2015 IL App (1st) 132656-U

FIRST DIVISION
March 30, 2015

No. 1-13-2656

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 18247
	)	
JUAN AVALOS,	)	Honorable
	)	Noreen Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Evidence was sufficient to convict defendant. Counsel was not ineffective for not making a closing argument in bench trial.

¶ 2 Following a bench trial, defendant Juan Avalos was convicted of three counts of attempted first degree murder and sentenced to concurrent prison terms of 26 years. On appeal, defendant contends that the evidence was insufficient to convict him beyond a reasonable doubt. He also contends that counsel was ineffective for not making a closing argument.

¶ 3 Defendant was charged with multiple counts of attempted first degree murder and aggravated discharge of a firearm for, on or about July 10, 2011, allegedly shooting at – that is, personally discharging a firearm towards – Jose Juarez, Jordan Michalak, and Jadrien Reed.

¶ 4 At trial in July 2013, the State and then defense waived opening statements.

¶ 5 Jadrien Reed, 18 years old at trial, testified that, at about 8:24 p.m. on the day in question, he was walking to a party in his honor when he saw Juarez, a long-time friend. Reed intended to meet Juarez to attend the party together. Juarez was with someone, but Reed was too far away to tell who. He could not remember how many people were with Juarez except that they were all male and non-black. Reed walked on for less than a block, towards Juarez, when he heard gunshots from the other side of nearby railroad tracks. He ran, not having seen who fired the shots. The police arrived immediately and arrested Juarez and Michalak, who Reed knew from the neighborhood only by his first name. Reed was also arrested.

¶ 6 Jose Juarez, 18 years old at trial, testified that he was "unsure" what he was doing at about 8:24 p.m. on July 10, 2011. On further examination, he recalled walking by himself to Reed's party and that he intended to meet Reed, Michalak, and a group of girls by the railroad tracks. He had just met Reed and Michalak when he heard gunshots and fled, without seeing who fired the shots. Reed and Michalak also fled in different directions. However, the police arrested them essentially immediately. Juarez was taken to the police station, but denied at trial that he spoke with the police. Juarez declined to identify anyone in the courtroom as the shooter. When shown a photographic array at trial, Juarez admitted seeing it before and acknowledged that it bore his initials and had one person's photograph circled. However, he denied, was unsure, or

could not recall being shown the array by police detective Frank Schmalz the day after the shooting or initialing the array, nor would he identify Detective Schmalz at trial.

¶ 7 Juarez also could not recall being brought to the police station on October 5, 2011, when he was in "boot camp" downstate, nor could he recall meeting Detective Schmalz, Detective Carlos Garcia, and Assistant State's Attorney (ASA) Tom Sianis that day. He acknowledged recognizing a five-page typewritten statement bearing his signature on each page, and he admitted that the statement bore a photograph of himself after initially denying recognizing the photograph. He testified first that he signed the statement so he could leave the police station, then that he could not recall dictating or signing the statement, then recalled that he said some of the personal matters therein while denying or not recalling that he said any of the substantive matters. He could not recall if he was allowed to use the washroom or was given food or drink during questioning, he could not recall if he was given an opportunity to read or correct the statement, and he denied telling ASA Sianis when they were alone that no threats or promises were made to obtain his statement.

¶ 8 Juarez testified to having no recollection of going to the courthouse, meeting ASA Andres Almendarez, or testifying before the grand jury on October 6, 2011. When confronted *seriatim* with each question and answer from his grand jury testimony, he professed to not recall any of the questions or answers.

¶ 9 On cross-examination, Juarez testified that he did not type the statement as he cannot type. He could not recall being given a copy of his statement or his grand jury testimony. He reiterated that he does not know and cannot identify who fired the shots on the day in question.

¶ 10 Detective Frank Schmalz testified that he investigated the shooting incidence of July 10, 2011 and interviewed Juarez in his mother's presence the following day. Juarez and his mother agreed to cooperate with the investigation and Juarez was shown a photographic array from which he identified defendant as the shooter. Juarez admitted that the shooting was preceded by an argument and then the throwing of rocks at defendant by Juarez and his friends. Detective Schmalz also interviewed Michalak and Reed. On October 5, 2011, Detective Schmalz again interviewed Juarez after bringing him to the police station from southern Illinois. After agreeing to do so outside his mother's presence, Juarez gave a statement to Detectives Schmalz and Garcia and ASA Sianis, and the latter prepared a typewritten statement. Juarez was not handcuffed during the interview or statement, he was given food and allowed to use the washroom, and he met with ASA Sianis outside the detectives' presence. The written statement was substantially similar to the grand jury testimony, with the additional admission by Juarez that he was also in the Four Corner Hustlers gang until he went to "boot camp." Juarez read the statement and made corrections, which he and the others initialed, before signing each page. To the best of Detective Schmalz's knowledge, no interview notes were taken before the written statement was prepared.

¶ 11 ASA Andres Almendarez testified that he met Juarez at the courthouse on October 6, 2011, and questioned him about his written statement of the prior day in preparation for Juarez testifying before the grand jury. Juarez then went before the grand jury and testified under oath upon ASA Almendarez's examination.

¶ 12 ASA Almendarez authenticated the transcript of Juarez's grand jury testimony and described that testimony. At about 8:20 p.m. on July 10, 2011, Juarez was walking with Reed

and Michalak (collectively, the group) near the railroad tracks. Juarez knew Reed and Michalak for several years and knew they were in gangs: Reed in the Four Corner Hustlers and Michalak in the Spanish Lords. As they walked, they saw defendant and a friend of his. Juarez knew defendant to be a member of the Twelfth Street Players gang, and he and defendant had argued earlier that summer. As defendant walked towards the group from across the street, he told them he would "get [you] later" and said "Spanish Lord killer" and "Four Corner Hustler killer." The group replied "Twelfth Street Players killer." The group followed defendant and threw rocks at him, until he stopped, drew a gun from his backpack, and fired several shots in the direction of the group. The group took cover, but when they "peeked" to see if defendant was still there, he fired again in their direction; Juarez heard the shots striking around them. The group did not return fire because, as far as Juarez knew, nobody in the group had a gun.

¶ 13 Juarez testified to the grand jury that he met with Detectives Schmalz and Garcia and ASA Sianis the previous day and was interviewed with his mother's telephoned permission. After the interview, Juarez signed a written statement based on his interview that was substantially similar to his grand jury testimony. Juarez denied that the detectives or ASA made any threats or promises to obtain his statement and denied being under the influence of drugs or alcohol during the interview. He read the entire statement and signed each page of the statement after making corrections that he, the ASA, and the detectives initialed. Outside the detectives' presence, Juarez denied to ASA Sianis that he was ill-treated, and he acknowledged that the ASA was a prosecutor rather than his counsel. Juarez testified before the grand jury with his mother's permission, and he denied being under the influence of drugs or alcohol as he testified.

¶ 14 On cross-examination, ASA Almendarez testified that Juarez did not appear to be under the influence of drugs or alcohol when he testified before the grand jury. Juarez was shown his statement before he testified but did not see it during his testimony except briefly to identify it.

¶ 15 Police sergeant David Kopka testified that he responded to a reported shooting on the night of July 10, 2011. He detained Reed, Juarez, and Michalak as they fled the scene together, and he found 10 to 15 spent shell casings in two groupings on the ground.

¶ 16 Defendant made a motion for a directed finding. Defense counsel argued that the State failed to make a *prima facie* case as neither eyewitness identified defendant as the shooter and their earlier statements were given when they were "of a tender age." Counsel argued that "today is the trial" but the State was unable to produce a witness who would identify defendant as the shooter at trial and did not present any corroborating evidence that defendant had a gun on the day in question or was responsible for the shots. Counsel characterized the State's case as unsuccessfully "trying to refresh the recollection of their two eyewitnesses" or impeaching them. The State responded that Juarez identified defendant as the shooter three times – from the photographic array the next day, and in his written statement and grand jury testimony – and the shell casings at the scene corroborated his account. The court denied the motion.

¶ 17 Jordan Michalak testified for the defense that he saw who fired the shots on July 10, 2011, but neither defendant nor anybody else in court at trial was the shooter. On cross-examination, Michalak testified that he was with Juarez and Reed and "a few other people" that night when an argument arose with two other men. Reed or Juarez threw rocks at the two men, one of whom produced a gun and fired 10 to 15 shots at Michalak's group. The group ran but

were quickly detained by police, while the shooter and his companion fled. Michalak was taken to the police station and interviewed by Detective Schmalz where he described the events as he did at trial. He could not describe the shooter beyond being a Hispanic male and did not tell Detective Schmalz that he could identify the shooter or offer to view a photographic array. Michalak came to court for trial with defendant, a friend. In the intervening years, Michalak did not contact the police or State's Attorney despite knowing that investigators were trying to contact him, nor mention to defendant that he could identify the shooter. He denied being promised or offered anything for his testimony.

¶ 18 Detective Schmalz testified in rebuttal. When Michalak was interviewed, he admitted that he as well as Juarez threw rocks and that the shooter was a Hispanic male Michalak knew from the neighborhood as a particular acquaintance's brother; that is, he identified defendant "[n]ot by name but by association."

¶ 19 The State waived closing argument while reserving rebuttal, and then defense counsel waived closing argument.

¶ 20 The court found defendant guilty on all counts. The court found that Reed had "selective memory" so his "testimony is absolutely of no importance." While Juarez also had "selective memory," he was "thoroughly impeached." He professed to not recall even appearing before the grand jury much less any of his answers there, and he professed to have no recollection of his written statement though he admitted it bore his signatures, but the ASA who examined him before the grand jury testified in detail to Juarez's testimony there including his admission that the statement was true. The shell casings corroborated the shooting, Michalak testified to a

similar number of shots, and Reed and Juarez also admitted to hearing multiple shots. Noting that Michalak never came forward earlier "to say you've got the wrong guy in custody," the court found his testimony incredible.

¶ 21 In his unsuccessful post-trial motion, defendant argued (in relevant part) insufficiency of the evidence and that the court erred by denying his motion for a directed finding. Following argument in aggravation and mitigation, the court merged the redundant counts into three counts of attempted first degree murder and sentenced defendant to concurrent prison terms of 26 years with fines and fees. This appeal timely followed.

¶ 22 On appeal, defendant first contends that the evidence was insufficient to convict him beyond a reasonable doubt.

¶ 23 On a claim of insufficiency of the evidence, this court must determine whether, after taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence. *Id*. The weight of the evidence and credibility of witnesses are matters for the trier of fact, who may accept or reject as much or little of a witness's testimony as it chooses. *People v. Rouse*, 2014 IL App (1st) 121462, ¶¶ 43, 46. This court does not retry the defendant – that is, we do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses – and we accept all reasonable inferences from the record in favor of the State. *Brown*, 2013 IL 114196, ¶ 48. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of

circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, 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. *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. *Brown*, 2013 IL 114196, ¶ 48.

¶ 24 A trial witness's prior inconsistent statement is admissible under a statutory hearsay exception – that is, substantively and not merely as impeachment – if the witness is subject to cross-examination concerning the statement and the statement was either (a) "made under oath at a trial, hearing, or other proceeding," or (b) "narrates, describes, or explains an event or condition of which the witness had personal knowledge," and "is proved to have been written or signed by the witness" or "the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding." 725 ILCS 5/115-10.1 (West 2012); *People v. Simpson*, 2015 IL 116512, ¶ 27.

¶ 25 On this record, taking the evidence in the light most favorable to the State as we must, we cannot conclude that no reasonable finder of fact would convict defendant of attempted murder or aggravated discharge of a firearm. The occurrence of the shooting was well-established: all three eyewitnesses testified to at least hearing shots, and several shell casings were found at the scene. A reasonable finder of fact could properly consider both Juarez's written statement and

grand jury testimony identifying defendant as the shooter as substantive evidence of defendant's guilt. The grand jury testimony was under oath and documented by ASA Almendarez's testimony and by transcript. The written statement concerned matters actually seen and heard by Juarez, and he both admitted at trial that his signatures were on the statement – one of the few matters he acknowledged at trial – and acknowledged the statement as his true account during his grand jury testimony. Though the trial court discounted Michalak's testimony that defendant was not the shooter, we note that his testimony corroborated the Juarez prior-inconsistent accounts that the shooter was firing at Reed, Juarez, and Michalak because rocks were thrown at him.

¶ 26 Defendant also contends that trial counsel was ineffective for not making a closing argument. To show ineffective assistance of counsel, a defendant must demonstrate both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceeding would have been different absent counsel's error. *Simpson*, 2015 IL 116512, ¶ 35. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id*. Counsel cannot be found ineffective where a defendant fails to satisfy either prong of this test. *Id*.

¶ 27 Here, trial counsel argued at length a motion for a directed finding, and he waived closing argument after the State also waived argument but reserved rebuttal. Notably, between the directed finding motion and the waiver, the defense presented the testimony of Michalak, defendant's friend, that he could identify the shooter as someone other than defendant but never mentioned this earlier to either the State or defendant, and the State presented Detective Schmalz's testimony that Michalak had identified defendant albeit not by name. We see no

unreasonableness in trial counsel deciding that additional argument at that point, which would allow State rebuttal, may not be prudent. Moreover, we see no reasonable probability that the result of trial would have been different with a closing argument.

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

¶ 29 Affirmed.