedure of 1963 states: "A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115-12 (West 2012); see also Ill. R. Evid. 801(d)(1)(B) (eff. Jan. 1, 2011). However, relevant evidence "may be excluded

[1]We note that defendant asserts the trial court's decision was based on a mistake of law, and therefore, the standard of review should be *de novo*. Though we disagree, we find that either standard would be met here.

if its probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403 (eff. Jan. 1, 2011). "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). Prejudice means " 'an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror.' " *People v. Eyler*, 133 Ill. 2d 173, 218 (1989) (quoting M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 403.1 (4th ed. 1984)).

¶ 13 Darrien's videotaped identification of defendant was admissible as an exemption from the hearsay rule as: (a) Darrien testified at trial; (b) he was subject to cross-examination; and (c) the videotape was a prior identification made after Darrien witnessed defendant as the shooter. As the videotape was admissible, the only question is whether the prejudicial effect outweighed the probative value.

¶ 14 We hold that the prejudicial effect did not outweigh the probative value. Here, the main issue below was the identification of the individual who shot Darrien and Tyrone. Accordingly, the videotape, which showed Darrien identifying defendant as the shooter, was highly relevant. The videotape further showed that Darrien did not hesitate in picking defendant out of the photographic lineup and stated that he was 100% sure that defendant was the shooter. Though Darrien or the police officer could have just testified that Darrien identified defendant, as defendant argued for below, the videotape showed the conviction and ease with which Darrien made such identification. This fact added substantially to the videotape's probative value. While we acknowledge that the videotape showed that Darrien was bandaged, wore a hospital gown, and appeared tired, we also note that Darrien was sitting up, talking without difficulty, did not appear to be in pain, was not in a hospital bed, and was not attached to any medical devices.

Therefore, any potential prejudicial effect would have been minimal. More importantly, any prejudicial effect was far overshadowed by its substantial probative value. Accordingly, the trial court did not abuse its discretion in allowing the jury to view Darrien's videotaped identification of defendant.

¶ 15 In coming to this conclusion, we note that defendant argues in his brief that the trial court "did not view the evidence and overruled the defense's objections based on a mistake of law." Because we find that the videotape was not unduly prejudicial, we need not consider this argument. See *People v. Johnson*, 208 Ill. 2d 118, 128 (2003) (" '[t]he question before [the] reviewing court is the correctness of the result reached by the lower court and not the correctness of the reasoning upon which that result was reached.' " (quoting *People v. Novak*, 163 Ill. 2d 93, 101 (1994))).

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Kankakee County is affirmed.

¶ 18 Affirmed.