

2018 IL App (1st) 160461-U

No. 1-16-0461

Order filed September 14, 2018

SIXTH 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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 15345
)	
TERRION BUTLER,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for aggravated battery with a firearm is affirmed over his contentions (1) that the trial court violated his due process right to present a defense when it prevented him from introducing evidence that showed the victim's motive to falsely accuse him and (2) the trial court erred when, in determining the credibility of a witness, it considered a fact not in evidence. Defendant's sentence for aggravated discharge of a firearm is vacated under the one-act, one-crime doctrine.

¶ 2 Following a bench trial, defendant Terrion Butler was found guilty of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)) and sentenced to 10 years in prison on each count, to be served concurrently. On appeal, defendant contends that (1) the trial court deprived him of his due process right to present a defense because it prevented him from introducing evidence that would have undermined the victim's credibility and demonstrated that the victim had a motive to falsely accuse him, (2) the trial court erred when, in determining the credibility of a witness, Kenneth McDonald, it considered that defendant and McDonald had been incarcerated together even though the State did not present evidence of this fact, and (3) we should vacate his conviction for aggravated discharge of a firearm under the one-act, one-crime doctrine. For the reasons below, we affirm defendant's conviction for aggravated battery with a firearm and vacate his conviction for aggravated discharge of a firearm.

¶ 3 Defendant's conviction arose from a shooting incident that took place during the early morning hours of July 5, 2013, which injured the victim, Donald Moore. At trial, Moore testified that he knew defendant a long time because they grew up together and he identified defendant in court. During the early morning hours of July 5, 2013, Moore was around the 900 block of North Cambridge Avenue, in Chicago, which was part of the Cabrini Green housing area. At about 1:30 a.m., Moore was standing with Kenneth McDonald in the street at Cambridge and Locust Street. As they were talking, Moore saw defendant, who was wearing a red shirt, standing inside the housing complex. Defendant started "skipping" towards Moore and, when doing so, he was trying to pull something out of his pocket. The streetlights were on in the area, Moore saw defendant "clear as day," and nothing covered defendant's face.

¶ 4 As defendant got closer to Moore, defendant pulled out a semi-automatic gun from his right pocket and shot him in the thigh. Defendant continued to shoot Moore in the upper thigh area. Moore tried to run away and defendant chased him. As Moore was running, he fell and defendant stood over him and shot him two times. Moore ran towards his mother's home and defendant ran in the opposite direction. When Moore was on the ground, he could see defendant's face.

¶ 5 Moore testified that he was shot five times and, at a hospital after the shooting, he told police detectives that defendant shot him. Moore identified defendant in a photographic array and in a line-up as the person who shot him.

¶ 6 The State presented video clips of the incident taken from different locations near the shooting. Moore testified that one video clip showed defendant, who was wearing a red shirt, run towards him and McDonald as they were standing on the street. Moore identified himself and McDonald in the video and testified that he was wearing a blue jean jacket and McDonald was wearing all black. Moore testified that another clip showed defendant walk up towards Moore and shoot Moore in the street. Moore had a prior conviction in 2012 for possession of a controlled substance.

¶ 7 On cross-examination, Moore testified that he knew defendant for over 10 years because they grew up in Cabrini Green together. During the evening hours on July 4, 2013, Moore had been smoking marijuana and shooting off fireworks. When defendant "skipped" towards Moore, Moore was standing right next to McDonald. McDonald moved out of the way and told Moore to "get the f*** away from him." Moore did not recall telling the detectives after the shooting that McDonald said anything to him before the shooting or that McDonald pushed him out of the

way. Moore testified that he did not tell detectives that he did not know which direction defendant fled. The person who shot Moore was not wearing anything on his head. In the photographic array and physical line-up that Moore viewed after the shooting, Moore did not know any of the other people other than defendant.

¶ 8 Moore testified that he told the detectives that he had an altercation with defendant's uncle in the past, which did not mean that defendant's uncle had shot him. The following exchange occurred when defense counsel asked Moore about the nature of the altercation with defendant's uncle:

“[DEFENSE COUNSEL]: What was the nature of the altercation between yourself and [defendant's] uncle?”

[ASSISTANT STATE'S ATTORNEY]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Judge, I would argue that it goes to bias and motive to lie.

THE COURT: Sustained.”

¶ 9 The parties stipulated that Lisa Decker, an evidence technician, would testify that she recovered three expended shell casings from the scene of the shooting and inventoried them using proper inventory procedures.

¶ 10 Kenneth McDonald, who knew defendant for a couple of years, testified for defendant and identified defendant in court as wearing the “brown DOC like me.” McDonald testified that, on July 4, 2013, he had been smoking and shooting off fireworks with Moore in the Cabrini Green area. That evening, there were a lot of people out and McDonald had seen defendant, who

was wearing a blue shirt. At about 1:30 a.m., McDonald was standing with Moore on Cambridge and someone, who was wearing dark blue pants, a red shirt, and a cap approached them and shot Moore.

¶ 11 McDonald testified that he saw the face of the person who shot Moore, did not know the person, and it was not defendant. When the person started shooting, Moore grabbed McDonald from behind, tried to use him as a shield, threw him to the side, and tried to run away. After the shooting, McDonald told detectives that he did not know the person who shot Moore and the shooter was not in the photographs that they showed him.

¶ 12 On cross-examination, McDonald testified that he spoke with detectives about the shooting when he was in a hospital for an unrelated incident and he told them he saw a man in a red shirt, Moore pushed McDonald out of the way, and he ran away, which is when he heard the gunshots. He told the detectives that he wanted to help but the incident happened too fast for him to see the shooter's facial features. McDonald could not remember whether he told detectives that the person who shot Moore was wearing a hat. McDonald testified that he saw defendant the day before the trial and, from the time of the shooting until the day of trial, he had seen defendant numerous times and had talked to him about the night of the shooting.

¶ 13 On re-direct, McDonald testified that, when detectives interviewed him after the shooting, he was on pain killers and in pain. When McDonald was standing next to Moore before the shooting, McDonald was under the influence of alcohol and marijuana.

¶ 14 Zachary Windbush testified that he knew defendant, McDonald, and Moore. Defense counsel played the video clip from the shooting and Windbush testified that, in the video clip, he did not see Moore, did not know or recognize the person who was shot, and the shooter was not

defendant. On cross-examination, Windbush testified that defendant had a relationship with his sister. Windbush was not present for the shooting on July 5, 2013, and did not have personal knowledge of the shooting. Windbush did not recognize the people in the video clip and testified that he could not see their faces on the video.

¶ 15 Defendant testified that he had a prior felony conviction in 2012 for possession of a controlled substance. Defendant knew Moore because Moore “bummed” cigarettes in the neighborhood. From 7 a.m. on July 4, 2013, to 12:30 a.m. on July 5, 2013, defendant was with Windbush and a few other people in the Cabrini Green housing complex near the 700 and 800 block of Cambridge. He was wearing blue and black and a black cap and never changed into a red shirt. At about 12:30 a.m. on July 5, 2013, defendant left and went to “the Park District.” At 1:30 a.m., defendant was not on Cambridge and did not shoot Moore. Earlier that day, defendant had not seen Moore but had seen McDonald.

¶ 16 When defense counsel asked defendant about Moore’s relationship with defendant and his family, the following exchange occurred:

“[DEFENSE COUNSEL]: And do you and [Moore] have a friendly history or an antagonistic history? Could you describe your relationship to the judge.

THE DEFENDANT: I don’t have no problems with him. I used to give him cigarettes *** I don’t got no problems with him.

[DEFENSE COUNSEL]: What about other members of your family?

[ASSISTANT STATE’S ATTORNEY]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Judge, I would argue it goes to bias on the part of the victim.

THE COURT: Sustained.”

¶ 17 On cross-examination, defendant testified that, on July 4, 2013, and the early morning hours of July 5, 2013, he was drinking alcohol and selling drugs and had seen McDonald for a few seconds earlier that day. At 12:30 a.m., he went with Windbush and a few other men to “the Park District, Sewell Park,” where he stayed until 2 a.m. From the date of the shooting to the date of trial, defendant had seen McDonald multiple times. Defendant had talked to McDonald about the shooting because McDonald asked him why he was locked up.

¶ 18 The parties entered into a stipulation that Chicago police detectives Ludwig and Pacheco would testify that Moore told them after the shooting that the shooter ran off and Moore did not know which direction the shooter fled. Moore told the detectives that McDonald saw the shooter with the handgun and pushed Moore out of the way when the shooter started shooting. Moore never told the detectives or the assistant State’s Attorneys that McDonald said “get the f*** away from him.”

¶ 19 In rebuttal, the State presented a stipulation between the parties that Ludwig would testify that McDonald did not tell the detectives after the shooting that the person who shot Moore was wearing a hat.

¶ 20 The trial court found defendant not guilty of six counts of attempted first degree murder but guilty of one count of aggravated battery with a firearm and one count of aggravated discharge of a firearm. In doing so, the court found the McDonald was “completely impeached,” that Moore’s testimony was “pretty strong,” and there “was no impeachment with respect to

significant portions of factual evidence that [Moore] was describing.” The court stated that, in the video, the faces could not be seen, but that it corroborated Moore’s testimony, physical locations on the street, and the running. The court subsequently denied defendant’s motion for a new trial and sentenced him to 10 years in prison on each count, to be served concurrently.

¶ 21 On appeal, defendant first contends that the trial court violated his due process right to present a defense because it prevented him from introducing evidence about Moore’s relationship with defendant’s uncle that would have undermined Moore’s credibility and demonstrated Moore’s motive to falsely accuse him of being the shooter. Defendant asserts he tried to introduce evidence regarding Moore’s relationship with defendant’s uncle during Moore’s cross-examination and defendant’s direct examination. Specifically, the court sustained the State’s objections when (1) defense counsel asked Moore about the nature of the altercation between defendant’s uncle and Moore and (2) defense counsel asked defendant about whether Moore had problems with members of defendant’s family. Defendant requests we reverse his convictions and remand for a new trial.

¶ 22 The State asserts that defendant forfeited review of his challenge because he failed to make an offer of proof to explain what Moore and defendant’s testimony would have been regarding Moore’s relationship with defendant’s uncle and how the testimony related to bias or motive.

¶ 23 To preserve a claim for review with respect to the exclusion of evidence, a party must make an adequate offer of proof in the trial court as to what the excluded evidence would reveal. *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992). The purpose of an offer of proof is to inform (1) the trial court and opposing counsel about the nature and substance of the evidence sought to

be introduced and (2) provide the reviewing court with an adequate record to determine whether the trial court's action was erroneous. *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010). When a line of questioning is objected to, a defendant must make an offer of proof to convince the trial court to allow the testimony or establish that the proposed evidence goes to bias or motive to testify falsely. *People v. Moore*, 2016 IL App (1st) 133814, ¶ 50. An adequate offer of proof requires the proponent of the evidence to assert, with particularity, the substance of the witness's anticipated testimony. *Andrews*, 146 Ill. 2d at 421. When a party fails to make an adequate offer of proof, then the issue on appeal is forfeited. *Id.*

¶ 24 Here, we find that defendant's offers of proof were inadequate. When the State objected to defense counsel's question to Moore regarding the nature of the altercation between Moore and defendant's uncle, defense counsel stated that "it goes to bias and motive to lie." When the State objected to defense counsel's question to defendant regarding whether Moore had any problems with defendant's family members, defense counsel likewise told the court that it went to Moore's bias. Defense counsel failed to explicitly state what the expected testimony from Moore and defendant would have been or how Moore's relationship with defendant's uncle would have demonstrated Moore's bias or motive to lie about defendant or the shooting. *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 147 (to make an adequate offer of proof, "counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony"). Defense counsel's statements that the testimony about the relationship between Moore and defendant's uncle would go to bias or motive are therefore speculative and conclusory. See *Pelo*, 404 Ill. App. 3d at 875-76 (an offer of proof is insufficient if the proponent speculates as to the witness's testimony or merely summarizes the testimony in

a conclusory fashion.). Accordingly, we conclude that the offers of proof were inadequate and, therefore, defendant has forfeited the issue for review.

¶ 25 Defendant next contends that the trial court erred because, when it determined that McDonald was not credible, it considered a fact not in evidence, *i.e.* that McDonald and defendant had been incarcerated together.

¶ 26 Initially, the State argues that defendant forfeited his claim for review because he did not object to the trial court's statement at trial or raise the specific issue in his posttrial motion. Citing *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009), defendant asserts that, to preserve his claim for review, it was not necessary for defense counsel to have interrupted the trial court to object because the trial court's reliance on facts not in evidence constitutes an extraordinary circumstance when an objection is not required. Defendant asserts that he raised his claim in his supplemental posttrial motion because he claimed that the court erred when it found that McDonald's credibility had been impeached.

¶ 27 To preserve a claim for review, a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Our supreme court has found that, under the *Sprinkle* doctrine (see *People v. Sprinkle*, 27 Ill. 2d 398, 400-01 (1963)), the rules of forfeiture may be relaxed when the trial court has overstepped its authority in the presence of the jury or when counsel is effectively prevented from objecting because an objection would have "fallen on deaf ears." *People v. Hanson*, 238 Ill. 2d 74, 118 (2010) (quoting *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)). The failure to preserve an error will be excused however only in "extraordinary circumstances," such as when a judge

makes inappropriate remarks to a jury or relies on social commentary instead of evidence in imposing a death sentence. *People v. Thompson*, 238 Ill. 2d 598, 612 (2010).

¶ 28 We find that defendant has forfeited his claim for review because he failed to object at trial and did not raise his specific claim in his posttrial motion. With respect to defendant's failure to object at trial, the narrow application of the *Sprinkle* doctrine does not apply here. See *People v. Bailey*, 409 Ill. App. 3d 574, 587 (2011) ("our supreme court has been reluctant to extend the *Sprinkle* doctrine beyond a narrow set of extraordinary circumstances"). Defendant's case did not involve a jury and the trial court did not rely upon social commentary in imposing a death sentence. See *Thompson*, 238 Ill. 2d at 612. Defendant has also not demonstrated that trial counsel was practically prevented from objecting to the trial court's findings or that there was an extraordinary or compelling reason to relax the forfeiture rule. See *Bailey*, 409 Ill. App. 3d at 587 (refusing to relax the forfeiture rule, noting that there was no jury present and the defendant did not argue that counsel "was practically prevented from objecting to the trial judge's findings").

¶ 29 Further, defendant did not raise his specific claim in his posttrial motion. In defendant's written supplemental posttrial motion, defendant stated: "[t]he court erred in finding defense witness Kenny McDonald completely impeached and disregarding his testimony entirely. Mr. McDonald was the only eye witness who testified and as such deserved greater consideration." However, defendant did not specifically claim that the trial court improperly relied on facts outside of the evidence, *i.e.* that McDonald and defendant were incarcerated together, when it determined that McDonald was not credible. Accordingly, because defendant did not object at trial or raise the specific issue in his posttrial motion, he did not properly preserve his claim for review.

¶ 30 Defendant argues, and the State does not dispute, that we can address the error as plain error. Under the plain error doctrine, we may review unpreserved error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) that error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under the plain error doctrine, we must first determine whether any error occurred at all. *Piatkowski*, 225 Ill. 2d at 565. We find that the trial court did not err here.

¶ 31 In a bench trial, as here, it is presumed that the trial court considered only competent evidence. *People v. Devalle*, 182 Ill. App. 3d 1, 3 (1989). We give every presumption to the trial court that it considered only admissible evidence in reaching its conclusion. *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 53. The presumption may only be rebutted when the record affirmatively establishes that the trial court in fact considered inadmissible evidence. *People v. Williams*, 246 Ill. App. 3d 1025, 1033 (1993). Further, in a bench trial, it is the trial court's responsibility to determine the credibility of the witnesses and draw reasonable inferences from the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 32 Here, defendant takes issue with the trial court's reference to the fact that McDonald and defendant were "in jail together" and asserts that the court improperly considered this fact because the State did not present evidence that they were ever incarcerated together. Specifically, when the trial court issued its credibility determination with respect to McDonald, it stated:

"McDonald was completely impeached. I think it's significant that when he talked to the detectives he said that he'd like to help but everything happened too fast, I couldn't see facial features, I ran away and then heard gunshots coupled with the fact that they're

both in jail together and he admitted that he's seen the defendant numerous times and they've talked about the shooting indicates to me that he's trying to help his friend, the defendant, and his testimony has to be pretty much viewed with extreme suspicion, so I don't give him any credibility."

¶ 33 We cannot find that the court's comment that McDonald and defendant were "in jail together" affirmatively establishes that, in making its credibility determination, the court relied upon, or based its credibility determination, on a fact not in the evidence. Rather, we find that the trial court's comment was a reasonable inference from the evidence. When McDonald identified defendant in court, he testified that defendant was wearing a "brown DOC like me." McDonald and defendant both testified that, from the date of the shooting to the date of the trial, they had spoken with each other numerous times and McDonald testified that he saw defendant the day before trial, supporting the inference that he had recently spoken with defendant. From this evidence, the trial court could reasonably infer that, when defendant and McDonald spoke before trial, they were in jail together.

¶ 34 Even if we would assume that the fact that defendant and McDonald were incarcerated together was not a proper inference from the evidence, we would not find that the court's passing comment that McDonald and defendant were "in jail together" affirmatively establishes that the court relied upon, or based its credibility determination on, the fact that McDonald and defendant were incarcerated together. Rather, the context of the court's ruling shows that the trial court considered that McDonald admitted he had seen defendant numerous times since the shooting and had talked to him about the shooting. Indeed, McDonald and defendant both testified that, from the date of the shooting to the date of the trial, they had seen each other numerous times

and had talked about the shooting. Thus, from our review, even if the fact that McDonald and defendant were incarcerated together was not a proper inference from the evidence, the court's passing reference to defendant and McDonald being "in jail together" does not affirmatively establish that the court improperly considered or relied upon evidence outside the record when it made its credibility determination. See *People v. Cepolski*, 79 Ill. App. 3d 230, 242-43 (1979) (finding that the trial court's comment to a matter outside the record was a parenthetical reference and did not demonstrate that the court was influenced by it when it found the defendant guilty); see *People v. Collins*, 21 Ill. App. 3d 800, 806 (1974) (where the defendant argued that the court improperly considered potential testimony of two witnesses, the court concluded that the trial judge's reference to the presence and availability of the witnesses was "surplusage" and had no effect on its determination).

¶ 35 Accordingly, the court's reference to McDonald and defendant being "in jail together" is not sufficient to overcome the presumption that the court considered only competent evidence when it made its credibility determination. See *People v. Turner*, 36 Ill. App. 3d 77, 79 (1976) (finding that the trial court's reference to improper testimony at the sentencing hearing was not sufficient to overcome the presumption that the court considered only admissible and relevant material in reaching its verdict). The court therefore did not err and the plain error doctrine does not apply.

¶ 36 Defendant finally contends, and the State correctly concedes, that we should vacate his aggravated discharge of a firearm conviction under the one-act, one-crime doctrine because his convictions for aggravated battery with a firearm and aggravated discharge of a firearm are based on the same physical act of shooting a firearm at Moore.

¶ 37 Under the one-act, one-crime doctrine, multiple convictions based on precisely the same physical act are prohibited. *People v. Akins*, 2014 IL App (1st) 093418-B, ¶ 17. When multiple convictions are entered on a single offense, sentence may only be entered on the most serious offense and the less serious offense should be vacated. *People v. Smith*, 233 Ill. 2d 1, 20 (2009).

¶ 38 The trial court convicted defendant of aggravated battery with a firearm and aggravated discharge of a firearm. Even though the State presented evidence that defendant fired multiple shots, the charging instrument did not treat defendant's conduct as multiple acts. See *People v. Crespo*, 203 Ill. 2d 335, 345 (2001). Thus, defendant's convictions violate the one-act, one crime doctrine because they were based on one physical act, namely shooting a firearm at Moore. We therefore must vacate his sentence for the less serious offense. Aggravated battery with a firearm is a class X felony (720 ILCS 5/12-3.05(h) (West 2014)) and aggravated discharge of firearm is a Class 1 felony (720 ILCS 5/24-1.2(b) (West 2014)). Accordingly, we vacate defendant's sentence for aggravated discharge of a firearm, the less serious offense, and order the clerk of the circuit court to correct the mittimus accordingly. See *Akins*, 2014 IL App (1st) 093418-B, ¶ 17 ("if guilty verdicts are obtained for multiple counts arising from the same act, then a sentence should be imposed on the most serious offense").

¶ 39 For the reasons explained above, we affirm defendant's conviction for aggravated battery with a firearm and vacate his sentence for aggravated discharge of a firearm.

¶ 40 Affirmed in part and vacated in part; mittimus modified.