2020 IL App (1st) 170984-U

No. 1-17-0984

Order filed February 28, 2020

Fifth Division

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 9829
	)	
DAVID MYRICK,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for attempted murder is affirmed over his contentions that the trial court (1) erred in refusing to strike hearsay testimony, elicited by defense counsel, that a nontestifying witness identified him; and (2) coerced a guilty verdict by instructing the jury to continue deliberating after receiving jury notes stating they could not reach a unanimous agreement.

¶ 2 Following a jury trial, defendant David Myrick was convicted of attempted murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)) and sentenced to 46 years' imprisonment. On appeal, he contends the trial court (1) erred by refusing to strike hearsay testimony, elicited by defense

counsel, that a nontestifying witness identified him as the shooter, thereby denying him his constitutional right to confront his accuser, and (2) coerced a guilty verdict by instructing the jury to continue deliberating after they informed the court three times that they were deadlocked. For the following reasons, we affirm.

¶ 3 Defendant was charged with two counts of attempted murder of the victim Joseph Kemp and one count of aggravated battery with a firearm. Because defendant does not challenge the sufficiency of the evidence, we recite only the facts necessary for our disposition. At trial, Kemp testified that in the early morning on October 2, 2012, he went to Allen Johnson's house, located on the 6100 block of South Campbell Avenue, to purchase loose cigarettes. When he arrived, defendant, Tony Russell, and "Sinai" were on the front porch. Kemp knew all three men and had attended both elementary school and high school with defendant, whom he identified in court. He spoke with them on the porch for more than a half hour. The men were loading bags into defendant's white industrial van and said they were delivering phone books out of state.

¶ 4 Kemp thereafter went to a residence that was a known "drug spot" across the street to see his cousin. Defendant and the other two men got into the van and drove away. While inside the residence, Kemp spoke with a man. As they talked, the front door opened, and defendant was standing in the doorway. He accused Kemp of stealing his "s***." Kemp laughed and denied taking anything belonging to defendant. Kemp observed a black gun that defendant was pointing at him. Defendant then fired the gun at Kemp, hitting him twice in the leg. Kemp fell to the ground and defendant walked toward him and continued shooting. Kemp was shot 11 times.

¶ 5 When the police arrived, Kemp informed them that "David" shot him, although he did not know his last name. On November 15, 2012, Kemp spoke with Detective Edward Louis, and again

told him that "David," whom he had known since elementary school, shot him. Kemp continued to look for a photograph of defendant because he knew he was the shooter but did not know his last name. In January 2013, Kemp saw a photograph of defendant on Facebook and recognized him as the shooter. On April 23, 2013, Kemp identified defendant as the shooter in a physical lineup.

¶ 6 Detective Louis testified that he spoke with Kemp in November 2012. Following that conversation, Louis attempted to find "David." He eventually learned from Latanya Clark that Kemp saw a photograph of the shooter. Based on Kemp's information, Louis issued an investigative alert for defendant on April 11, 2013. He learned defendant had been arrested on April 22, 2013, and Kemp subsequently identified him in a lineup.

¶ 7 On cross-examination, Louis testified that Clark told Louis about defendant's Facebook photo. The following colloquy then occurred:

"[DEFENSE COUNSEL]: Now, sir, you indicated that you issued an investigative alert for David Myrick?

[LOUIS]: Correct.

[DEFENSE COUNSEL]: You did that after Latanya Clark called you and gave you the name David Myrick?

[LOUIS]: Not immediately after, no.

[DEFENSE COUNSEL]: Okay. When did you do it?

[LOUIS]: After he was identified by another witness.

[DEFENSE COUNSEL]: Did you -- what witness?

[LOUIS]: Stacy Prater.

[DEFENSE COUNSEL]: Where is Stacy Prater?

[LOUIS]: I don't know.

* * *

[DEFENSE COUNSEL]: Was Stacy Prater the one that was only going to help you if you helped her with her criminal case?

[LOUIS]: Once she talked to the Assistant State's Attorney, that's correct."

¶ 8 On redirect, the assistant state's attorney (ASA) attempted to ask Louis about Prater. Defense counsel objected and asked for a sidebar. Outside the presence of the jury, defense counsel informed the court that it was objecting to Louis's "hearsay statement" regarding Prater's identification of defendant. Counsel requested that portion of Louis's testimony be stricken and moved for a mistrial because defendant's right to confront his accuser was violated. The State responded that counsel "opened the door" to this line of questioning by continuing to ask Louis about Prater. The court sustained counsel's objection and noted:

"And it is challenging because Stacy Prater has not testified in this matter. To make further reference of Stacy Prater would be inappropriate by anyone, and so and the parties are here when the jury comes back, I'm going to sustain the objection, and we're going to move on. So that's the Court's ruling. Detective, why don't you retake the witness stand. Go on, [defense counsel]."

¶ 9 The court then denied defense counsel's motion for a mistrial and his request to have his cross-examination questions and Louis' answers regarding Prater struck from the record. The court sustained defense counsel's objection in the presence of the jury.

¶ 10 Defendant testified that in September 2012, he had a job delivering phonebooks in Columbus, Ohio, in his white van, although he lived in Chicago. While working that job, he stayed at Value Place Hilliard, a hotel that he paid for with his debit card. He identified his hotel bill, which showed he stayed from September 12, 2012 through October 10, 2012. Defendant denied knowing or working with Russell and Sinai. He had never owned a gun. Defendant acknowledged that he knew Kemp but denied shooting him. He further acknowledged that he and Kemp attended the same elementary school but denied that they attended the same high school. He knew Johnson, who lived around the corner from his Chicago home.

¶ 11 In rebuttal, Allen Johnson testified that, in 2012, he lived on the 6100 block of South Campbell with Russell. On the day of the shooting, defendant, Russell, and Sinai knocked on the door of the basement where he lived. Johnson was a mechanic and knew defendant because he fixed defendant's white van. Johnson spoke with defendant for about two minutes. Defendant said they were going to Minnesota to deliver phone books. Defendant, Russell, and Sinai had been on the front porch.

¶ 12 After returning to the basement, Johnson heard five gunshots. When he walked upstairs, no one was around except the police.

¶ 13 The jury began deliberating at approximately 4:38 p.m. At 6:55 p.m., the court received a note from the jury, reading "we cannot come to a unanimous decision, what do you advise[?]" The court stated it believed the correct response was, "please, continue to deliberate." It then asked the parties for input. The State agreed with the court's response, and defense counsel moved for a mistrial, which the court denied. At 7:06 p.m., the court provided the jury with a written response, reading "please, continue to deliberate."

¶ 14 About 7:50 p.m., the jury sent a second note, stating "Judge, we took another secret vote. We have a hung jury (8 guilty, four undecided) what now? It doesn't seem to be much movement with the undecided[.]" The court again stated that it believed the proper response was "please, continue to deliberate." The State agreed with the court. Defense counsel disagreed, noting the jury "clearly state[d]" they were hung. Defense counsel moved for a mistrial, which the court denied. Over defense counsel's objection, the court responded in writing at 8 p.m., "please, continue to deliberate."

¶ 15 At 8:47 p.m., the court went back on the record and informed the parties it was going to continue deliberations until the following day. The State agreed with the court. Defense counsel stated, "Respectfully, Judge, I would move for a mistrial. They have indicated that they are hung. I wouldn't force them to deliberate." The court denied the motion and continued deliberations.

¶ 16 The following day, the jury began deliberating at 9:49 a.m. At approximately 12:32 p.m., the jury sent a third note: "Judge, we have a stalemate, nine guilty, 3 non-guilty." The court asked the parties for input regarding a response. The State asked that the jury be instructed to continue deliberating, and defense counsel moved for a mistrial. The court denied the motion and instructed the jury to "please continue to deliberate" at 12:57 p.m. The court noted that if they sent a fourth note, it would "address it at that time."

¶ 17 At 2 p.m., the jury notified the court it had reached a verdict. The jury found defendant guilty of two counts of attempted first degree murder and that he had personally discharged the gun during the commission of the offense. It further found him guilty of aggravated battery with a firearm. After the verdicts were read, the court polled the jury, and each juror confirmed those were his or her verdicts.

¶ 18 Defendant filed a motion for a new trial, alleging, in relevant part, that (1) the court erred by denying defendant's request to have "questions and answers regarding Stacey Prater stricken from the record," and (2) his due process right to a fair trial was violated when the court forced the jury to continue to deliberate after the jury sent the notes stating they could not reach a unanimous decision.

¶ 19 Following a hearing, the court denied defendant's motion. With respect to defendant's claim of a coerced verdict, the court stated,

> "[T]here were a number of statements coming out of the jury indicating they can't reach a decision, they actually gave their count in terms of how many for guilty, how many undecided, and it is common for juries or jurors to if they don't make up their mind unanimously in the beginning, saying, oh, we can't do it, and that's what happened in this case, but with further consideration, they did reach a verdict. Total deliberation time on this case was about seven and a half hours, on a very serious case with an alibi defense that had some documentation to help corroborate it, combated by, if nothing else, Mr. Johnson's testimony who said I saw him right there, right before *** the shooting. It is reasonable for this jury to have taken their time to consider the impact of all the testimony and all of the evidence that came before them."

¶ 20 The court merged the counts into one count of attempted murder. It sentenced defendant to 21 years for attempted murder with a 25-year firearm enhancement for a total term of 46 years' imprisonment.

¶ 21 On appeal, defendant first argues that the trial court erred by failing to strike Detective Louis' testimony that a nontestifying witness identified defendant as the shooter. He contends this

testimony was inadmissible hearsay in violation of section 115-12 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-12 (West 2016)) and violated his constitutional right to confront his accuser.

¶ 22 Initially, the parties dispute whether the standard of review on appeal is *de novo* or abuse of discretion. Defendant asserts that whether a statement qualifies as hearsay is a question of law and is subject to *de novo* review. See *People v. Hall*, 195 Ill. 2d 1, 21 (2000) (courts apply the *de novo* standard of review to questions of statutory interpretations and other questions of law).

¶ 23 Contrary to defendant's argument, we review the trial court's evidentiary rulings for an abuse of discretion. See *People v. Cox*, 377 Ill. App. 3d 690, 700 (2007) (noting that appellate courts review the admission of hearsay evidence deferentially and will reverse only if the trial court abused its discretion, resulting in manifest prejudice to the accused); *People v. Dunmore*, 389 Ill. App. 3d 1095, 1104 (2009) (applying the abuse of discretion standard to whether the trial court correctly excluded testimony as inadmissible hearsay); *People v. Hammonds*, 409 Ill App. 3d 838, 400 (2011) (the appellate court applies an abuse of discretion standard to a trial court's determination of whether a statement is hearsay and if so, whether an exception applies to render it admissible). "An abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable man would take the view adopted by the trial court." *Dunmore*, 389 Ill. App. 3d at 1105.

¶ 24 "The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted." *People v. Mims*, 403 Ill. App. 3d 884, 897 (2010). "The fundamental purpose of the hearsay rule *** is to test the real value of testimony by exposing the

source of the assertion to cross-examination by the party against whom it is offered." *Id.* Section 115-12 of the Code provides that, "[a] statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115-12 (West 2016). "Inadmissible hearsay exists where a third party testifies to statements made to him by another nontestifying party that identify the accused as the perpetrator of a crime." *Cox*, 377 Ill. App. 3d at 700.

¶ 25 However, "[w]here testimony of an out-of-court statement is offered, not for the truth of the matter asserted, but for the limited purpose of explaining the reason the police conducted their investigation as they did, the testimony is not objectionable on the grounds of hearsay." *Id.* at 701-02. In such an instance, "testimony recounting the steps taken in a police investigation does not violate the sixth amendment, 'even if a jury would conclude that the police began looking for a defendant as a result of what nontestifying witnesses told them, as long as the testimony does not gratuitously reveal the substance of their statements and so inform the jury that [the declarant] told the police that the defendant was responsible for the crime.' " *Id.* at 703 (quoting *People v. Henderson*, 142 Ill. 2d 258, 304 (1990), *declined to follow on other grounds by People v. Terry*, 183 Ill. 2d 298 (1998)). This includes testimony that the police officer spoke with a victim of or witness to a crime and proceeded to search for, surveil, or arrest the defendant. *See People v. Gacho*, 122 Ill. 2d 221, 248-49 (1988) (police officer may testify he had a conversation with a shooting victim, then set out to find the defendant). The " 'arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be

allowed some explanation of his presence and conduct.' " *People v. Cameron*, 189 Ill. App. 3d 998, 1004 (1989) (quoting McCormick, Evidence § 249, at 734 (3d ed. 1984)).

¶ 26 Here, we find that the trial court did not abuse its discretion in refusing to strike Detective Louis' testimony that another witness identified defendant where the statement was in response to defense counsel's question regarding when Louis issued an investigative alert, *i.e.* for a nonhearsay purpose. Louis first testified that he did not issue the alert immediately after speaking with Kemp's mother. He brought up the other witness only after defense counsel continued to ask about the timing of the alert. Further, as the State points out, although Louis testified that Prater "identified" defendant, his testimony did not reveal that she identified him as the shooter or being present at the scene. Thus, we find Louis' testimony fell within the hearsay exception that allows police to testify to an out-of-court statement in order to explain their reason for conducting their investigation as they did and, therefore, did not violate section 115-12 of the Code. It is well-settled that "[s]uch testimony is not hearsay because it is based on the officers' own personal knowledge, and is admissible although the inference logically to be drawn therefrom is that the information received motivated the officers' subsequent conduct." *Gacho*, 122 Ill. 2d at 248. Additionally, the court later curtailed further testimony about Prater by sustaining defendant's objection to the State's question, finding that, although defense counsel elicited Prater's name, it would be "inappropriate" for the parties to "make further reference" to Prater because she had not testified. Given these circumstances, we cannot say that the court's refusal to strike Louis' testimony was an abuse of discretion.

¶ 27 Nevertheless, even if we were to conclude the testimony constituted inadmissible hearsay, we briefly note that defendant forfeited review of such an issue by eliciting the evidence. "A

defendant forfeits any issue as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission of that evidence." *People v. Woods*, 214 Ill. 2d 455, 475 (2005) (citing *People v. Caffey*, 205 Ill. 2d 52, 114 (2001) (when a party procures the admission of evidence, he cannot challenge the admission of such evidence on appeal)). The record clearly establishes that defendant invited the admission of Louis' testimony regarding Prater. Defendant elicited testimony from Louis on cross-examination that Louis issued an investigative alert for defendant "[a]fter he was identified by another witness." Defendant then elicited further testimony that the witness was Stacey Prater, Louis did not know Prater's whereabouts, and that Prater would help Louis once she spoke with the assistant state's attorney in exchange for help with her own criminal case. Defendant cannot now challenge the admissibility of the testimony regarding Prater that he invited. *Woods*, 214 Ill. 2d at 473-74; see also *People v. Williams*, 192 Ill. 2d 548, 571 (2000) (finding no error in admission of evidence where the defendant elicited the evidence).

¶ 28 We are likewise unpersuaded by defendant's argument that the trial court denied him the right to confront Prater by refusing to strike Louis' testimony regarding her identification. The United States and Illinois constitutions guarantee the criminally accused the right to confront the witnesses against them. U.S. Const. amends. VI, XIV; Ill. Const.1970, art. I, § 8. This is a fundamental right that bars the admission of "testimonial hearsay" against a defendant unless the declarant is "unavailable to testify [at trial], and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). However, defendant's argument relies on his contention that the testimony addressed above is hearsay. As previously discussed, that testimony was not hearsay. Therefore, defendant's confrontation right was not

violated. *People v. Williams*, 238 Ill. 2d 125, 142 (2010) (noting that *Crawford* applies only to hearsay).

¶ 29 In his reply brief, defendant argues for the first time that counsel was ineffective for eliciting the testimony regarding Prater. We decline to consider this issue. See Ill. S. Ct. R. 341(h)(7) ("Points not argued [in appellant's brief] are forfeited and shall not be raised in the reply brief.").

¶ 30 Defendant next contends the trial court coerced a guilty verdict by instructing the jury to continue deliberations following three jury notes stating they could not reach a unanimous decision. Specifically, defendant argues that the court erred by failing to give an instruction pursuant to *People v. Prim*, 53 Ill. 2d 62 (1972), to inform the jury of "the possibility of a hung jury."

¶ 31 " 'The integrity of the jury's verdict must be protected from coercion, duress or influence.' " *People v. Gregory*, 184 Ill. App. 3d 676, 680 (1989). "A trial court's comments to the jury are improper where, under the totality of the circumstances, the language used actually interfered with the jury's deliberations and coerced a guilty verdict." *People v. Wilcox*, 407 Ill. App. 3d 151, 163 (2010). Coercion is "a highly subjective concept" without a precise definition. *Id.* Consequently, "a reviewing court's decision often turns on the difficult task of ascertaining whether the challenged comments imposed such pressure on the minority jurors as to cause them to defer to the conclusions of the majority for the purpose of reaching a verdict." *Id.* While the length of deliberations following the court's comments, on its own, is insufficient to determine whether those comments were the primary factor in procuring a verdict, brief deliberations invite an inference of coercion. *Id.* A trial judge has broad discretion when responding to a jury that claims

to be deadlocked. *People v. McLaurin*, 235 Ill. 2d 478, 491 (2009). Additionally, the length of jury deliberations is a matter which rests within the sound discretion of the trial court and its judgment in this regard will not be disturbed unless it is clearly abused. *People v. Daily*, 41 Ill. 2d 116, 121 (1968).

¶ 32 In *Prim*, our supreme court addressed the issue of what a trial judge should do when a jury indicates that it may be deadlocked and unable to reach a verdict. The supreme court noted that providing additional instruction to a jury has possible coercive effects. *Prim*, 53 Ill. 2d at 74. However, the court cautioned that, "[j]urors, and especially those voting in the minority, conceivably could feel a coercive influence if when seeking guidance from the court they are met with stony silence and sent back to the jury room for further deliberation." *Id.* Thus, the *Prim* court developed a model instruction with the purpose of addressing the concerns regarding coercive effects. *Id.* at 75-76. Whether to give a *Prim* instruction to a deadlocked jury is within the court's sound discretion (*People v. Cowan*, 105 Ill. 2d 324, 328 (1985)), and the failure to give one is not *per se* reversible error (*Wilcox*, 407 Ill. App. 3d at 164).

¶ 33 Here, we find that the trial court did not abuse its discretion or coerce a verdict in instructing the jury to continue deliberating in response to their notes. The record shows that the jury began deliberating at 4:38 p.m. on charges of attempted first degree murder and aggravated battery with a firearm, following a two-day trial with seven witnesses. After just over two hours of deliberation at 6:55 p.m., the jury informed the court it could not reach a unanimous decision and sought advice. The court instructed the jury to "please, continue to deliberate." Less than an hour later, the jury again informed the court it could not reach a decision and indicated they had voted 8-4 in favor of guilt, with four jurors being "undecided." The court gave the jury the same response and, at 8:47

p.m., continued deliberations to the following day. The jury reconvened the next morning at 9:50 a.m. and at 12:32 p.m., informed the court that they had a "stalemate" with 9-3 in favor of guilt, with three jurors voting "non-guilty." The court again responded, "Please continue to deliberate." See *Cowan*, 105 Ill. 2d at 328 (The trial court has discretion to have the jury keep deliberating even though the jury has reported that it is deadlocked and will be unable to reach a verdict).

¶ 34 The record shows there were reasons for the court to encourage further deliberations. In the first two notes, the jury mentioned that they could not reach an agreement. The jury had been deliberating for a relatively short time at that point. The first note, in particular, merely asked the court for advice on how to proceed when they could not agree. The second note to the court revealed four of the jurors were "undecided," indicating they had not yet reached a decision as to defendant's guilt or innocence. Thus, we find no error with the court's instruction urging further deliberation. While the third note described a "stalemate," the court explained, in ruling on defendant's motion for a new trial, that it was "common" for juries to state they could not reach a verdict when they failed to immediately reach a unanimous decision. The court further elaborated that the total deliberation time was seven and a half hours on "a very serious case with an alibi defense that had some documentation to help corroborate it, combated by, if nothing else, Mr. Johnson's testimony who said I saw him right *** before the shooting." *Cowan*, 105 Ill. 2d at 328 (in exercising its discretion, the trial court should consider the length of time the jury had deliberated and the complexity of the issues the jury must decide). We agree with the court that it was reasonable for the jury to have taken time to consider the "impact of all the testimony" and evidence before them.

¶ 35 Although the court did not give a *Prim* instruction, its responses to the jury did not impose pressure on minority jurors to heed the majority. Rather, the court's responses to the jury's notes were clear, simple, and not coercive. See *McLaurin*, 235 Ill.2d at 492 ("keep on deliberating with an open mind" and "keep on deliberating" were proper responses to notes claiming that the jury was deadlocked). Importantly, the court did not instruct the jury to reach a verdict or preclude the option of not reaching a verdict. Cf. *Wilcox*, 407 Ill. App. 3d at 164-65 (finding it erroneous for the court to tell jurors that they were "pledged to obtain a verdict" and instruct them to "continue to deliberate *and* obtain a verdict" requiring this court to conclude that "being deadlocked was not an option") (Emphasis in original).

¶ 36 Moreover, the record indicates that the court listened to the arguments from both parties about how to respond to the notes. Although the court did not follow defense counsel's suggestions, nothing suggests that the court's instructions interfered with the jury's verdict. The jury was polled following the reading of the verdicts and each juror confirmed that the verdicts were his or her own. Thus, we cannot say that the court abused its discretion by instructing the jury to continue deliberations. See *People v. Williams*, 173 Ill. 2d 48, 87-88 (1996) (no abuse of discretion where trial judge invited arguments and objections from both sides, listened to the arguments, and exercised his discretion).

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed.