

2018 IL App (1st) 143726-U
No. 1-14-3726
January 16, 2018

SECOND DIVISION

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	No. 12 CR 11995
v.)	
)	The Honorable
LUIS SERRANO,)	Tommy Brewer,
)	Judge Presiding.
Defendant-Appellant.)	

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The decision not to use former testimony to impeach a witness for the prosecution did not show ineffective assistance of counsel, where the impeachment would not have helped the defense much. The prosecutor has wide latitude to comment on reasonable inferences from the evidence in closing argument. The trial court here did not commit plain error by imposing a sentence near the middle of the available sentencing range.

¶ 2 A jury found Luis Serrano guilty of the aggravated battery and attempted armed robbery of Antonio Gomez. The trial court sentenced Serrano to 27 years in prison. On appeal, Serrano argues that (i) the evidence does not support the convictions; (ii) his attorney should

have used prior testimony to impeach Antonio; (iii) the prosecutor's comments in closing argument deprived Serrano of a fair trial; (iv) the evidence did not show that Antonio suffered severe bodily harm; and (v) the court imposed an excessive sentence. We find the evidence sufficient to prove Serrano guilty. Defense counsel may have had strategic reasons for not using prior testimony to impeach Antonio. The prosecutor based the closing argument on reasonable inferences from the evidence. The trial court did not commit plain error by finding severe bodily harm. The trial court did not abuse its discretion when it imposed a sentence in the middle of the available range. Accordingly, we affirm the trial court's judgment.

¶ 3

BACKGROUND

¶ 4

On May 14, 2012, at the end of a long and unprofitable day trying to sell ice cream from his cart, Antonio Gomez saw some persons, apparently customers, wave at him with cash in hand. When Antonio went over to them, one pulled out a gun and demanded Antonio's money. Antonio said he had sold very little. One of the men started shooting. Three bullets hit Antonio. An ambulance carried Antonio to a nearby hospital. A helicopter took Antonio from that hospital to a second hospital, where he underwent surgery.

¶ 5

A police officer who arrived at the scene a few minutes after the shooting brought in a tracking dog. The dog found a scent near some spent shell casings on the street. The dog followed the scent for about a mile along an extended path with several turns, stopping at the door of Laquan Moore's home. Police questioned Moore. Police also found two witnesses near the scene of the shooting. Yesenia Gomez (no relation to Antonio) saw a man in a white shirt shooting Antonio, but she could not see the shooter's face. When Jamee Humphrey

heard the gunshots, she went to her window and saw a Hispanic man in a white shirt, running with a gun in his hand. Police never found the gun.

¶ 6 Based on Moore's responses to their questions, police brought Luis Serrano to the police station and put him in a lineup. Humphrey identified Serrano as the man she saw run past her window holding a gun. Antonio viewed a lineup that included Serrano, but he could not identify anyone in the lineup as the shooter. Police also showed Antonio a photo array based on Moore's statements. From the photo array, Antonio picked a photograph of Alexis Sanchez as the person who waved him over to start the attempted robbery. Prosecutors charged Serrano with attempted murder, attempted armed robbery, and aggravated battery.

¶ 7 A jury found Serrano not guilty of attempted murder, but the jurors could not agree on a verdict on the other counts. The trial court set a second trial on the charges of attempted armed robbery and aggravated battery. At the second trial, Yesenia and Humphrey again testified about what they saw. Humphrey said that shortly after she heard the shots, she saw Serrano run past her window, carrying a gun. Moore, Sanchez, Antonio, and Serrano all testified, and their accounts of the incident differed in many ways.

¶ 8 Antonio testified that as he approached the three persons who waved him over, they covered their faces. First, he said two Hispanics and a Mexican waved him over. Next, he described them as two Hispanics and one Black male. Later, he said it was two Black males and one Hispanic. He said that a Hispanic man shot him.

¶ 9 Moore, who is a Black child, 15 years old at the time of trial and 13 at the time of the shooting, testified that after school on May 14, 2012, he met with his friend Sanchez and Sanchez's girlfriend. They met up with other friends, including one named Terry, and went

over to Serrano's home. Terry apparently knew Serrano, but Moore did not. The group of six or seven persons talked on Serrano's porch. According to Moore, when they heard the ice cream vendor, Serrano said, "Let's hit a lick." Moore said Serrano meant they should rob the ice cream vendor. Terry handed Serrano a gun. Serrano and Sanchez walked towards Antonio. Moore said he followed them off the porch, but he lagged behind. Moore first said he stayed "like three houses back," but on cross-examination, Moore said he was three or four feet behind them. Serrano waved a dollar bill in the air and Antonio walked over. Serrano pulled out the gun and said, "Give me everything." Antonio raised his hands and said, "No, no, no." Serrano shot him. Moore, Sanchez, and Serrano ran back to the porch, and Serrano said to everyone there, "If y'all say something, anything, the same thing that happened to him will happen to y'all." Moore said Serrano wore a white and orange Bears shirt. Moore admitted that police had charged him with robbery in an unrelated incident, and in March 2014, Moore pled guilty to the lesser charge of theft. But he said he received no promises in exchange for his testimony against Serrano.

¶ 10 Although both parties questioned Sanchez before the jury, neither attorney appeared to listen to his testimony. Sanchez, a Hispanic child of 14 at the time of the shooting, testified that he belonged to the Latin Counts, a street gang, and gang members told him to go to Serrano's home on May 14, 2012. Serrano was not a member of the gang. Sanchez corroborated Moore's list of the persons on Serrano's porch. One person went inside with Serrano while the others stayed on the porch. When Moore and Sanchez heard the ice cream vendor, they decided to rob him. Sanchez did not know why Serrano came with them when they walked off the porch. Moore waved some dollar bills in the air, and Antonio came over.

Sanchez told Antonio to empty his pockets. Moore pulled out a gun. Serrano just stood behind them. Antonio did not give them any money. Sanchez walked away before Moore started shooting. Antonio chased Moore. As he ran from Antonio, Moore handed the gun to Serrano. Serrano fired the gun. Sanchez admitted that police questioned him, and he identified Serrano as the person who shot Antonio. Sanchez admitted that he had been convicted of attempted armed robbery for his role in the attempt to rob Antonio.

¶ 11 Because Sanchez's testimony deviated from the statement the prosecutor wrote out for Sanchez to sign at the police station, the prosecutor decided to impeach Sanchez. The prosecutor presented a statement Sanchez signed at the police station. Sanchez testified that although he signed the statement the prosecutor wrote at the police station, Sanchez did not read it. Some parts of the written statement did not accurately reflect what happened on May 14, 2012. The written statement says that Serrano said, "Let's go rob this motherfucker," Serrano pointed a gun at Antonio when Sanchez demanded Antonio's money, and Serrano started shooting when Antonio refused to give them money. Sanchez testified that those statements were false, and he never said to anyone at the police station that Serrano had suggested the robbery, that Serrano pulled out the gun, or that Serrano fired the first shots.

¶ 12 Sanchez clarified his testimony on cross-examination. According to Sanchez, Moore brought the gun and fired the first shots, but "[h]e didn't shoot [Antonio]. He was shooting at [Antonio]." Sanchez said that Serrano shot Antonio after Moore passed the gun to Serrano. Defense counsel asked, "When you told police officers back in May 16th of 2012 that Luis Serrano shot the ice cream man, that was a lie?" Sanchez insisted, "No, it wasn't." Both at trial and on this appeal, counsel for Serrano apparently refused to recognize that Sanchez

testified that he saw Moore fire the gun (those shots did not hit Antonio), the gun passed from Moore to Serrano, Serrano fired the gun, and the shots Serrano fired hit Antonio.

¶ 13 Serrano, a Hispanic man with many visible tattoos, testified that in 2011 and 2012 he worked as a manager for Chicago Heights Pallets. In 2011, he bought a house in Chicago Heights, near the location of the shooting. Within a few months after he moved into the new home with his wife and three children, he lost expensive items in two separate burglaries. One other time, intruders entered the home while Serrano was home. Serrano learned from his brother in law that the Latin Counts operated in the area of Serrano's home, so Serrano contacted Terry, who was, according to Serrano, "the leader of the Latin Counts." On May 14, 2012, Terry came over to Serrano's home to discuss the burglaries. Terry brought several persons with him, including Sanchez and Moore. Serrano testified that "Terry said that was his security." After they came to an agreement, Serrano walked to a store on the corner to buy some beer, while Terry and the others stayed outside Serrano's home.

¶ 14 As Serrano walked back from the store, carrying beer, he saw Antonio arguing with Moore, with Sanchez standing nearby. Serrano met Terry across the street from the encounter between Antonio and Moore. Serrano saw Moore pull out a gun "and fire[] once in the air." Antonio grabbed a lid off the ice cream cart. Moore fired several more shots. Antonio and another ice cream vendor started chasing Moore. Sanchez ran past Serrano, then Moore ran up and threw the gun towards Serrano. The gun hit Serrano and fell to the sidewalk. Antonio ran up, following Moore. Serrano picked up the gun and told Antonio, in Spanish, to relax. Serrano noticed Antonio was bleeding. Serrano ran back to his home. He handed the gun to Terry, who gave it to another member of his group. Serrano testified that

he never spoke with Sanchez or Moore, he never suggested or agreed to a robbery, and he never fired the gun. He testified that he had worn a grey tank top, but he said it "could have looked white."

¶ 15 Serrano admitted that police brought him in for questioning in June 2012, and after he told police about the incident, an attorney, Pierina Infelise, came to talk to him. He asked, "Are you my lawyer?" She said she was not. Serrano testified that he refused to speak with her. Serrano admitted that a federal court found him guilty of bank robbery in 2003.

¶ 16 Infelise testified in rebuttal that Serrano told her he fired the gun twice, then handed the gun to Terry, who hid it in some weeds. Infelise said Serrano refused to put his account in writing and he refused her offer to video record his statement.

¶ 17 The prosecutor in closing argument sought to persuade jurors to believe the written statement Sanchez signed, and not to believe Sanchez's testimony in court. The prosecutor said:

"Sanchez, he gave you *** a different story on the stand. When he was sitting here[,] this far away from the actual shooter, yes, he told you something different. But *** three days after the incident took place within the police station with his mother and he's talking to the police, he tells you the truth. He made that statement, and he told you he made that statement.

You can believe that statement and you should believe that statement because that statement is the truth. Because this defendant, *** this 30-something-year-old man wasn't in the room with him at that time. Yesterday when he testified, this 30 year old man, this shooter, was in the room when he told that story."

¶ 18 Defense counsel did not object to the argument.

¶ 19 The jury found Serrano guilty of aggravated battery and attempted armed robbery. The trial court denied Serrano's motion for a new trial. The presentence investigation report showed that in addition to the bank robbery, Serrano also had convictions for aggravated driving under the influence of alcohol in 2009, possession of a controlled substance in 2001, and driving under the influence, assault, and theft, all in 2000. The court specifically found that Antonio suffered severe bodily injury, and therefore the sentencing statute mandated consecutive sentences. The court, emphasizing Serrano's criminal history and the involvement of two minors in the robbery, sentenced Serrano to 20 years for aggravated battery and to 7 years for attempted armed robbery, with the sentences to run consecutively. Defense counsel made an oral motion to reconsider the sentence, which the court denied. Serrano did not file a written motion to reconsider the sentence. Serrano now appeals.

¶ 20 ANALYSIS

¶ 21 Serrano argues that (i) the conflicting, inconsistent evidence did not prove him guilty; (ii) he received ineffective assistance of counsel; (iii) prosecutorial misconduct in closing argument made the trial unfair; (iv) the evidence does not support the finding that Antonio suffered severe bodily injury; and (v) the trial court imposed an excessive sentence. We apply distinct standards to review the different issues.

¶ 22 Sufficiency of the Evidence

¶ 23 This court will not reverse a conviction for insufficient evidence if any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find that the

prosecution proved all the elements of the crimes charged beyond a reasonable doubt. *People v. Schott*, 145 Ill. 2d 188, 203 (1991).

¶ 24 Antonio testified that three males tried to rob him, and one of them shot him. Yesenia saw a man in a white shirt shoot Antonio. Humphrey saw Serrano, in a white shirt, run past her window carrying a gun right after she heard the gunshots. Serrano admitted that he carried a gun from the scene, and that he wore a shirt that might appear white. Sanchez and Moore testified that they saw Serrano shoot Antonio.

¶ 25 Serrano points out that Sanchez and Moore both participated in the attempted armed robbery. The trier of fact should regard the testimony of accomplices "with utmost caution and suspicion." *People v. Williams*, 147 Ill. 2d 173, 233 (1991). Many inconsistencies between the testimony of Moore and the testimony of Sanchez gave the trier of fact further reason to doubt that testimony. But Sanchez's testimony corroborated Serrano's own account in several ways. Sanchez said that he and Moore decided to rob Antonio, with Serrano taking no part in the decision. Sanchez also said that Serrano stood nearby, but not with Moore and Sanchez when they confronted Antonio. Sanchez corroborated Serrano's testimony that Moore drew the gun and fired into the air, and that as Antonio chased Moore, the gun passed from Moore to Serrano. Serrano and Sanchez's testimony differed about two crucial facts. Serrano said he never fired the gun, while Sanchez said that Serrano shot Antonio. According to Serrano, Moore shot Antonio, while Sanchez said that Moore shot at Antonio, but Moore's shots did not hit Antonio. We find that the testimony of Yesenia, Humphrey, and Antonio, with some corroboration from Sanchez, provides sufficient evidence to sustain the convictions.

¶ 26 Ineffective Assistance of Counsel

¶ 27 Serrano relies on two differences between the questioning of Antonio at the first trial and the questioning at the second trial to show that Serrano received ineffective assistance of counsel. At the second trial, the prosecutor elicited from Antonio the testimony that the three persons who waved him over covered their faces as he approached. Serrano argues that his attorney should have impeached Antonio by presenting evidence that, at the first trial, Antonio did not mention that the robbers covered their faces.

¶ 28 The argument rests on misreading of the record. On cross-examination at the first trial, Antonio recognized Sanchez because he "uncovered his mouth" in the confrontation. He clarified that three persons called him over, and "when [Antonio] got next to them, right away, they covered themselves up." Antonio's testimony at the second trial that the three robbers covered their faces did not differ significantly from his testimony at the first trial.

¶ 29 Serrano also points out that at the first trial, his attorney asked Antonio, "You don't remember any of these individuals being heavily tattooed either, do you?" Antonio admitted that he did not remember whether any of the robbers had tattoos. At the second trial, Serrano's attorney did not ask Antonio whether he remembered any tattoos.

¶ 30 "Generally, the decision of whether or not to cross-examine or impeach a witness is a matter of trial strategy, which cannot support a claim of ineffective assistance of counsel." *People v. Franklin*, 167 Ill. 2d 1, 22 (1995). To show that trial counsel provided ineffective assistance, a defendant must "overcome the strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance and that the challenged conduct might have been nothing more than part of counsel's sound trial strategy." *People v. Skinner*,

220 Ill. App. 3d 479, 483 (1991). When a defendant claims that his attorney provided ineffective assistance by failing to impeach a witness, the defendant must show that, because of the value of the impeaching evidence, no reasonable strategy would lead counsel not to use the evidence. See *People v. Jimerson*, 127 Ill. 2d 12, 33-34 (1989).

¶ 31 Here, the evidence that Antonio did not remember tattoos had little value. Antonio's inconsistent testimony about the races of the robbers thoroughly established that he remembered little about them. Two Hispanics and a Mexican? Two Hispanics and a Black male? Two Blacks and one Hispanic? Establishing that Antonio also did not remember whether any of the robbers had tattoos would not much help the jurors. Also, Antonio did not identify Serrano as one of the robbers. Further impeachment of Antonio may have served only to make him more sympathetic to the jurors, while contributing nothing significant to Serrano's defense. See *People v. Negron*, 297 Ill. App. 3d 519, 538–39 (1998). Serrano has not shown ineffective assistance of counsel.

¶ 32 Closing Argument

¶ 33 Next, Serrano contends that the prosecutor deprived him of a fair trial by arguing, in closing, that Sanchez's testimony differed from the statement he signed because Sanchez feared Serrano. Courts afford the parties wide latitude to make arguments based on reasonable inferences from the evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The parties may comment on the demeanor of a witness. *People v. Bratton*, 178 Ill. App.3d 718, 725 (1989).

¶ 34 Sanchez testified that Serrano shot Antonio. Moore testified that after the shooting, he, Sanchez, and Serrano all ran back to Serrano's home, and Serrano said to them, "If y'all say

something, anything, the same thing that happened to him will happen to y'all." We find that evidence in the record supports the inference that Sanchez feared that Serrano would carry out his threat because Sanchez testified against Serrano. We find no impropriety in the remarks.

¶ 35 Because Serrano has not shown that reversible error occurred at the trial, we affirm the convictions. Serrano admits that his attorney failed to preserve for review his objections to the sentence, as counsel failed to file a written motion to reconsider the sentence. See *People v. Ballard*, 206 Ill. 2d 151, 192 (2002). We review the sentencing issues only for plain error. *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010).

¶ 36 Severe Bodily Injury

¶ 37 Section 5-8-4(d)(1) of the Unified Code of Corrections (730 ILCS 5/5-8-4(d)(1) (West 2012)) provides that the sentencing court must impose consecutive sentences when it finds (i) the defendant committed a Class X felony and a second offense, and (ii) the defendant inflicted severe bodily injury. The jury found Serrano guilty of the Class X felony of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1), (h) (West 2012)), and a second offense, attempted armed robbery. We will not disturb the trial court's finding of severe bodily injury unless that finding is contrary to the manifest weight of the evidence. *People v. Deleon*, 227 Ill. 2d 322, 331-32 (2008).

¶ 38 "Not all gunshot wounds are severe just because they are gunshot wounds." *People v. Williams*, 335 Ill. App. 3d 596, 599 (2002). The *Williams* court succinctly summarized cases in which courts found either severe bodily harm or no severe bodily harm.

¶ 39 "Cases finding the existence of severe bodily injury include: *People v. Johnson*, 149 Ill. 2d 118 (1992) (victim shot in the shoulder, in the hospital the next day); *People v. Kelley*, 331 Ill. App. 3d 253 (2002) (victim shot twice in the right arm, hospitalized for three days); *People v. Austin*, 328 Ill. App. 3d 798 (2002) (victim shot in the back and grazed on the side of the head near his left ear, injuries that required overnight hospitalization); *People v. Amaya*, 321 Ill. App. 3d 923 (2001) (one victim shot in the stomach, the other in the back; both required surgery and a lengthy hospital stay, the bullet remaining in one victim at the time of trial); *People v. Primm*, 319 Ill. App. 3d 411 (2001) (victim shot in the back of his left thigh, taken to the hospital); *People v. Strader*, 278 Ill. App. 3d 876 (1996) (victim struck by three bullets from defendant's rifle, one of them removed surgically); *People v. Townes*, 94 Ill. App. 3d 850 (1981) (victim's face was 'beaten up,' eye almost swollen closed, x-rays ordered by doctors to investigate possible bone damage).

¶ 40 Cases finding a failure to prove severe bodily injury include: *People v. Jones*, 323 Ill. App. 3d 451 (2001) (bullet grazed victim's right cheek bone, receiving a band-aid from a doctor but no other medical attention); *People v. Rice*, 321 Ill. App. 3d 475 (2001) (one bullet struck victim in the hand, another in the hip, taken to hospital where he remained for two days); *People v. Murray*, 312 Ill. App. 3d 685 (2000) (victim suffered gunshot wound to the right foot with an open fracture to the big toe, treated and released within two-and-one-half hours after the shooting); *People v. Durham*, 312 Ill. App. 3d 413 (2000) (victim's gunshot wound described as a mark, 'like a small nick or cut'); *People v. Ruiz*, 312 Ill. App. 3d 49 (2000) (victim police officer suffered gunshot wound to knee, wound barely visible, went to a meeting before seeking medical treatment); *In re T.G.*, 285 Ill. App. 3d 838 (1996) (not

enough for 'great bodily harm' under the aggravated battery statute where victim suffered three stab wounds to the chest, felt only the first stab, had three bloody wounds)." *Williams*, 335 Ill. App. 3d at 600-01.

¶ 41 Here, Antonio showed his wounds to the jurors and the court. One bullet grazed his side, a second entered his abdomen and exited through his buttocks, and a third entered his abdomen and remained lodged in him. Antonio explained that at first he did not realize bullets had struck him. Once he felt the wounds, he "tried to throw [himself] behind the cart," then he collapsed. He slipped in and out of consciousness waiting for the paramedics and on the trip to the hospital. Doctors performed surgery the day of the shooting. The following day, Antonio spoke to police who came to the hospital. No one asked how many days Antonio remained in the hospital.

¶ 42 The evidence supports the finding that Antonio suffered an injury as severe as the injuries suffered by the victims in *Johnson*, *Kelley*, and *Primm*. We cannot say that the finding of severe bodily harm is contrary to the manifest weight of the evidence, and therefore we can find no plain error in the court's imposition of consecutive sentences.

¶ 43 Excessive Sentence

¶ 44 Finally, Serrano argues that the trial court imposed an excessive sentence. We defer to the trial court's sentencing decisions. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court "has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Stacey*, 193 Ill. 2d at 209. This court "must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *Stacey*, 193 Ill. 2d at 209. "[A] sentence

within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210.

¶ 45 The Class X offense of aggravated battery with a firearm carries a sentencing range of 6 to 30 years in prison. 720 ILCS 5/12-3.05(e)(1), (h) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Attempted armed robbery carries a sentencing range of 4 to 15 years. 720 ILCS 5/8-4(c)(2), 5/18-2(a) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2012). The parties addressed appropriate factors in aggravation and mitigation. The court's comments do not prove that the court ignored the relevant factors. The total sentence of 27 years falls near the middle of the available range of 10 to 45 years. We cannot say that the sentence deviates greatly from the spirit and purpose of the sentencing laws. Accordingly, we affirm the sentence the trial court imposed.

¶ 46 CONCLUSION

¶ 47 The testimony of two impartial eyewitnesses, partially corroborated by the testimony of accomplices, sufficiently supports the convictions. Defense counsel did not provide ineffective assistance when he chose not to further impeach the victim of the shooting and the attempted robbery. Testimony at trial provided an adequate basis for the prosecutor's assertion that Sanchez may have feared Serrano. The trial court's finding that Antonio suffered severe bodily injury is not contrary to the manifest weight of the evidence. The trial court did not abuse its discretion by imposing a sentence in the middle of the statutorily available range. Accordingly, we affirm the trial court's judgment.

¶ 48 Affirmed.