2017 IL App (1st) 150336-U

SIXTH DIVISION
Order filed: December 8, 2017

No. 1-15-0336

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 08 CR 19447
	)	
DEVIN PETTIS,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the defendant's convictions for first degree murder and unlawful use of a weapon by a felon, where: (1) his alleged absence from a hearing on the State's motion *in limine* to admit proof of other crimes did not violate his right to be present at a critical stage of the proceedings; (2) he was not prejudiced by trial counsel's failure to object to hearsay testimony or request a jury instruction on second degree murder; and (3) his conviction for unlawful use of a weapon by a felon does not violate the one-act, one crime rule.

¶ 2 Following a jury trial, the defendant, Devin Pettis, was convicted of first degree murder and unlawful use of a weapon by a felon and sentenced to a total of 55 years' imprisonment. On

appeal, he contends that: (1) the trial court violated his right to be present at a critical stage of the proceedings by conducting a hearing outside of his presence on the State's motion *in limine* to admit proof of other crimes; (2) trial counsel was ineffective for not objecting to hearsay testimony or requesting a jury instruction for second degree murder; and (3) his conviction for unlawful use of a weapon by a felon violates the one-act, one-crime rule. For the reasons that follow, we affirm.

¶ 3 The defendant was charged by indictment with multiple counts of first degree murder (720 ILCS 5/9-1 (West 2008)) and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1 (West 2008)) in connection with the death of the victim, Michael Guyton, in Chicago on July 23, 2008. Prior to trial, the State filed a motion *in limine* to admit evidence that, a few hours before Guyton was shot, the defendant fired at a Lincoln Town Car that Staria Campbell, Guyton's wife, had purchased on the defendant's behalf and which was the subject of a dispute between the two men. In the motion, the State argued that the other-crimes evidence was "intrinsic" to the events surrounding Guyton's murder, or, alternatively, admissible under Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011). No transcript of a hearing on the motion appears in the record. However, on the morning of trial, in the defendant's presence, trial counsel made a continuing objection to the admission of other-crimes evidence and asked the trial court to issue a limiting instruction before the State elicited other-crimes testimony.

¶ 4 At trial, the State called Campbell, who testified that, at approximately 7 p.m. on July 23, 2008, she observed Guyton and defendant arguing outside a house at 4920 West Hubbard Street. The defendant gave Guyton partial payment for the Lincoln and left. Guyton and Campbell drove around to find the defendant again and eventually "cut him off" while he was in the Lincoln. Another argument occurred, during which the defendant and Guyton pushed and

shoved each other. Afterwards, Guyton drove away in the Lincoln and parked near Race and Lavergne Streets. The defendant arrived and Guyton gave him the keys, but the defendant threw them across the street and left. The trial court then admonished the jury regarding the limited admissibility of other-crimes evidence. According to Campbell, the defendant returned to the scene, criticized Guyton for "embarrassing me over a car," shot four or five times at the Lincoln, and fled. Campbell testified that Guyton became angry as a result of the defendant shooting the vehicle. Approximately half an hour later, Campbell left Guyton at 4920 West Hubbard Street. Later that night, she learned he had been killed.

¶ 5 The State next introduced the testimony of Darryl Glass, Corey Austin, Isiah Anderson, Mario Nixon, and the defendant's brother, Ronnie Pettis, each of whom was familiar with the defendant and Guyton. Glass was incarcerated for home invasion at the time of trial, and Anderson and Ronnie both had been arrested for failing to appear in court. Glass, Austin, Anderson, and Ronnie each acknowledged speaking with detectives or assistant state's attorneys following Guyton's death and, afterwards, reviewing and signing written statements, the content of which is set forth *infra*. However, all four men either denied or did not recall saying what was in their statements, claimed that their statements were untruthful, or alleged that their statements resulted from police coercion. Glass further stated that he did not remember testifying before a grand jury and denied making any of the statements contained in a transcript of his grand jury testimony. Anderson claimed that his grand jury testimony was perjured. Relevant to this appeal, Ronnie testified that he saw Guyton after the Lincoln had been shot up, believed that he was "high," and observed Campbell take a revolver from him and put it in her car.

¶ 6 The State also called Assistant State's Attorneys Aidan O'Connor, Teresa Molina-Guerrero, and Michelle Spizzirri. O'Connor published the statements of Glass, Anderson, and

Ronnie, which established that all three men observed the defendant and Guyton arguing throughout the day on July 23, 2008. Glass and Ronnie both witnessed the defendant shoot Guyton—Glass, from across the street, and Ronnie, from 20 feet away—and Anderson heard the gunfire. All three men denied that Guyton held a weapon when he was shot, although Ronnie claimed to have observed Campbell take a revolver from Guyton earlier in the day. Molina-Guerrero testified that she reviewed Glass's and Anderson's statements with them prior to their grand jury testimony and that they confirmed their statements were accurate. The State published Glass's and Anderson's grand jury testimony, which generally tracked their written statements.

¶ 7 Spizzirri published Austin's statement, which stated that the defendant arrived at Austin's apartment unexpectedly at 1 a.m. on July 24, 2008, and was upset and nervous. The defendant told Austin that he "just shot" Guyton, had "fucked up and just ruined his life," and that the police would look for him. He remained in the apartment for approximately two weeks without going outside, left for a week or two, then returned and stayed there until his arrest. Austin stated that "he feels bad both that Michael is dead and that Devin is the one that killed him."

¶ 8 Nixon testified that, at 10:20 p.m. on July 23, 2008, he was in front of his girlfriend's house, four or five houses from 4920 West Hubbard, and observed the defendant and Guyton arguing. After 10 minutes, the defendant said to Guyton, "if you pull the gun on me, what if I pull the gun on you." Guyton responded, "[i]f you pull the gun on me, you better use it." Ten seconds later, Nixon saw the defendant raise a firearm, heard gunfire, and saw Guyton lying on the ground. Nixon stated that Guyton was not holding a firearm and that he had no doubt that he saw the defendant shoot Guyton. He denied telling a defense investigator that he never saw the defendant before or after the shooting or that he did not see the shooter's face or firearm.

¶ 9 The State proffered the testimony of several law enforcement witnesses, a firearms expert, and the forensic pathologist who examined Guyton's body. Their evidence established that different firearms were used to shoot at the Lincoln and kill Guyton, and that, when the defendant was arrested, he told the police officers "I knew you were looking for me." Additionally, the State introduced a stipulation between the parties that the defendant had been convicted of a felony in October 2005.

¶ 10 The defense called a single witness, Kimyona Taylor, an investigator, who testified that she interviewed Nixon on February 18, 2010. According to Taylor, Nixon denied seeing the defendant before or after the shooting and also denied seeing the shooter's face or firearm. Taylor further testified that Nixon claimed the police told him to identify the defendant and that both his statement to the police and his grand jury testimony were false.

¶ 11 Following closing arguments, the jury found the defendant guilty of first degree murder and unlawful use of a weapon by a felon, and that he personally discharged a firearm that caused Guyton's death.

¶ 12 The defendant retained a different attorney as posttrial counsel. In a motion for new trial, posttrial counsel argued, in relevant part, that: (1) the trial court erred by admitting other-crimes evidence without holding a pretrial hearing; (2) trial counsel was ineffective for not objecting to the admission of Austin's prior statement as substantive evidence; and (3) trial counsel was also deficient for not requesting a second degree murder instruction based on mutual combat.

¶ 13 The trial court held a hearing on the motion for new trial. At the hearing, the defense called the defendant's trial counsel, who testified that he thought the State's motion *in limine* to admit other-crimes evidence had been discussed in chambers, outside the defendant's presence. The defense also presented the defendant's affidavit, attesting that: (1) he was not present when

the State's motion *in limine* "was argued or ruled upon;" (2) he did not authorize trial counsel to conduct the hearing in his absence; (3) prior to jury selection, he "was not advised" whether other-crimes evidence would be admitted; and (4) had he known about the admissibility and strength of the other-crimes evidence, "there is a reasonable possibility" that he would have "seeked [*sic*] another defense or a plea agreement." Posttrial counsel argued that, in view of the foregoing, the defendant was not present at a critical stage of the proceedings.

¶ 14 The trial court denied the defendant's motion for new trial. In holding so, the trial court stated that it believed the hearing on the State's motion *in limine* occurred prior to jury selection, in the defendant's presence, and that trial counsel "had a conversation with *** [the defendant] about it."

¶ 15 Following a sentencing hearing, the trial court sentenced the defendant to a total of 55 years' imprisonment for first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The trial court denied the defendant's motion to reconsider sentence, and this appeal followed.

¶ 16 The defendant first contends that the trial court violated his right to be present at a critical stage of the proceedings by conducting a hearing outside of his presence on the State's motion *in limine* to admit proof that he fired at the Lincoln. He submits that, had he attended the hearing and known the outcome, he might have pursued a different a defense, sought a plea bargain, or chosen a bench trial. The State maintains that, even if the defendant was absent from the hearing, it was not a critical stage of the proceedings and his presence would not have contributed to his defense.

¶ 17 A defendant has a right, under both the due process clause of the fourteenth amendment of the United States Constitution (U.S. Const., amend. XIV, § 1) and the Illinois Constitution (Ill.

Const. 1970, art. 1, § 8), to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to either the fairness of the procedure or the opportunity to defend himself against the charges. *People v. Lindsey*, 201 Ill. 2d 45, 55-56 (2002); *People v. Lofton*, 194 Ill. 2d 40, 67 (2000). A defendant's absence, however, will violate his constitutional rights only if the record demonstrates that it caused the proceeding to be unfair or resulted in the denial of an underlying right. See *Lindsey*, 201 Ill. 2d at 57. Thus, although "due process clearly requires that a defendant be allowed to be present to the extent that a fair and just hearing would be thwarted by his absence," the right to be present "is not guaranteed when presence would be useless, or the benefit but a shadow ***." (Internal quotation marks omitted.) *Lofton*, 194 Ill. 2d at 67. Whether a defendant's constitutional right to be present at trial has been denied is a question of law and our review is, therefore, *de novo*. See *People v. Hale*, 2013 IL 113140, ¶ 15; *People v. O'Quinn*, 339 Ill. App. 3d 347, 358 (2003).

¶ 18 We observe, at the outset, that in denying the defendant's posttrial motion, the trial court expressed its recollection that, contrary to the defendant's affidavit and trial counsel's testimony, the defendant was present during the hearing on the State's motion *in limine*. See *In re Marriage of Hindenburg*, 227 Ill. App. 3d 228, 230 (1992) ("The trial judge may rely on his own recollection, particularly where that recollection does not contradict the record, but rather supplies an omission to its contents."). However, even if we accepted that the defendant was not present during the hearing on the State's motion, we would not find that his absence violated his right to be present at a critical stage of the proceedings.

¶ 19 As our supreme court has noted, the constitutional right to be present at trial generally "does not embrace a right also to be present at the argument of motions prior to trial or subsequent to verdict" unless the defendant's presence "has a relation, reasonably substantial, to

the fullness of his opportunity to defend against the charge." (Internal quotation marks omitted.) *Lofton*, 194 Ill. 2d at 66. Here, the defendant's presence at the hearing would have had no effect on the trial court's ruling as to whether the other-crimes evidence was admissible and, therefore, his absence did not implicate his ability to defend himself. See *People v. Harvey*, 95 Ill. App. 3d 992, 1000-01 (1981) (the defendant's presence was not required when the judge and attorneys listened to an audiotape that, afterwards, was entered into evidence); *People v. Breitweiser*, 38 Ill. App. 3d 1066, 1068 (1976) (the defendant's presence was not required during a preliminary hearing to determine the competency of a witness). To the extent the defendant claims that he later might have pursued a different defense strategy had he attended the hearing, his argument is misplaced because "[t]he question is not whether 'but for' the outcome of the proceeding the defendant would have avoided conviction but whether the defendant's *presence at the proceeding* would have contributed to his opportunity to defend himself against the charges." (Emphasis added.) *Lofton*, 194 Ill. 2d at 67 (citing *Kentucky v. Stincer*, 482 U.S. 730, 744 n.17 (1987). The defendant's absence from the hearing on the State's motion *in limine*, therefore, would not have violated his right to be present at a critical stage of the proceedings.[1] Because we find no error, we also reject the defendant's contention that the trial court erred by denying this claim when posttrial counsel raised it during argument on his posttrial motion.

¶ 20 The defendant next contends that trial counsel was ineffective for failing to object to the admission of Austin's prior inconsistent statement that the defendant admitted to shooting Guyton, "fucked up," and "ruined his life." According to the defendant, Austin's statement was

[1] As to the defendant's allegation in his affidavit that he was *never* apprised that other-crimes evidence would be admissible at trial, we observe that, on appeal, he has not raised a claim of ineffective assistance of counsel in connection with this issue. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived ***.").

inadmissible both under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 115-10.1 (West 2008)) and for impeachment purposes.

¶ 21 Claims of ineffectiveness of counsel are judged using the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Peterson*, 2017 IL 120331, ¶ 79. Under *Strickland*, the defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland*, 466 U.S. at 688, 694). The defendant's failure to establish either prong of the *Strickland* test precludes a finding that counsel was ineffective. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 22 In this case, the defendant is unable to establish a claim of ineffective assistance because trial counsel's failure to object to Austin's allegedly inadmissible statement did not cause prejudice. At the outset, we observe that the defendant does not challenge the sufficiency of the evidence, but, rather, suggests that weaknesses in the State's case might have precluded a conviction but for Austin's account of his confession.

¶ 23 The record demonstrates that, in the days after Guyton's murder, Glass, Ronnie, and Anderson all provided statements to law enforcement. Per their statements, Glass witnessed the defendant shoot Guyton from across the street; Ronnie witnessed the defendant shoot Guyton from 20 feet away; and all three men denied that Guyton held a firearm. Nixon testified that he witnessed the murder and had no doubt that he saw the defendant shoot Guyton. Additionally, a police officer testified that, when the defendant was arrested several weeks after the shooting, he stated that "I knew you were looking for me."

¶ 24 As the defendant observes, Glass, Ronnie, and Anderson, in their trial testimony, all contested the accuracy of their earlier statements. Ronnie and Anderson appeared in court only after being arrested, and Nixon's testimony was contradicted by Taylor, the defense investigator. This information was before the jury, as was: Molina-Guerrero's testimony that Glass and Anderson confirmed the accuracy of their statements; Glass's and Anderson's grand jury testimony, which generally tracked their statements; and the fact that Glass, Austin, Anderson, Nixon, and Ronnie all had connections with both the defendant and Guyton. The jury was responsible for weighing the evidence, evaluating the credibility of the witnesses, and resolving conflicts in the testimony. *People v. Brown*, 2013 IL 114196, ¶ 48. Even without Austin's statement, sufficient evidence was before the jury from which it could resolve the conflicts in the State's favor, and there is no reasonable probability that, but for Austin's statement, the defendant would not have been convicted. *Cf. People v. Simpson*, 2015 IL 116512, ¶¶ 16, 39 (finding prejudice where the trial court improperly admitted three video clips containing a hearsay account of the defendant's confession and, further, accomplices who testified against the defendant "all received lighter treatment from the justice system"). Because the defendant was not prejudiced by trial counsel's failure to challenge Austin's statement, we also reject his contention that posttrial counsel was ineffective for failing to argue that the statement was inadmissible for impeachment purposes.

¶ 25 Next, the defendant contends that trial counsel was ineffective for failing to request that the jury be instructed on second degree murder. According to the defendant, this instruction would have been proper because, based on evidence that Guyton was the initial aggressor and may have been armed, a reasonable jury could find that the defendant subjectively believed in the need for self-defense or was subject to strong provocation due to mutual combat.

¶ 26 Under *Strickland*, as we have explained, the defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Manning*, 241 Ill. 2d at 326 (citing *Strickland*, 466 U.S. at 688, 694). As we have also noted, the failure to establish either prong precludes a claim of ineffective assistance. *Henderson*, 2013 IL 114040, ¶ 11.

¶ 27 Second degree murder requires proof of all the elements of first degree murder plus the presence of imperfect self-defense or serious provocation. 720 ILCS 5/9-2(a) (West 2008); *People v. Jeffries*, 164 Ill. 2d 104, 113-14 (1995). The mitigating factor of imperfect self-defense applies when, at the time of the murder, a person unreasonably believes that circumstances exist which justify deadly force, *i.e.*, "that such force is necessary to prevent imminent death or great bodily harm to himself or another ***." 720 ILCS 5/7-1(a), 9-2(a)(2) (West 2008). In turn, a person commits second degree murder based on the mitigating factor of serious provocation when, at the time of the murder, he responds to conduct by the person killed that is "sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(a)(1), (b) (West 2008). The standard for determining whether a defendant is entitled to a jury instruction on second degree murder is whether there is "*some evidence*" that supports the instruction, irrespective of whether that evidence is credible. (Emphasis in original.) *People v. McDonald*, 2016 IL 118882, ¶ 25.

¶ 28 In view of these principles, the trial evidence did not support an instruction for second degree murder and, therefore, the defendant cannot establish, under the second prong of the *Strickland* test, that he was prejudiced by trial counsel's failure to request the instruction. First, nothing at trial suggested that, when the shooting occurred, the defendant believed that

circumstances justified killing Guyton in self-defense. No testimony demonstrated that the defendant thought that Guyton posed an imminent threat at the time of the shooting or knew that Ronnie claimed to have seen Guyton with a firearm earlier in the day. While Nixon testified that the defendant threatened to "pull the gun" on Guyton if Guyton were to "pull the gun" on him, Glass, Anderson, Ronnie, and Nixon all denied that Guyton had a firearm when he was shot. As such, a second degree murder instruction based on imperfect self-defense was unmerited. Because the defendant was not prejudiced by trial counsel's failure to request a second degree murder instruction based on imperfect self-defense, we also reject his contention that posttrial counsel was ineffective for failing to address this issue in the posttrial motion.

¶ 29 Second, no testimony suggested that, at the time of the shooting, the defendant was subject to serious provocation due to mutual combat. The evidence, at most, demonstrated that Guyton and the defendant were engaged in a verbal exchange when the shooting occurred. See *People v. Garcia*, 165 Ill. 2d 409, 429-30 (1995) (finding that words alone "can never constitute serious provocation" for purposes of second degree murder). While the defendant argues that he had "no significant cooling off period" after previous confrontations with Guyton, the record shows that their only physical altercation, which involved pushing and shoving, happened hours before the shooting. See *id.* at 429 (finding that a defendant's passion, "no matter how violent, will not relieve *** [him] of culpability for first degree murder unless it is engendered by provocation which the law recognizes as reasonable"); *People v. Jarvis*, 158 Ill. App. 3d 415, 429-30 (1987) (mutual combat that occurred 3 ½ hours prior to a murder did not constitute provocation). A second degree murder instruction based on serious provocation was, therefore, also unmerited, and, as a result, the defendant was not prejudiced by trial counsel's failure to request the instruction.

¶ 30 Finally, the defendant contends that his conviction for unlawful use of a weapon by a felon must be vacated under the one-act, one-crime rule because it is based on the same physical act of possessing a firearm that underlies his murder conviction.

¶ 31 The defendant did not raise this issue at trial or in a posttrial motion and, therefore, forfeiture applies. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (objection both at trial and in a posttrial motion is required to preserve an issue for appeal). He argues, however, that this court should consider the matter pursuant to the second prong of the plain-error doctrine, under which a reviewing court will consider an unpreserved error that is "clear or obvious" and "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *People v. Clark*, 2016 IL 118845, ¶ 42. Our supreme court has held that " 'a one-act, one-crime violation affects the integrity of the judicial process, thus satisfying the second prong of the plain-error test.' " *Id.* ¶ 45 (quoting *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009)).

¶ 32 The one-act, one-crime rule prohibits convictions for multiple offenses "carved from" the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). However, multiple convictions are proper "where a defendant has committed several acts, despite the interrelationship of those acts." *Id.* "For purposes of the rule, an 'act' is defined as any overt or outward manifestation that will support a separate conviction." *People v. Almond*, 2015 IL 113817, ¶ 47. Whether a conviction violates the one-act, one-crime rule is a question of law and our review is, therefore, *de novo*. *Id.*

¶ 33 Relevant to this case, a person commits first degree murder when he "kills an individual without lawful justification," and, in doing so, "either intends to kill or do great bodily harm to

that individual or another, or knows that such acts will cause death to that individual or another ***." 720 ILCS 5/9-1(a)(1) (West 2008). A person commits unlawful use of a weapon by a felon when he knowingly "possess[es] on or about his person *** any firearm or any firearm ammunition if the person has been convicted of a felony ***." 720 ILCS 5/24-1.1(a) (West 2008). As to these offenses, the defendant's indictment alleged that he committed first degree murder by "personally discharg[ing]" a firearm that caused Guyton's death, and that he committed unlawful use of a weapon by a felon by "knowingly possess[ing] on or about his person" a firearm despite having been previously convicted of felony manufacturing or delivery of a controlled substance.

¶ 34 Based on the foregoing, the defendant's convictions did not violate the one-act, one-crime rule. Necessarily, the offenses of first degree murder predicated on personally discharging a firearm and unlawful use of a weapon by a felon both require that the defendant possessed a firearm. However, the defendant could not be convicted of first degree murder based solely on the act of possession; rather, the State also had to prove that he committed the separate act of discharging the firearm, conduct that is not a part of unlawful use of a weapon by a felon. Therefore, although both of the defendant's convictions had possession of a firearm as a common element, they did not arise from precisely the same conduct. See *People v. Tolentino*, 409 Ill. App. 3d 598, 610 (2011) (finding that, although the defendant's convictions for being an armed habitual criminal, aggravated discharge of a firearm, and attempted first degree murder of a peace officer all had possession of a firearm as a common element, the latter two convictions did not violate the one-act, one-crime rule because they also required "proof of separate and distinct acts in addition to the possession of a firearm"). Consequently, the defendant's

convictions were not improperly based on a single physical act and no violation of the one-act, one-crime rule occurred.

¶ 35 For all the foregoing reasons, we find that: (1) the defendant's alleged absence from a hearing on the State's motion *in limine* to admit proof of other crimes did not violate his right to be present at a critical stage of the proceedings; (2) he was not prejudiced by trial counsel's failure to object to the admission of Austin's statement or request a jury instruction on second degree murder; and (3) his conviction for unlawful use of a weapon by a felon does not violate the one-act, one-crime rule.

¶ 36 Affirmed.