2012 IL App (1st) 101393-U

FOURTH DIVISION
MAY 17, 2012

No. 1-10-1393

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. 07 CR 20919
	)	
JAY PARKER,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's convictions of first degree murder and armed robbery affirmed over his claim that the State's introduction of a witness' prior inconsistent statements was cumulative and violative of the rule against prior consistent statements; armed robbery sentence vacated and cause remanded for resentencing on that conviction; mittimus modified.

¶ 2 Following a jury trial, defendant Jay Parker was found guilty of first degree murder and armed robbery, then sentenced to an aggregate term of 82 years' imprisonment. On appeal, defendant contends that the State's introduction of a witness' prior inconsistent statements at trial was improper because those statements were consistent with each other, unduly cumulative, and

prejudicial. He also claims that his armed robbery sentence must be vacated because the 25-year enhancement to that sentence was not in effect on the date the offense was committed, and that his mittimus should be modified to reflect only one conviction of first degree murder.

¶ 3 The record shows, in relevant part, that about 6:25 a.m. on September 8, 2007, defendant shot, killed, and robbed Russell Feggins during a game of dice that was being played at 127 South Spaulding Avenue, in Chicago. At trial, one of the State's occurrence witnesses, Lawrence Cox, contradicted his earlier handwritten statement and grand jury testimony, and the State introduced his prior inconsistent statements pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2010)). Defense counsel objected solely on the ground of improper impeachment.

¶ 4 The jury subsequently found defendant guilty of first degree murder and armed robbery, and that during the commission of the armed robbery, he personally discharged a firearm that proximately caused death to another person. The court then sentenced defendant to consecutive, respective terms of 26 and 6 years' imprisonment for first degree murder and armed robbery, with 25-year enhancements on each conviction for personally discharging a firearm that proximately caused the death of Feggins.

¶ 5 In this appeal from that judgment, defendant first contends that the trial court erred in allowing the State to introduce both the handwritten statement and grand jury testimony of Lawrence Cox under section 115-10.1 of the Code. Although defendant acknowledges that he forfeited this issue by failing to raise it in a post-trial motion, as required (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), he claims that it should be reviewed under the second prong of the plain error doctrine.

¶ 6 The plain error rule is a narrow exception to the waiver rule (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)) which allows a reviewing court to consider unpreserved claims of error where

defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)). Under both prongs, defendant bears the burden of persuasion, and must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545.

¶ 7 In this case, defendant does not challenge the sufficiency of the evidence to sustain his conviction, or that it was proper for the State to substantively introduce Cox's prior inconsistent statements under section 115-10.1 of the Code. Rather, he claims that the State violated the rule against prior consistent statements and presented cumulative evidence by introducing *both* the handwritten statement and grand jury testimony of Cox.

¶ 8 The State responds that the admission of Cox's handwritten statement and grand jury testimony was not erroneous, citing this court's decisions in *People v. Johnson*, 385 Ill. App. 3d 585 (2008), *People v. Maldonado*, 398 Ill. App. 3d 401 (2010), *People v. Perry*, 2011 IL App (1st) 081228, and *People v. Santiago*, 409 Ill. App. 3d 927 (2011). In reply, defendant claims that these cases are "wrongly decided because they fail to account for the substantial prejudice which results from the repeated admission of prior consistent statements."

¶ 9 The State correctly observes that this court has decided this same issue adversely to defendant. In *Johnson*, 385 Ill. App. 3d at 608, this court acknowledged that prior consistent statements are generally inadmissible, but noted that "consistency" is measured against trial testimony, *i.e.*, those statements which harmonize with trial testimony. This court also observed that the rule against consistent statements exists because they needlessly bolster a witness' trial testimony, whereas inconsistent statements obviously can do no such thing. *Johnson*, 385 Ill. App. 3d at 608. We thus found no reason to apply the general rule against admission of prior consistent statements to prior inconsistent statements that were consistent with each other. *Johnson*, 385 Ill. App. 3d at 608. We have reaffirmed that ruling in subsequent decisions

(*Santiago*, 409 Ill. App. 3d at 932; *Perry*, 2011 IL App (1st) 081228, ¶ 85; *Maldonado*, 398 Ill. App. 3d at 423), and find no reason to depart from those well-reasoned decisions in this case, and likewise find no error in the admission of multiple inconsistent statements.

¶ 10 We also reject defendant's claim that the trial court should have excluded the witnesses' prior inconsistent statements as cumulative evidence. The record shows that defendant never objected that these statements were cumulative, and he cites no authority for his claim that the trial court committed error by admitting those statements in the absence of such an objection. He has thus failed to establish a clear error warranting plain error review, and we, therefore, honor his procedural default of that claim. *Hillier*, 237 Ill. 2d at 545.

¶ 11 Finally, we find no merit in defendant's alternative claim that this court "should hold that defense counsel was ineffective for failing to include this issue in his motion for new trial." Having already concluded that it was not error for the court to admit multiple prior inconsistent statements, counsel's failure to raise the issue in a post-trial motion cannot constitute deficient performance or result in prejudice to defendant. Thus, his ineffective assistance of counsel claim also fails. *People v. Hanson*, 238 Ill. 2d 74, 115 (2010).

¶ 12 Defendant next contends that this court should vacate the 31-year sentence imposed on his armed robbery conviction and remand the cause for resentencing because the 25-year enhancement to his sentence for armed robbery was not in effect on the date he committed the offense. He notes that the enhancement provision was held unconstitutional in *People v. Hauschild*, 226 Ill. 2d 63 (2007). The State responds that *Hauschild* was "wrongly decided," and urges this court to leave his sentences for armed robbery and the weapon enhancement intact. We observe that a challenge to the constitutionality of a statute may be raised at any time (*People v. McCarty*, 223 Ill. 2d 109, 123 (2006)), and we review such a challenge *de novo* (*In re J.W.*, 204 Ill. 2d 50, 62 (2003)).

¶ 13 In *Hauschild*, 226 Ill. 2d at 86-87, the supreme court held that the 15-year sentence enhancement for armed robbery while armed with a firearm violated the proportionate penalties clause of the Illinois Constitution because the penalty for that offense was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. The supreme court affirmed that ruling in *People v. Clemons*, 2012 IL 107821, ¶ 26.

¶ 14 In the case at bar, defendant did not receive a 15-year enhancement for being armed with a firearm during the commission of the offense; but rather, he received a 25-year enhancement for personally discharging a firearm that proximately caused the death of another person. These circumstances are similar to those in *People v. Harvey*, 366 Ill. App. 3d 119, 121 (2006) where defendant was sentenced to 40 years' imprisonment for armed robbery/discharge of a firearm that caused great bodily harm. On appeal, this court found that the mandatory 25-year sentence enhancement for armed robbery/discharge of a firearm that caused great bodily harm violated the proportionate penalties clause of the Illinois Constitution because the penalty for that offense was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. *Harvey*, 366 Ill. App. 3d at 130. We thus instructed the trial court to vacate defendant's armed robbery sentence on remand, and to resentence him in accordance with the armed robbery statute as it existed before the enactment of Public Act 91-404 (eff. Jan. 1, 2000) (amending 720 ILCS 5/18-2), which created the mandatory 25-year enhancement. *Harvey*, 366 Ill. App. 3d at 134.

¶ 15 Here, likewise, the record shows that defendant received a 31-year sentence for armed robbery which included a 25-year sentence enhancement for personally discharging a firearm that caused death to another person. The record also shows that he committed the armed robbery in question on September 8, 2007, which was after our decision in *Harvey* on May 17, 2006, and before the armed violence statute was amended by Public Act 95-688 (eff. Oct. 23, 2007)

(amending 720 ILCS 5/33A-2) to cure the proportionate penalty issue (see *People v. Clemons*, 2012 IL 107821, ¶¶ 15-17). Under these circumstances, we are compelled to find that defendant's enhanced sentence for armed robbery violates the proportionate penalties clause of the Illinois Constitution. *Harvey*, 366 Ill. App. 3d at 130. Consistent with the supreme court's decision in *Clemons* and our prior decision in *Harvey*, we vacate defendant's sentence for armed robbery, and remand the cause to the trial court for resentencing on that conviction in accordance with the armed robbery statute as it existed before the enactment of Public Act 91-404. *Harvey*, 366 Ill. App. 3d at 134.

¶ 16 Defendant finally requests this court to modify his mittimus to reflect only one conviction of first degree murder. The State concedes that his mittimus should be corrected as requested, but also asks this court to modify defendant's mittimus to reflect that he received a 25-year enhancement to his murder sentence for personally discharging a firearm that caused death to another person, as well as a sentence of 6 years' imprisonment for armed robbery with an additional 25-year weapon enhancement for that offense.

¶ 17 We agree that defendant's mittimus should be corrected to reflect only one conviction of first degree murder on the most serious charge of knowing and intentional murder (720 ILCS 5/9-1(a)(1) (West 2006)) where he intentionally killed the victim and personally discharged a firearm that caused that death. *People v. Lee*, 2012 IL App (1st) 101851, ¶50; *People v. Walker*, 2011 IL App (1st) 072889, ¶ 39. We decline to make the additional modifications requested by the State regarding defendant's armed robbery sentence which we have now vacated.

¶ 18 For the reasons stated, we vacate defendant's sentence for armed robbery and remand the cause to the trial court for resentencing on that conviction; pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), we order the clerk to modify defendant's mittimus to reflect one conviction of first degree murder (720 ILCS 5/9-1(a)(1) (West

2006)) (count 11) and sentence of 26 years plus a 25-year firearm sentencing enhancement to that sentence; and affirm the judgment in all other respects.

¶ 19 Affirmed in part; vacated in part; cause remanded with instructions; mittimus modified.