THIRD DIVISION
May 11, 2011

No. 1-09-1577

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. 06 CR 3228
	)	
ANTHONY SHIEF,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Neville and Steele concurred in the judgment.

O R D E R

HELD: Defendant forfeited claim that trial court erred in denying his motions *in limine* to admit pending charge of witness and certain comments of a 911 operator; no abuse of discretion found in sentence imposed; mittimus corrected.

Following a jury trial, defendant Anthony Shief was convicted of first degree murder, then sentenced to 50 years' imprisonment and an additional 25 years for personally discharging a firearm. On appeal, defendant contends that the

court erred in refusing to allow him to impeach a State witness with his pending criminal charge, and that the court's refusal to allow him to introduce a 911 operator's comments regarding that witness denied him the right to confrontation and due process. Defendant also contends that his sentence is excessive.

The record shows that defendant was arrested for fatally shooting Leroy Willis on June 8, 2002. He was convicted of first degree murder on evidence including, but not limited to, an identification made by eyewitness, Darrell Harvey.

Prior to trial, defense counsel informed the court that he was planning to call as a witness, Sherman Brown, a 911 operator, who would testify that he received a 911 call from the eyewitness, Harvey, who was "possibly drunk." The State responded that there is no recording, Brown's notes do not indicate who the caller was, and Brown could not establish that he knows Harvey's voice. The State further noted that a layman can observe if someone is drunk when they see and hear them, but cannot give such an opinion over the phone. Counsel indicated that he would submit a written motion on this matter.

Counsel then informed the court that he was seeking to question Harvey and police on whether Harvey was driving on a suspended license at the time of the incident, and that this matter goes to his motive, bias, and reason to lie if police learned that he was driving on a suspended license. Counsel

stated that he was seeking Harvey's driving abstract to clear up whether his license was actually suspended. The court stated that it would not decide the matter at this time.

Counsel subsequently filed two written motions *in limine* in support of his arguments. In the first, he sought to question Harvey and police regarding the status of Harvey's driver's license at the time of the incident. He alleged that on April 4, 2002, Harvey was arrested for driving under the influence of alcohol (DUI). Counsel claimed it was highly likely that his driver's license was suspended on June 8, 2002, and since he was driving that day, he was in jeopardy of being arrested. As a result, counsel posited, Harvey's driving status affected his credibility, motive, and bias when he talked with police.

In the second motion, counsel requested the court to allow him to call Sherman Brown who allegedly took Harvey's 911 call. Counsel claimed that Brown entered notes from the call into the Office of Emergency and Management Communications system, which are available, and indicate that the caller was irate, possibly drunk, and refused to allow the woman on the scene to talk to police on his phone.

On March 17, 2009, the State informed the court that Harvey was arrested in May 2002 for DUI, but since his driver's license was from Indiana, there was no automatic summary suspension. The State also stated that its check of Indiana's records revealed no

summary suspension. The court responded, "[o]bviously then he's not suspended. [The Defense] will be foreclosed from going into that."

Defense counsel then inquired if he could go into the fact that Harvey had a pending DUI when he witnessed the incident. The State responded that the defense cannot prove up a bad act for impeachment purposes. The court agreed, noting that it was just an accusation when the incident occurred, and the fact that the bad act exists was irrelevant to Harvey's credibility. Accordingly, the court denied defendant's motion.

The parties then argued the motion *in limine* regarding Brown's comments. Counsel indicated that Brown's notes do not reflect that Harvey was the caller, but that Harvey's statements to police and the grand jury that he called 911 in the presence of the other victim would establish that Brown was talking to Harvey. The State responded that the 911 records show that several people called that night, and since Harvey's name does not appear in the notes regarding the call in question, Brown cannot testify that Harvey was the person he spoke to, especially where he does not know his voice. Counsel replied that no one else refused to give the phone to the woman on the scene.

The court denied defendant's motion *in limine* finding that the operator's observations were not reliable to the point where the probative value outweighed the prejudice to the witness. The

court explained that it could not allow someone on a telephone to say that the other person was intoxicated based on their manner of speech, and that a phone call was insufficient to describe someone as drunk.

At trial, Harvey testified that in the early morning hours of June 8, 2002, he went to a couple of clubs in Chicago, and had about two drinks, but was not drunk. At 4:50 a.m., while he was driving eastbound on 76th Street towards Stony Island, he observed the victim exiting the passenger side of a car with its brake lights on in the parking lot of Goldblatt's Department store. He then saw defendant shoot the victim, and drive off with the car. Harvey followed him, and when they arrived at a streetlight, he saw defendant's face as he ran out of the car and attempted to close the passenger side door.

Harvey further testified that he called police, and as he drove back to the scene of the crime, he saw a woman, later identified as Janice Minnis. She was hysterical, and Harvey assumed she was part of the incident, but had a difficult time understanding her. He eventually calmed her down, and called 911 again. When police arrived, he told them what he had seen. In 2006, Harvey identified defendant in a line-up.

On cross-examination, counsel asked Harvey how much alcohol he had consumed and if it affected his judgment to follow the shooter while the victim was bleeding. Harvey stated he might

have had some beer, but it did not affect his judgment. Counsel also inquired if Harvey was concerned about police because he was drinking and driving, and Harvey responded that he was not. When asked if he slurred his words while talking to the 911 operator, was uncooperative, and told him that he was standing with a woman who was with the victim, Harvey stated that he did not slur his words, that he was cooperative, and told the operator that he was standing next to the victim, and that he did not recall telling him anything about Minnis.

Chicago police officer Adrienne Neely testified that in the early morning of June 8, 2002, she spoke to Harvey. She did not recall if he seemed to be drunk.

Sherman Brown, a 911 operator, testified that at 4:53 a.m. on June 8, 2002, he received an emergency call from a man about a person shot in the Goldblatt's parking lot. The caller indicated that he was at the scene of the crime with a woman. He was excited and irate, and only helpful in relating that a person was shot.

Janice Minnis testified that she and the victim had several drinks, then drove in her son's 1998 Monte Carlo to the Goldblatt's parking lot. While there, a man came up to them with a shotgun, and told them to get out of the car. Minnis exited, and as the victim was exiting, the offender shot him, then took off with the car. Minnis was in shock, and went to get help. She

came across Harvey, who did not seem drunk and called 911. Minnis did not get on the phone with the operator, or ask to talk to him. Minnis also stated that she did not get a good look at the shooter's face because she was drunk, and could not identify him.

The trial evidence also included testimony that the stolen vehicle was recovered, that one of defendant's neighbors saw him driving it, and that defendant's fingerprints were found in and outside the car. Adam Pegues' grand jury testimony that defendant told him in 2002, that he shot someone while robbing him in the Goldblatt's parking lot, was also entered into evidence. Although Pegues stated at trial that he lied to the grand jury based on threats from the detectives that beat him up, the assistant State's Attorney, who interviewed him, stated that Pegues indicated that he was not threatened and had been treated fine by police. In addition, one of these detectives testified that Pegues was not threatened, beaten, or told any facts regarding the case.

At the close of evidence, the jury found defendant guilty of first degree murder and made a factual determination that he discharged a firearm that proximately caused the victim's death. At the sentencing hearing, the State presented two victim impact statements in aggravation, and noted that defendant had a juvenile history where he received probation for two cases and

was also convicted of possession of a controlled substance, for which he received eight years' imprisonment.

In mitigation, defense counsel presented the statement of defendant's stepfather that defendant has a close relationship with his family. Counsel then noted that defendant was 18 years old at the time of the crime, that his family has continued to support him; however, his biological father was not involved in his life, his siblings are in prison, he has an eighth grade education, and he lived in a drug and gang infested area.

Before announcing its sentencing decision, the court stated that it had considered the trial evidence, the pre-sentence investigation (PSI) report, the evidence offered in aggravation and mitigation, the statements, the arguments of counsel, and the initial impact of incarceration. The court noted that defendant's background was a "troubling circumstance," and this was a callous murder. The court stated that there was some potential for rehabilitation, but the punitive aspect of what occurred was something it was going to consider. The court then sentenced defendant to 50 years' imprisonment with an enhancement of 25 years for personally discharging the weapon. Defense counsel subsequently presented an oral motion to reconsider the sentence, which the court denied.

On appeal, defendant first contends that the court erred in refusing to allow him to impeach Harvey with evidence of his DUI

charge which was pending at the time of the crime. He maintains that it was necessary to impeach Harvey's credibility, and show any interest, bias, or motive he had to testify falsely.

As an initial matter, the State responds that defendant has forfeited this issue by failing to raise it in a post-trial motion, and has also forfeited plain error review by not arguing it. In order to preserve an issue for review, defendant must object at trial and raise the matter in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant did not raise the issue in his post-trial motion, and as such, waived it for review. *Enoch*, 122 Ill. 2d at 186. Defendant has, however, argued for plain error review in his reply brief, and we may review plain error arguments raised in this manner. *People v. McCoy*, 405 Ill. App. 3d 269, 274 (2010).

The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). The burden of persuasion remains with defendant, and the first step is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find there was no plain error to preclude defendant's forfeiture of this issue.

Defendant contends that he was denied his right to confrontation where he was not allowed to impeach Harvey with his

pending DUI charge. It is well settled that a defendant has a constitutional right to cross-examine a witness as to his biases, interests, or motives to testify falsely. *People v. Triplett*, 108 Ill. 2d 463, 474 (1985). Although a pending charge against a witness may not be used to impeach the witness' credibility, inquiry may be made where it would reasonably tend to show that the witness' testimony might be influenced by bias, motive, or interest to testify falsely. *Triplett*, 108 Ill. 2d at 475. However, evidence of bias, interest, or motive may not be remote or uncertain, but rather, must give rise to the inference that the witness has something to gain or lose *by his testimony*. (Emphasis added.) *Triplett*, 108 Ill. 2d at 475-76.

Here, defendant contends that he was seeking to cross-examine Harvey regarding the pending DUI he had at the time of the incident to show that Harvey may have believed he would be subject to harsher treatment by police at the scene of the shooting, or by the State, if he did not cooperate with the investigation or provide the testimony the State wanted against defendant, or conversely believed that he would have been given leniency if he cooperated and testified against defendant. The record shows that Harvey was arrested for DUI in 2002, and that he had an Indiana driver's license which had not been suspended. In addition, there is no evidence in the record indicating that he had a pending DUI charge when the trial commenced in 2009.

Thus, the fact that Harvey had a pending DUI arrest in 2002 when he spoke with police does not give rise to the inference that he had something to gain or lose by his lineup identification of defendant in 2006 or *by his testimony* in 2009. Accordingly, we find defendant's contention speculative where the DUI arrest was remote in time, and did not provide a sufficient nexus to the proposition it supposedly supports (*People v. Nutall*, 312 Ill. App. 3d 620, 628, 630 (2000)), *i.e.*, that Harvey lied at the 2009 trial to gain leniency or avoid harsher treatment from the State based on the 2002 DUI arrest. We, therefore, find no error to excuse defendant's procedural default of this issue.

Defendant next contends that the court's refusal to allow him to introduce the 911 operator's comments that Harvey was "possibly drunk" denied him the right to confrontation and due process. Defendant claims that this comment went to Harvey's mental deficiency, which can be explored on cross-examination, and goes to the weight and credibility of his testimony.

Defendant once again failed to raise this issue in his post-trial motion, but requested plain error review of it in his reply brief. For the reasons that follow, we find there was no plain error to preclude his forfeiture of this issue.

Defendant contends that the court's refusal to allow him to question the 911 operator about his note that "Harvey was *** possibly drunk" prevented him from challenging Harvey's ability

to correctly perceive, interpret, and recall the shooting. Where the issue is one of identification, defendant is entitled to cross-examine and present independent evidence of matters regarding the witness' powers of discernment and capacity to form a correct judgment. *People v. Waldroud*, 163 Ill. App. 3d 316, 336 (1987). This right to cross-examination is guaranteed by the federal and state constitutions, and may concern any matter that goes to explain, modify, discredit, or destroy the witness' testimony (*People v. Plummer*, 344 Ill. App. 3d 1016, 1023 (2003)), such as whether the witness was sober or under the influence of drugs (*People v. Morris*, 30 Ill. 2d 406, 409 (1964); *People v. Henderson*, 175 Ill. App. 3d 483, 488 (1988)).

Here, the court did not prevent defendant from questioning Harvey and other witnesses, who had observed him, regarding his sobriety. Rather, the court denied defendant's request to have the 911 operator testify that Harvey was "possibly drunk" based on its finding that the operator's observations were not reliable where they were based solely on a phone call.

We observe that a layman is competent to testify regarding intoxication from alcohol because such observations are within the competence of all adults of normal experience. *People v. Vanzandt*, 287 Ill. App. 3d 836, 845 (1997). However, a layman's determination of whether someone is intoxicated necessarily involves the exercise of his perceptive facilities, *i.e.*, the

five senses. *City of Crystal Lake v. Nelson*, 5 Ill. App. 3d 358, 361-62 (1972). In this case, the 911 operator only heard the caller, and thus did not make the necessary observations to competently testify regarding whether the caller was intoxicated. Furthermore, the operator did not indicate in his notes that the caller was Harvey, and, thus, could not testify that it was Harvey who was "possibly drunk." Accordingly, we find that the court did not err in excluding the operator's testimony on this subject.

In reaching this determination we have considered *Morris*, 30 Ill. 2d 406, and *People v. Di Maso*, 100 Ill. App. 3d 338 (1981), cited by defendant, and find his reliance on them misplaced. In *Morris*, this court reversed the trial court's decision to not allow defendant to cross-examine a certain witness and another person who was with that witness regarding his sobriety. *Morris*, 30 Ill. 2d at 409. Unlike *Morris*, the other person in this case, namely, the operator, was not with Harvey, and defendant was not completely precluded from inquiring into Harvey's sobriety where he cross-examined Harvey, Minnis and the responding officer on this issue.

In *Di Maso*, this court held that defendant was entitled to present evidence contained in the witness' medical records regarding his drug addiction and resulting disorientation, and the fact that his drinking triggered blackouts, as relevant to

his perceptual capacities. *Di Maso*, 100 Ill. App. 3d at 340, 342-43. Here, unlike *Di Maso,* the evidence in question, whether Harvey was drunk, was not based on medical records. Rather, it was based on a 911 operator's notes regarding a call which did not even identify the name of the caller. We, therefore, find no error to excuse defendant's procedural default of this issue.

Defendant next claims that his sentence was excessive. He maintains that his sentence should be reduced based on his minimal background, youth, and significant potential for rehabilitation.

As an initial matter, the State responds that defendant forfeited this issue because he only presented an oral motion to reconsider his sentence. Where, as here, the State fails to object below to defendant's failure to file a written motion, we consider the issue preserved for appeal. *In re Justin L.V.*, 377 Ill. App. 3d 1073, 1082 (2007), and cases cited therein.

There is no dispute that the 50-year sentence and the 25-year enhancement based on defendant personally discharging the firearm fall within the statutory range provided for this offense. 730 ILCS 5/5-8-1(a)(1)(a), (d)(iii) (West 2008). As a result, we may not disturb that sentence absent an abuse of discretion. *People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002).

The record shows that the court considered, *inter alia*, the aggravating and mitigating factors presented by the parties, and

the PSI report which allows us to presume that it took into account his potential for rehabilitation. *People v. Powell*, 159 Ill. App. 3d 1005, 1011 (1987). In fact, the court specifically noted this factor, before commenting on the punitive aspect of the case. The court was not required to give greater weight to defendant's rehabilitative potential than to the seriousness of the offense (*People v. Phillips*, 265 Ill. App. 3d 438, 450 (1994)), which involved defendant shooting the victim as he was complying with defendant's order to get out of the car. Accordingly, we find no abuse of discretion in the sentence imposed, and thus have no cause for interfering with the sentencing determination entered by the court. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

Defendant finally contends that the mittimus incorrectly reflects that he was convicted of two counts of first degree murder with 50 and 25-year prison sentences. The State concedes, and we agree that the mittimus should be corrected to reflect a single conviction for first degree murder (count VI) with a sentence of 50 years' imprisonment and an additional 25 years' imprisonment under the enhancement statute (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)).

In light of the foregoing, we affirm the judgment of the circuit court of Cook County, and order that the mittimus be

corrected as noted. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

Affirmed; mittimus corrected.