2018 IL App (1st) 153631-U

No. 1-15-3631

Order filed September 26, 2018

Third Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County, |
| | ) | |
| v. | ) | No. 13 CR 13268 |
| | ) | |
| TYSHAWN REESE, | ) | Honorable |
| | ) | Vincent Gaughan, |
| Defendant-Appellant. | ) | Judge, presiding. |

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held*: The evidence was sufficient to convict defendant of attempted murder and aggravated assault. Trial counsel was not ineffective for failing to seek a substitution of judge after codefendants were convicted before defendant's trial.

¶ 2 Following a bench trial, defendant Tyshawn Reese was convicted of attempted first degree murder and aggravated assault and sentenced to concurrent prison terms of 32 and 5 years. On appeal, he contends that the evidence was insufficient to convict him of either offense

beyond a reasonable doubt, and that trial counsel rendered ineffective assistance by not seeking a substitution of judge following the trials of codefendants and before his own trial. We affirm.

¶ 3 Defendant and codefendants Denzel Bonner, Antonio Bryant, Deandre Fields, and Dajuan Gates were charged with attempted first degree murder for, on or about April 28, 2013, shooting Nicklaus Dorsey about the body while armed with a firearm and with the intent to kill. The charges alleged that defendant and Bryant each personally discharged a firearm that caused great bodily harm to, and permanent disfigurement of, Dorsey. Defendant, Bonner, Bryant, and Fields were also charged with aggravated assault for, on the same day, placing Ronald Coleman in reasonable apprehension of a battery by pointing a firearm at him when they knew him to be a peace officer (to wit, a Chicago police officer) engaged in the performance of his duties.

¶ 4 Defendant's trial was severed from all codefendants. Bryant and Fields were tried, convicted, and sentenced in 2014, before defendant's 2015 trial, and their bench trials were before the same judge as defendant's bench trial. *People v. Fields*, No. 1-14-3575 (2017); *People v. Bryant*, No. 1-14-3578 (2018), *petition for leave to appeal pending* No. 123520 (unpublished orders under Illinois Supreme Court Rule 23).

¶ 5 At trial, Nicklaus Dorsey testified that, on the night of April 28, 2013, he lived in the 300 block of South Leavitt Street in Chicago. He was crossing the street from his home to his parked car when he noticed a maroon car stopped in the street. He could not see who was in the maroon car, and he saw someone exit the car but could not tell if the person was a man or woman. Dorsey then heard multiple gunshots and took cover behind his car, but was shot while taking cover. He fled into his home, where he noticed his wound. He did not see the shooter. While he made no remark to any passerby or bystander before going inside, he told his girlfriend as he

entered his home that he had been shot. Someone called for an ambulance, which took him to a hospital. His bullet wound to the buttocks required surgery, a colostomy, and a week in the hospital. At trial in May 2015, he still had "a problem walking and *** with my stomach."

¶ 6 Chicago police officer Ronald Coleman testified that he was off-duty and not in uniform, but carrying his badge and gun and driving a white unmarked police car, on the night in question. He was parking the car on the street in the 300 block of South Leavitt Street in Chicago, where the street was "very well lit from artificial light," when a maroon car with four occupants stopped abruptly less than ten feet away from his car. Two men exited the maroon Buick from the rear passenger side and rear driver side and fired multiple gunshots. Coleman identified defendant at trial as the driver-side shooter. Defendant had a silver semi-automatic pistol while the other shooter had a silver revolver. Both men re-entered the maroon car and it drove away. Coleman reported the incident by telephone and followed the maroon car after making a U-turn. As he was leaving, he heard a man on the street exclaim that he had been shot.

¶ 7 When the maroon car stopped at an intersection where a state trooper was conducting an unrelated traffic stop, Coleman exited his car. He announced his office to the trooper and told him what had happened. The occupants of the maroon car turned in his direction, and defendant and the other man in the rear seat slumped down. Coleman told the maroon car to stop, announcing his office and holding his badge in one hand and his pistol in the other. Defendant, in the rear driver-side seat about 10 feet away from Coleman, looked at Coleman and pointed a silver semi-automatic pistol at him. Coleman fired ten shots at defendant, and the maroon car began driving away as Coleman fired. The trooper confirmed that Coleman was an officer and then drove away.

¶ 8 The next day, Coleman viewed a photographic array from which he identified defendant as the man who pointed a gun at him. Weeks later, he viewed a lineup from which he identified defendant as the man who pointed a gun at him. He also identified codefendant Bryant before trial as the man who exited the rear passenger-side door of the maroon Buick and fired shots.[1]

¶ 9 A security video from a school in the 300 block of South Leavitt was shown at trial. Coleman testified that it was an accurate depiction of the incident. In the video, a person enters a light-colored parked car at night on a well-lit street. A few seconds later, a dark car stops in the street next to that parked car but faced the other way. Over a few seconds, two persons exit the rear of the dark car, one from each side, step behind the car, and re-enter the car before it drives away. The light car then drives away in the same direction after making a U-turn.

¶ 10 On cross-examination, Coleman was asked about a statement or interview he gave in which he described defendant's gun as black, not silver. Coleman testified that he described the gun as silver and opined that the interviewer erred in preparing the statement. When asked if he was saying that the stenographer who transcribed the interview had erred, Coleman maintained that the interviewer had erred, he had always described defendant's gun as silver, and he had no explanation for the interview transcript reflecting that he described a black gun.

¶ 11 In the same interview, Coleman described the gun that defendant pointed at him as a silver revolver. Coleman acknowledged saying so, explaining that "[i]t's hard to tell if it's a revolver from where you are." A silver revolver was found in the maroon Buick, Coleman acknowledged. He admitted that he was aiming at defendant when shooting at the maroon car but defendant was not struck with a bullet. The codefendant in the back seat with defendant had been

[1] Coleman did not testify to his pretrial identification of Bryant, but the parties stipulated that he would testify to making such an identification.

holding a silver revolver during the earlier shooting, and he was wounded by Coleman. Coleman denied confusing defendant with the other earlier shooter as the man who aimed a gun at him.

¶ 12 State Trooper Timothy Mayerbock testified that he was conducting a traffic stop on the night in question when a man holding a badge announced loudly that he was a police officer before firing several shots into a red car about 40 feet away. When the red car drove away, Mayerbock confirmed that the man was a police officer. However, he testified that he would have fired upon Coleman as Coleman fired had he not believed him to be an officer. Mayerbock reported the incident by radio and drove away. A few minutes later, he saw the red car with the rear window shot out, a revolver in plain view, and a blood trail leading from the car.

¶ 13 Because Mayerbock was conducting a traffic stop at the time of the incident, the video system in his patrol car was recording. He testified that the video accurately depicted the incident, and it was shown at trial. We also viewed it. Because of the camera angle, the video does not show Coleman until after the shots and the maroon car's departure. Coleman is not seen interacting with Mayerbock before firing. Coleman yelled "police" multiple times before and after the shots, and in particular at least twice before the shots began.

¶ 14 Officer Maureen Boyle testified that she responded to a report of a wounded man. Bystanders directed her to an alley where she found codefendant Bryant bleeding from multiple gunshot wounds. Boyle called for an ambulance and followed a trail of blood from Bryant to a maroon Buick with a broken rear window and a revolver on the back-seat floor.

¶ 15 Police detective Dave March testified that he showed Officer Coleman a photographic array on April 29, 2013, from which he identified defendant as the man who pointed a gun at Coleman after firing a gun in the street. Defendant was arrested in June 2013, and March showed

Coleman a lineup from which Coleman again identified defendant as the man who pointed a gun at Coleman after firing a gun in the street.

¶ 16 The parties stipulated that codefendant Bryant's fingerprint was found on the rear passenger door of the maroon or red Buick and codefendant Fields's fingerprint was found on the driver's vanity mirror. They stipulated that Bryant's DNA was found on two cellphones found in the maroon car, and in blood on swatches taken from the maroon car.

¶ 17 The parties also stipulated to the collection and testing of firearms evidence. A .45-caliber revolver was found on the rear floor of the Buick, and five cartridge cases found in the revolver had been fired from it. Ten cartridge cases found at the scene where Officer Coleman fired at the maroon car had been fired from Coleman's .45-caliber semi-automatic pistol. Nine .45-caliber cartridge cases found at the Dorsey shooting scene had been fired from one gun that was neither the revolver nor Coleman's pistol. A spent bullet from the Dorsey shooting scene, and two spent bullets found in the maroon car, were not fired from the revolver, and Coleman's pistol could not be either identified or eliminated as their source.

¶ 18 Following closing arguments, the court found defendant guilty of attempted first degree murder by personally discharging a firearm causing permanent disfigurement, and aggravated assault.[2] Defendant filed a posttrial motion, arguing (in relevant part) insufficiency of the trial evidence. Following arguments, the court denied the motion. Following a sentencing hearing, the court sentenced defendant to concurrent prison terms of 32 and 5 years.

¶ 19 On appeal, defendant first contends that the evidence was insufficient to convict him of attempted murder and aggravated assault. He challenges the sufficiency of the State's evidence

[2] The court also found defendant guilty of aggravated battery, which it merged into the attempted murder count.

that he was one of the men in the maroon Buick and that he shot Dorsey. Regarding aggravated assault, he contends that the State failed to prove that he knew Officer Coleman was a peace officer when he allegedly pointed a gun at him.

¶ 20 On a claim of insufficient evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *Id.*; *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry a defendant; that is, we do not substitute our judgment for that of the trier of fact on witness credibility or the weight of evidence. *Gray*, 2017 IL 120958, ¶ 35. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. Instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Id*. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor to find a witness not credible merely because a defendant says so. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Gray*, 2017 IL 120958, ¶ 35.

¶ 21 The positive and credible testimony of a single witness is sufficient to convict. *Id*. ¶ 36. A conviction will not be reversed merely because there was contradictory evidence, as the task of the trier of fact is determining if and when a witness testified truthfully, and minor or collateral

discrepancies in testimony need not render a witness's entire testimony incredible. *Id.* ¶¶ 36, 47. When a finding of guilt depends on eyewitness testimony, we must decide whether a trier of fact could reasonably accept the testimony as true beyond a reasonable doubt. *Id*. ¶ 36. We find eyewitness testimony insufficient only when the evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id.*

¶ 22 A person commits attempted first degree murder when he, without legal justification and with the intent to kill another, performs any act constituting a substantial step toward killing another. 720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012). A person commits aggravated assault when he "knowingly engages in conduct which places another in reasonable apprehension of receiving a battery" and knows that the person assaulted is a peace officer performing his official duties. 720 ILCS 5/12-1(a); 12-2(b)(4) (West 2012).

> "A person knows, or acts knowingly or with knowledge of [t]he nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists." 720 ILCS 5/4-5(a) (West 2012).

A defendant's mental state of intent or knowledge is rarely proven by direct evidence, and may be proven by surrounding facts and circumstances, including the defendant's actions, from which a trier of fact can fairly draw an inference of intent or knowledge. *People v. Peterson*, 2017 IL 120331, ¶ 43, *petition for cert. pending*, No. 17-9464; *People v. Monteleone*, 2018 IL App (2d) 170150, ¶ 26; *People v. Johnson*, 2018 IL App (1st) 140725, ¶ 68; *People v. White*, 2016 IL App (2d) 140479, ¶ 37.

¶ 23 Here, taking the evidence in the light most favorable to the State as we must, we conclude that a reasonable trier of fact could find defendant guilty of attempted murder and aggravated assault. Defendant places great weight on the fact that the only trial evidence linking him to shooting Dorsey and pointing a gun at Officer Coleman was Coleman's testimony, which he characterizes as unreliable due to various discrepancies. Acknowledging that Coleman's testimony included discrepancies, we nonetheless find that various aspects of his testimony are corroborated so that we cannot conclude that no reasonable person could accept his testimony.

¶ 24 First and foremost, while no forensic evidence corroborated Coleman's pretrial and at-trial identifications of defendant, his pretrial identification of codefendant Bryant was amply corroborated by a fingerprint and DNA evidence placing Bryant inside the maroon car and outside the rear passenger side just as Coleman testified. Thus, the reliability of Coleman's identification of defendant, who he viewed under essentially the same circumstances as Bryant, is strengthened. We find those circumstances – Coleman was facing the maroon car when defendant and Bryant exited only a few feet away, at night but in a well-lit area – generally conducive to reliable identifications.

¶ 25 The video evidence corroborated a key point in the reliability of Coleman's identifications: the maroon or dark car stopped very near his parked car on a well-lit street. It also corroborated that two persons exited the dark car, one from each side, returned to the car seconds later, and Coleman followed the dark car. The firearms evidence corroborated that there were three guns (including Coleman's) involved in the incident as a whole, further corroborating Coleman's account that two men fired in the incident where Dorsey was shot. Lastly, Dorsey testified that he told his girlfriend as he entered his home that he was shot. While this does not

match Coleman's testimony that Dorsey remarked on being shot as he was still in the street, it tends to corroborate rather than refute Coleman's account.

¶ 26 Defendant argues that the shooting Coleman witnessed was unrelated to the shooting of Dorsey. However, we need not raise to reasonable doubt the possibility that Coleman witnessed a different shooting than Dorsey's. Dorsey's shooting and the shooting Coleman witnessed occurred on the same night in the same block. Moreover, Dorsey saw a maroon car stop on his street, and a person exit it, just before his shooting. That testimony corresponds well with Coleman's testimony regarding the shooting he witnessed.

¶ 27 As to aggravated assault in particular, Officer Coleman testified that he announced that he was a police officer before defendant pointed a gun at him, and was holding his badge in one hand as he did so. Trooper Mayerbock corroborated that Coleman was holding a badge and yelling that he was a police officer before he fired at the maroon car. The video also corroborates that Coleman yelled "police" more than once before he fired. We need not raise to reasonable doubt the possibility that defendant did not hear Coleman loudly announce his office or see him holding his badge, particularly when (1) Coleman was about 10 to 40 feet from the maroon car and (2) defendant and Bryant ducking down in the back seat, and defendant pointing a gun at him, clearly indicate that they at least saw Coleman well enough that night.

¶ 28 The evidence shows that Coleman strived to make defendant and codefendants in the maroon car aware that he was an officer before defendant pointed a gun at him. We do not find that conclusion altered by the fact that Mayerbock confirmed that Coleman was a police officer after the maroon car was gone. Mayerbock wanting to be *certain* that Coleman was an officer does not disprove that Coleman conveyed a *substantial probability* that he was an officer,

especially in light of Mayerbock's testimony that he would have shot at Coleman if he did not believe him to be an officer. From the testimony of Coleman and Mayerbock, and the video evidence, a trier of fact could reasonably infer that defendant was aware of the substantial probability that Coleman was a peace officer when he pointed a gun in Coleman's direction.

¶ 29 In sum, we conclude that the evidence of defendant's guilt of attempted murder and aggravated assault is not so unreasonable, improbable, or unsatisfactory that we have a reasonable doubt of his guilt.

¶ 30 Defendant also contends that trial counsel rendered ineffective assistance by not seeking a substitution of judge following codefendants' trials and before his own. He contends that trial counsel knew that the judge who would try defendant was prejudiced against him from the convictions of Bryant and Fields by the same judge.

¶ 31 A defendant's claim that trial counsel failed to render effective assistance is governed by a two-pronged test whereby the defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced by that performance. *People v. Brown*, 2017 IL 121681, ¶ 25. Prejudice is a reasonable probability that the result of the proceeding would have been different absent counsel's error, and a reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Peterson*, 2017 IL 120331, ¶ 79.

¶ 32 Section 114-5 of the Code of Criminal Procedure (725 ILCS 5/114-5 (West 2012)) governs motions for substitution of judge in criminal cases. Within a period of 10 or 11 days[3] after a case is assigned to a judge, a defendant may move by right for substitution of judge. 725

[3] In cases with multiple defendants, the statute provides an additional day to file such a motion after a codefendant has filed such a motion. 725 ILCS 5/114-5(b) (West 2012).

ILCS 5/114-5(a), (b) (West 2012); *People v. Tate*, 2016 IL App (1st) 140598, ¶ 13. Afterwards, substitution is available "for cause, supported by affidavit." 725 ILCS 5/114-5(d) (West 2012).

¶ 33 To obtain a substitution for cause, a defendant bears the burden of showing that the judge was actually prejudiced, not just possibly prejudiced, against him. *People v. Jones*, 219 Ill. 2d 1, 18 (2006), abrogated on other grounds by *People v. McDonald*, 2016 IL 118882; *People v. Haywood*, 2016 IL App (1st) 133201, ¶ 29. Prejudice is animosity, hostility, ill will, or distrust towards the defendant. *Id*. Judges are presumed to be impartial. *People v. Jackson*, 205 Ill. 2d 247, 276 (2001); *People v. Romero*, 2018 IL App (1st) 143132, ¶ 96. "It is assumed that judges, regardless of their personal backgrounds and experiences in life, will be able to set aside any biases or predispositions they might have and consider *each case* in light of the evidence presented." (Emphasis added.) *Jackson*, 205 Ill. 2d at 276. Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the judge's specific reaction to the events taking place. *People v. Urdiales*, 225 Ill. 2d 354, 426 (2007); *Romero*, 2018 IL App (1st) 143132, ¶ 96.

¶ 34 Here, the judge who tried defendant in March 2015 presided over his case from August 2013 onward. Thus, defendant had no right to substitution by the time codefendants Bryant and Fields were convicted in 2014, but would have had to show cause. Defendant contends that he had cause, which trial counsel should have recognized, from the fact that the judge tried and convicted codefendants as accountable for defendant's actions before he tried defendant. In other words, defendant contends that the judge was "necessarily" prejudiced *because* he convicted codefendants before trying defendant and thus "pre-judged" the case against defendant.

¶ 35 In support of this proposition, defendant cites *People v. Robinson*, 18 Ill. App. 3d 804, 808 (1974). In *Robinson*, this court found that a motion for substitution of judge for cause was erroneously denied where the judge had opined upon a defendant's guilt in finding a codefendant guilty. *Id*. However, that finding was *dicta*, as this court went on to find the error waived because the defendant pled guilty. *Id*. at 808-10. Moreover, the proposition defendant argues is inconsistent with the aforesaid caselaw that a judge is presumed to be impartial and that prejudice is determined in context based on the judge's specific reaction to the events taking place. Defendant would have us disregard such presumptions and case-specific analysis to find categorically that a judge is prejudiced regarding trying a defendant whenever he or she has already tried and convicted a codefendant. To the extent that following *Robinson* would be contrary to the requirement of case-specific analysis of prejudice, we will not follow *Robinson*.

¶ 36 Defendant also argues that his case is distinguishable from simultaneous but severed bench trials because a judge in such trials cannot become prejudiced against one defendant before hearing his trial by having already heard a codefendant's trial. As the judge here heard the evidence at codefendants' trials before hearing the evidence at defendant's trial, defendant emphasizes that his case involves the risk of the judge using evidence presented in the State's cases against codefendants to find defendant guilty. But that possibility also applies to simultaneous bench trials. Pursuant to the general presumption that a judge considers only properly-admitted evidence unless the record affirmatively shows the contrary, we presume that a judge considers against each defendant only the evidence admitted against that defendant. *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 69; *People v. Abston*, 263 Ill. App. 3d 665, 671 (1994). "[W]ell established law in Illinois *** recognizes the ability of a trial judge sitting as a

fact finder in a bench trial to separate the evidence offered against different defendants and to compartmentalize the cases to ensure the integrity of each defendant's trial." *Abston*, 263 Ill. App. 3d at 671. We see no reason to disregard that presumption, to set aside that recognition, merely because defendant was tried after codefendants rather than simultaneously.

¶ 37 We conclude that defendant has failed to show on this record that, merely because the judge who presided over his bench trial had already tried and convicted codefendants Bryant and Fields, the judge was prejudiced against defendant. Because defendant has failed to show that a motion for substitution of judge for cause was meritorious, he has also failed to show that trial counsel rendered ineffective assistance by not filing such a motion.

¶ 38 Accordingly, the judgment of the circuit court is affirmed.

¶ 39 Affirmed.