2016 IL App (4th) 140050-U

NO. 4-14-0050

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 4, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
LOUIS L. JENKINS,	)	No. 13CF136
Defendant-Appellant.	)	
	)	Honorable
	)	Bob G. Hardwick,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court improperly admitted a prior consistent statement. Review of the error is barred by the doctrine of invited error.

¶ 2 On March 2, 2013, defendant, Louis L. Jenkins, was arrested after police pulled him over and found a gun in his car. He was charged with aggravated unlawful use of a weapon (count I) (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2012)), unlawful possession of a firearm by a felon (count II) (720 ILCS 5/24-1.1(a) (West 2012)), and unlawful possession of a firearm without possessing a firearm owner's identification card (FOID card) (count III) (430 ILCS 65/2(a)(1) (West 2012)). The State voluntarily dismissed counts I and III. On October 21, 2013, a jury trial was held on count II. Defendant was found guilty and sentenced to two years in prison. This appeal followed.

¶ 3 I. BACKGROUND

¶ 4 On March 2, 2013, defendant stopped within the bounds of a crosswalk. Two police officers attempted to pull defendant over. While the officers pursued defendant, he picked up a passenger, Sadie Foust. Defendant drove a few more blocks before pulling over. Officers discovered defendant's license was expired. Defendant was removed from the car and detained. After searching the vehicle, officers recovered a handgun from Foust's purse, which was on the floor of the passenger side of the car. Defendant was charged with unlawful possession of a firearm by a felon (720 ILCS 5/24-1.1(a) (West 2012)) for possessing a handgun and previously committing a felony.

¶ 5 On October 21, 2013, a trial was held. During opening statements, defendant's counsel did not suggest Foust's testimony would be fabricated. At trial, Foust testified about the drive with defendant prior to being pulled over. When Foust initially approached defendant's car, she saw a police car, with its emergency lights on, following defendant. Foust got into the car on the passenger side. Defendant continued to drive for a few blocks. Foust asked defendant to stop the car, and defendant refused. When asked why he would not stop, defendant handed Foust a handgun. According to Foust, defendant told her to put the gun in her purse because the police could not search a female. Defendant said he would "take the charges" if the police ended up finding the gun.

¶ 6 Foust put the gun under the passenger seat first. After defendant was pulled over and removed from the car, Foust moved the gun into her purse. An officer asked her to step out of the car. The officer searched the purse and found the gun. Foust was detained and taken to the police station. There, she agreed to cooperate and told the police what transpired in defendant's car through two interviews and a written statement.

¶ 7 While Foust was testifying about her interview with the police, the State asked her:

"[STATE]: And what you told [the police] is the same thing that you shared with us —

[FOUST]: Yes.

[STATE]: — today?

[FOUST]: Yes."

Defense counsel did not object to this exchange. Foust testified she did not know the difference between a revolver and a semiautomatic pistol. Foust stated she was testifying against defendant in exchange for the State dropping charges against her.

¶ 8 On cross-examination, defendant also asked Foust about her statement to police being the same as her testimony in court. Defendant then inquired about inconsistencies in Foust's interview with police. In her first interview, she did not initially mention defendant giving her a gun. In a second interview with police, Foust's statement included the testimony about the gun. On redirect examination, the State read Foust's written statement to police back to her, which was similar to her testimony at trial and her second interview with police.

¶ 9 Officer Peter Hummel testified to the search of Foust's purse. He stated Officer Adam Gibson, the canine officer, walked a dog around defendant's car to perform an "open air sniff." The dog signaled the officers to the presence of narcotics in the car. Hummel observed Foust lean forward over her purse then sit upright. The officers asked Foust to step out of the car. The combination of Foust's movements and the dog's signal made Hummel suspicious of Foust's purse. He searched her purse, which was sitting on the floor of the passenger side, and found a handgun.

¶ 10 Officer Justin Ebbing also testified. His testimony recounted the same evidence as Hummel. Hummel and Ebbing interviewed Foust and defendant multiple times. Defendant altered his story from knowing nothing about the gun to seeing and handling the gun several days

earlier. According to Hummel and Ebbing, Foust's story changed slightly but remained generally the same. The officers conducted a criminal background check and discovered defendant was a previously convicted felon.

¶ 11 Defendant testified to his recollection of March 2, 2013. Foust contacted defendant for a ride from a party to her house because she was intoxicated. While defendant was on his way to pick her up, the police tried to pull him over. Defendant picked Foust up and then pulled his car over after driving a few more blocks. He claimed he was unaware of the gun and denied ever possessing it or giving it to Foust. Defendant stated it was snowing, which made it difficult to pull over immediately.

¶ 12 The State rebutted defendant's testimony with testimony from Hummel and Ebbing. Both stated it had snowed, but plows cleared the streets by the time defendant was pulled over. Neither officer believed Foust was intoxicated.

¶ 13 The jury found defendant guilty of unlawful possession of a weapon by a felon (count II) (720 ILCS 5/24-1.1(a) (West 2012)). The trial court denied defendant's motions for a new trial and judgment notwithstanding the verdict. On January 10, 2014, the trial court sentenced defendant to two years in prison. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues the State improperly introduced Foust's prior consistent statement before defendant ever argued her testimony was fabricated. He contends (1) it was plain error to admit the testimony at trial; or alternatively, (2) counsel was ineffective for failing to raise the issue at trial. Both parties concede the prior consistent statement issue was forfeited for this appeal.

¶ 16 A. Prior Consistent Statement

¶ 17 As a preliminary issue, we agree Foust testified to a prior consistent statement.

The relevant portion of Foust's testimony was:

"[STATE]: And what you told [the police] is the same thing that you shared with us —

[FOUST]: Yes.

[STATE]: — today?

[FOUST]: Yes."

¶ 18 Defendant argues this was an admission of a prior consistent statement offered to enhance Foust's credibility. The State agrees it is a prior consistent statement, but it was admissible in this context. Prior consistent statements are inadmissible for the purpose of corroborating trial testimony. *People v. Walker*, 211 Ill. 2d 317, 344, 812 N.E.2d 339, 354 (2004). Two exceptions to the inadmissibility of prior consistent statements are (1) "to rebut a charge or inference that the witness is motivated to testify falsely or [(2)] that his testimony is of recent fabrication." *People v. Clark*, 52 Ill. 2d 374, 389, 288 N.E.2d 363, 371 (1972). Even then, the exceptions only apply if the prior statement occurred before the witness had a motive to fabricate the testimony. *Id.* This rule was recently codified in the Illinois Rules of Evidence. Ill. R. Evid. 613(c) (eff. Jan. 6, 2015). At trial, the State explicitly asked Foust if her current testimony was the same as her statement to the police. She responded it was. This exchange corroborated Foust's testimony without any suggestion from the defense she was lying. Absent any indication her testimony was false or fabricated, Foust's statement was an improperly admitted prior consistent statement.

¶ 19 The State argues it could elicit Foust's prior statements in anticipation of the defense impeaching Foust's credibility. We disagree. Impeachment and prior consistent statements are two distinct evidentiary principles. See Ill. R. Evid. 607 (eff. Jan 1, 2011); R. 613(c) (eff. Jan 6, 2015). The State can "anticipate and deflect the impact of potential

impeachment of its witness." *People v. Rainge*, 211 Ill. App. 3d 432, 448, 570 N.E.2d 431, 441 (1991) (First District). However, impeachment is constrained by the rule against prior consistent statements. Prior consistent statements are only admissible to rehabilitate the witness after impeachment and otherwise inadmissible to prove the statement is true. *People v. Walker*, 335 Ill. App. 3d 102, 113, 779 N.E.2d 268, 277 (2002), *aff'd on other grounds*, 211 Ill. 2d at 345, 812 N.E.2d at 355 (agreeing with the appellate court's analysis of prior consistent statements).

¶ 20 The distinction between these rules is demonstrated in the present case. In anticipation of defendant's likely attempt to impeach Foust's testimony, the State properly elicited its promise to drop charges against Foust in exchange for her truthful testimony. The impeaching testimony was introduced without any reference to a prior consistent statement. Conversely, the State elicited Foust's statement to police solely to show it was the same as her current testimony. Despite the properly anticipated impeachment of Foust's testimony, the statement includes a prior consistent statement. Eliciting the statement, before defendant suggested any motive to testify falsely or fabricate testimony, shows the statement was offered only to suggest her testimony was true. Prior consistent statements are inadmissible for this purpose, even in anticipation of impeachment.

¶ 21 B. Plain Error

¶ 22 Although Foust's testimony included an improper prior consistent statement, defendant is barred from arguing plain error. Defendant argues it was plain error to admit the prior consistent statement into evidence. The State seems to argue the plain error argument was not preserved on appeal or, alternatively, it was waived due to acquiescence in the error. We agree defendant acquiesced in the error. Plain-error review enables the appellate court to review *unpreserved* issues on appeal. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007) (quoting *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005)). The

State initially suggests we "need not consider defendant's claim of error" because he did not preserve the issue for appeal by objecting or raising it in a posttrial motion. This is an incorrect statement of law. Plain error is designed to address unpreserved issues on appeal.

¶ 23 The State alternatively argues defendant acquiesced in the error. We agree. The doctrine of invited error includes acquiescence in the error. *People v. Payne*, 98 Ill. 2d 45, 50, 456 N.E.2d 44, 46 (1983). Invited error bars a claim of plain error on appeal. *People v. Harvey*, 211 Ill. 2d 368, 386, 813 N.E.2d 181, 192 (2004). Specifically, it bars defendant from proceeding one way on an issue at trial and later arguing it was an error to do so on appeal. *Id.* at 385, 813 N.E.2d at 192. Invited error is considered an estoppel issue. *Id.*

¶ 24 After the State submitted Foust's prior consistent statement to police, defendant cross-examined her about the same prior consistent statement to police. He used the opportunity to highlight inconsistencies in Foust's statements to police. In doing so, defendant had Foust repeat the prior consistent statement and used Foust's prior statement to attack her credibility. See *People v. Ramirez*, 2013 IL App (4th) 121153, ¶¶ 77-78, 996 N.E.2d 1227 (finding invited error after appellant repeated and used improperly admitted evidence to attack credibility). Defendant took advantage of the improper admission, showing he acquiesced in the error he is now appealing. Defendant is barred from arguing plain error on this issue.

¶ 25 C. Ineffective Assistance of Counsel

¶ 26 Defendant argues ineffective assistance of trial counsel. The sixth amendment to the United States Constitution provides defendants the right to counsel, which is interpreted to mean the right to effective assistance of counsel. U.S. Const., amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish counsel was ineffective, the defendant must show (1) counsel's performance was not objectively reasonable and (2) "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different."

People v. Enis, 194 Ill. 2d 361, 376, 743 N.E.2d 1, 11 (2000) (citing *Strickland*, 466 U.S. at 687, 694). These types of claims often involve considerations of an attorney's trial strategy or potential errors committed by the attorney. *People v. Evans*, 369 Ill. App. 3d 366, 384, 859 N.E.2d 642, 655-56 (2006). Ineffective assistance is ideally determined under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)), where a record can be developed and the trial attorney can be examined. *Evans*, 369 Ill. App. 3d at 384, 859 N.E.2d at 655.

¶ 27 Here, defendant's argument is based on trial counsel's failure to object to the prior consistent statement and failure to raise it in a posttrial motion. These could be mistakes or the result of sound trial strategy. The record on appeal is silent as to defense counsel's reason for proceeding as he did. A postconviction proceeding will enable the court to examine whether counsel's assistance was ineffective. Defendant may bring this claim in a later postconviction petition.

¶ 28 III. CONCLUSION

¶ 29 We find defendant's claim of plain error is barred by the doctrine of invited error. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 30 Affirmed.