2012 IL App (1st) 103158-U

SECOND DIVISION
December 11, 2012

No. 1-10-3158

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 540
	)	
ISHMAEL CLARK,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

O R D E R

¶ 1 *HELD*: Trial court did not err in permitting the State to present identification testimony at trial and sentencing from witnesses who viewed uncounseled lineups where those lineups were conducted during the investigation of other crimes in which defendant had not been charged. However, trial court did err in sentencing defendant to an extended term sentence for attempted armed robbery after already sentencing him to an extended term for first degree murder. Further, the clerk of the court is ordered to correct the mittimus to reflect that defendant earned 1710 days of credit for time spent in custody prior to sentencing.

¶ 2 Following a bench trial defendant, Ishmael Clark, was convicted of first-degree murder, three counts of attempted first-degree murder, armed robbery, and attempted armed robbery. He was subsequently sentenced by the trial court to an extended 100-year term for first-degree murder, a concurrent 30-year term for armed robbery, three concurrent 80-year terms for attempted murder, and an extended 30-year term for attempted armed robbery. On appeal, defendant contends that his conviction should be reversed and a new trial granted because the trial court erred in admitting line-up identifications and in-court identifications at trial where defendant was denied his sixth amendment right to counsel during the line-ups. Defendant also contends that the trial court erred in sentencing him to an extended term sentence on the attempted armed robbery count after already sentencing him to an extended term for first-degree murder and that the mittimus should be corrected to reflect 1710 rather than 1707 days of credit for time defendant spent in custody prior to sentencing. For the reasons set forth below, we affirm defendant's conviction but reduce the 30-year extended term sentence to 15 years, the maximum for defendant's attempted armed robbery conviction. We also order the clerk of the court to correct the mittimus to reflect 1710 days of credit for time in custody.

¶ 3 On December 5, 2005, defendant and two other men, Elbert Dunnigan, and Gino Wilson, were arrested in connection with the robbery and shooting death of Lee Richardson, Jr. On January 4, 2006, defendant was charged by indictment with four counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2006)), three counts of attempted first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), armed robbery (720 ILCS 5/18-2(A)(2) (West 2006)), attempted armed robbery (720 ILCS 5/8-4 (West 2006)), three counts of aggravated battery (720

ILCS 5/12-4(a), (b)(18) (West 2006), and eleven counts of aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1(a)(1) (West 2006)). Prior to trial, the State filed a motion to admit evidence of several other crimes defendant and the other men had committed, including two home invasions that occurred in August and October 2005, the aggravated kidnapping of Tina Horace, which occurred two days before the incident at issue in this case, and a home invasion and armed robbery of Rachael Mejia, which occurred earlier on the same day as the armed robbery and murder at issue in this appeal. The trial court ruled that the State could only use evidence of one other crime, the home invasion and armed robbery of Mejia.

¶ 4 Also prior to trial, defense counsel filed a motion to quash arrest and to suppress line-up identifications from the other crimes on the grounds that they violated his sixth amendment right to counsel because counsel had already been appointed in this case. The State argued that the right to counsel had not yet attached in those other cases because there had been no court appearance and defendant had not yet been charged. The trial court agreed with the State and denied the motion.

¶ 5 At trial,[1] the evidence showed that on December 5, 2005, Lee Richardson Sr. was helping his 31-year-old son, Lee Richardson Jr., fix the furnace in his home. Shortly before noon, the two men returned to Lee Richardson Jr.'s house from the store, parked the car in the garage, and exited through a side door. As they walked across the backyard, they were confronted by two African American men with guns who forced them to lay face down on the ground. One of the

[1]Defendant's codefendants, Elbert Dunigan and Gino Wilson, were convicted of related charges after a simultaneous bench trial and a guilty plea respectively and are not parties to this appeal.

gunmen, who the State posited was defendant, wore a light-colored coat and was armed with a large, silver semiautomatic gun. The other gunman, who, the State asserted was codefendant, Elbert Dunnigan, was wearing a two-toned blue jacket and had his head was covered in a skull cap. While the Richardsons were laying on the ground, the gunmen searched them for valuables. Lee Richardson, Jr. began to struggle with the man in the light-colored jacket and both offenders shot him several times. Lee Richardson Sr. was also shot, but the bullet went through his coat pocket, hitting a roll of plumbers tape. He played dead until after the perpetrators fled the scene. Lee Richardson Jr., who suffered four gunshot wounds, died of his injuries.

¶ 6 Across the street, neighbors Louis and Amelia Washington watched the robbery and shooting through their windows. Louis called the police while it was happening and gave a description of the incident, the offenders, and the direction of their flight. Both offenders ran to the corner of 115th and Parnell, got into a waiting silver minivan, and fled the scene. Defendant's former girlfriend, Tawana Turner, testified at trial that in December 2005, she owned a silver Dodge Caravan and that on the morning of December 5, 2005, defendant borrowed it from her. She also identified a photo of the van in court but stated that several items recovered from the van, including purses, hats, jewelry, bullets, marijuana, and a police scanner were not hers.

¶ 7 A report about the robbery and shooting went out over the police radio and a high speed chase ensued, covering several miles and resulting in multiple crashes. Chicago Police Officer Ed Kos testified that he and his partner, Officer Ferreira, were chasing the minivan in their unmarked squad car and at one point they used their car to block off the path of the minivan near

112th Street and Racine Avenue. The officers got out of their car, drew their weapons, approached the van, and ordered the three occupants to get out. Officer Kos identified defendant as the driver of the van, codefendant Wilson as the passenger, and codefendant Dunnigan as the backseat passenger. Defendant put the van into reverse and drove backwards to the intersection of 112th Street and Racine Avenue, proceeded down Racine, and the chase ensured. Officer Kos testified that the van was traveling at a high rate of speed and disregarding all traffic signals and stop signs. Officer Kos stated that several police units, in marked and unmarked cars, were chasing the minivan, as it fled at speeds reaching 85 miles per hour.

¶ 8 The chase reached a dead end on Hoyne Avenue and 95th Street. Police officers saw a man jump out of the passenger side of the moving van with a gun in his waistband. Officers descended on the man, who was later identified as codefendant Dunigan, and apprehended him. They recovered a 9-mm semiautomatic pistol from Dunigan's waistband. They also recovered proceeds from the robbery, including Lee Richardson Jr.'s wallet, cell phone, and cash, which were falling from Dunigan's pockets as he struggled with the police. The gun recovered from Dunigan was later stipulated by the parties to be the source of three of the four bullets recovered from Lee Richardson, Jr.'s body. Dunnigan was wearing a light and dark blue two-toned jacket, which Amelia Washington identified as being worn by one of the shooters.

¶ 9 In the meantime, defendant and Wilson continued to flee in the minivan, with Officers Kos and Ferreira in pursuit. Another unmarked police car containing Officers Alonso and Bentley subsequently joined the pursuit. Wilson jumped out after the van was struck by two trucks in the middle of an intersection. He broke his foot and was subsequently apprehended.

Defendant continued to flee and crashed into the passenger side of the police car containing Officers Alonso and Bentley. Officer Alonso testified that he was exiting the police car when defendant drove the van into the car at a high rate of speed and stated that he had to dive back into the car to avoid being seriously injured. Officer Alonso identified defendant as the driver of the van.

¶ 10 The van proceeded westbound on 87th Street and drove head on into the police car in which Officers Kos and Ferreira were parked. Defendant then continued to flee west on 87th Street until he crashed the van into the front steps of a nursing home at 2940 West 87th Street. Defendant attempted to flee on foot but was apprehended about two blocks away. Inside the van, the police found several purses, jewelry, tools, and a police scanner. The police also recovered a white and black reversible jacket, which Lee Richardson, Sr. and Amelia Washington identified as the jacket one of the shooters wore. They did not recover the second weapon that was determined to be the source of one of the bullets recovered from the decedent and one of the cartridge casings found at the scene of the shooting.

¶ 11 One of the State's witnesses, Rachael Mejia, testified that on December 5, 2005, the day Lee Richardson Jr. was killed, she was in her apartment ironing uniforms while her 3-year-old daughter was in the living room watching cartoons. Mejia's daughter had an accident and Mejia took her into the bathroom to clean up when she heard a loud boom. She opened the bathroom door and saw two men holding black guns. One of the men was wearing a beige jacket and the other had on a black sweatshirt. At trial, Mejia identified the beige reversible jacket that had been found in the minivan as the jacket one of the men was wearing during the robbery in her

apartment. The men pointed the guns at Mejia and her daughter and the man in the beige jacket made Mejia and her daughter walk with him through the apartment while he looked for items to steal. The men took purses, jewelry, identification cards, and a small amount of cash. Mejia said that one of the men was holding a small radio from which she could hear voices and sirens. Mejia testified that after searching the apartment, the men left out the front door, which they had broken down upon entering.

¶ 12 Mejia testified that after the men left, she called her husband and then called 911. Two police officers arrived at her apartment to investigate the robbery. On January 19, 2006, Mejia went to the police station to view a line-up and identified defendant as the man who had been wearing the beige jacket during the home invasion. Mejia also identified several items, including watches, purses, a necklace, earrings, a bracelet, and rings, which she stated were taken from her apartment during the robbery and the radio that one of the intruders had been holding that day.

¶ 13 The State rested its case, and defendant filed a motion for a directed finding of acquittal, which the trial court denied. Defendant did not testify and rested after entering several exhibits into evidence. The court found defendant guilty of first degree murder, armed robbery, attempted first degree murder, and attempted armed robbery.

¶ 14 The court then proceeded to a sentencing hearing. In aggravation, the State presented Frank Barber, his aunt, Hope Joiner, and his cousin, Raphael Keys, who testified to an incident that occurred at Joiner's home at 7038 South Oakley on August 23, 2005. On that date, Barker was taking out the garbage at approximately 8 a.m. when two men approached with guns and demanded that Barker open the door. The men entered the residence where they and a third man

forced the family to lie on the floor, bound them with phone cords and duct tape, covered them with a blanket, and searched the home for valuables. Keys and Joiner testified that the men said that they had police scanners and would come back and kill them if they called the police. Barber, Joiner, and Keys subsequently viewed a lineup and identified defendant and Elbert Dunnigan as two of the gunmen.

¶ 15 Alexis Blakemore testified that at about 11:15 a.m. on October 10, 2005, she was returning to her first-floor apartment at 5511 South Carpenter Street in Chicago when she was approached at the door by two black men who put pistols in her face and forced their way into her apartment. She said there was a third man present who also had a pistol. The men tied her up with cords and searched her home for valuables, taking two televisions, jewelry, alcohol, and other items before leaving about 45 minutes later. Blakemore subsequently identified defendant and Dunnigan in a lineup as two of the gunmen and said that she recognized them earlier when she saw them on television in connection with a murder.

¶ 16 Assistant State's Attorney Steve Rosenblum testified that he prosecuted defendant in 1997 for possession of a controlled substance with intent to deliver and that defendant was found guilty and sentenced to six years in prison. Rosenblum testified that defendant was also charged in separate cases with possession of cannabis, attempted murder, aggravated kidnapping, armed violence, and unlawful use of a weapon. Defendant pled guilty in those cases and was sentenced to two years' imprisonment for unlawful use of a weapon, seven years for attempted murder and aggravated kidnapping, and two years for possession of cannabis, with the sentences running consecutively for a total of 17 years' imprisonment.

¶ 17 Tina Johnson testified that on December 3, 2005, just before 8 p.m., she was leaving a friend's house in Markham and was talking on her cell phone when a gray van pulled up. A man got out, grabbed her shoulders, stuck a gun in her mouth, forced her into the van with two other men and drove off. The men took about $300, her cell phone, purse keys and mink coat before letting her out in an alley near 111th Street with a bag over her head. On December 5, 2005, Johnson saw a news broadcast about a shooting and recognized the van and the men who kidnapped her. She called the Markham police and the next day went with police to an auto pound where she identified the gray van used in the kidnapping. On December 22, 2005, she viewed a lineup and identified the three offenders who kidnapped her. In court, she identified defendant, Dunnigan, and Wilson as the offenders but due to the passage of time could not recall which man had done what. Mike White, a former Markam investigator, testified that at the lineup, Johnson identified defendant as the driver, Wilson as the man who jumped out of the van and stuck a gun in her face, and Dunnigan as the man who stuck a gun in her mouth and told her to shut up.

¶ 18 Rochelle Howard, the sister of Lee Richardson, Jr. and the daughter of Lee Richardson, Sr. read a victim impact statement to the court during the sentencing hearing. She told the court that her brother was 31-years-old when he was shot to death and that he had served in the Navy and had been honorably discharged. She stated her father wanted the court to show no mercy on the men who killed his son but that she had forgiven them.

¶ 19 After the State rested in aggravation, defendant presented no witnesses in mitigation. The trial court then sentenced him to an extended 100-year term for first-degree murder, a concurrent

30-year term for armed robbery, three concurrent 80-year terms for attempted murder, and an extended 30-year term for attempted armed robbery Defendant filed a motion for a new trial and a motion for a new sentence, which were both denied. This appeal followed.

¶ 20 On appeal, defendant first asserts that his conviction should be reversed and the case remanded for a new trial because his sixth amendment rights were violated when the trial court permitted Rachel Mejia to testify at trial and Hope Joiner, Raphael Keys, Frank Barker and Alexis Blakemore to testify at sentencing about their line-up identifications of defendant. Defendant concedes that he had not yet been charged in the cases involving those witnesses, but asserts that because he was indicted in this case on January 4, 2006, his sixth amendment right to counsel had attached when Mejia viewed the lineup on January 19, 2006 and Barker, Keys, Joiner, and Blakemore viewed the lineup on January 20, 2006, and therefore, he had the right to have counsel present. Defendant contends that by using these identifications as substantive evidence against him at the trial and sentencing, the State and the court violated his sixth amendment rights, requiring a reversal of conviction and a new trial. Therefore, defendant asserts that his conviction should be reversed and the case remanded for a new trial.

¶ 21 In response, the State asserts that defendant has forfeited this claim by failing to specifically raise it in his posttrial motion. It is well-settled that to preserve an issue for review, a defendant must object at trial and in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture of that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). General and vague allegations are not sufficient to preserve an issue for appeal. *People v. Parchman*, 302 Ill. App. 3d 627, 632 (1998). Here, at trial, defendant did

object at trial by adopting his codefendant's argument objecting to line-up identifications made by other crimes witnesses, where those line-ups were held after defendant retained counsel in this case. The trial court denied the motion to suppress the identification testimony, finding that defendant's sixth amendment right to counsel had not attached in those cases at the time those line-ups were conducted. In his post-trial motion for a new trial, defendant did not specifically challenge that ruling, but instead made a general complaint about the trial court's decision to deny his motion to quash arrest and suppress evidence and grant the States motion to admit proof of other crimes. Defendant did not specifically assert that the line-up identifications violated his sixth amendment right to counsel. Therefore, defendant has forfeited review of this issue.

¶ 22 The plain error rule allows a reviewing court to consider an unpreserved error when the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in conducting plain error review is to determine whether error occurred at all. *People v. Staple*, 402 Ill. App. 3d 1098, 1105 (2010).

¶ 23 Defendant argues that the trial court erred in permitting the State to introduce the lineup identification testimony of Mejia, Joiner, Keys, Barker, and Blakemore because at the time those witnesses viewed the lineup, he had already been indicted in this case, and his sixth amendment right to counsel had attached. The State counters by arguing that although defendant had a sixth amendment right to counsel in this case, as he had been charged with a crime and appointed an

attorney, he did not have a sixth amendment right to counsel in the cases involving those witnesses, since he had not yet been indicted in those crimes.

¶ 24 "It is well-established law in Illinois, that a lineup conducted after adversarial judicial criminal proceedings have commenced is a 'critical stage' and denying counsel during a lineup impermissibly violates an accused's sixth amendment right to counsel." *People v. Curtis*, 113 Ill. 2d 136, 143 (1986). Once attachment of the sixth amendment right to counsel occurs, the accused is entitled to the presence of appointed counsel during any "critical stage" of the postattachment proceedings. *United States v. Wade*, 388 U.S. 218, 226-27 (1967). If a lineup is held in violation of the sixth amendment, any evidence offered by the State showing that witness identified the accused from that process is subject to a *per se* rule of exclusion. *Gilbert v. California*, 388 U.S. 263 (1967). However, the sixth amendment right is offense-specific. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). That is because the police have an interest in investigating new or additional crimes after an individual is formally charged with one crime. *McNeil*, 501 U.S. at 175-76.

¶ 25 Here, although defendant's sixth amendment right to counsel had attached in this case, he did not have a right to counsel in the cases involving Mejia, Joiner, Keys, Barker, and Blakemore, because at the time of the lineups, the police were simply investigating those crimes. In addition, we reject defendant's assertion that the line-ups in those other crimes were a critical

stage of those proceedings at which he was entitled to counsel. In the most recent United States Supreme Court case to address the issue, *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the court stated that the right to counsel attaches when the accused is brought before a judicial officer and is told of the formal accusation against him and his liberty is subject to restriction. *Rothgery*, 554 U.S. at 202. While a post-indictment lineup is a critical stage of a proceeding, a pre-indictment line-up, is not. *Wade*, 318 U.S. at 227-28. Therefore, since defendant had not been charged with any crime involving the five identification witnesses at the time they viewed the lineup, they did not constitute a "critical stage of those proceedings that would trigger the right to counsel."

¶ 26 Further, an in-court identification may be permitted even when it follows an uncounseled lineup if the State can establish by clear and convincing evidence that the witness had an independent basis for their identification. *Wade*, 388 U.S. at 240. In *United States v. Wade,* the Court set forth factors to be considered when determining whether a witness' in-court identification had an origin independent of the uncounseled lineup; these factors include: "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to [the] lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification." *Wade*, 388 U.S. at 241.

¶ 27 "The independent-basis determination can be made by a reviewing court where the record permits an informed judgment [citations], and the court may find a sufficient alternative

foundation for the in-court identification 'even where a small number of these factors are present.' " *People v. Curtis*, 113 Ill. 2d 136, 147 (1986) (quoting *United States v. Anderson*, 714 F.2d 684, 686 (7th Cir. 1986). Our review of the record reveals that it allows an informed judgment in this case. Evaluation of the *Wade* factors shows clearly and convincingly that the witnesses' in-court identifications were based on their observations during the commission of the crimes, not on viewing defendant at the uncounseled lineups. Mejia, who was the only identification witness to testify during the guilt phase of the trial stated that she got a good look at defendant, who was in her apartment for approximately an hour during the robbery. There is nothing to indicate that her description of defendant was inaccurate or that there was any discrepancy between her pre-lineup description and defendant's actual appearance. There is also nothing to suggest that Mejia was shown any photographs of defendant prior to the lineup or that she failed to identify the defendant on a prior occasion. Further, only 45 days had elapsed between the date of the Mejia home invasion and robbery and the date of the lineup.

¶ 28 Similarly, Barker, Joiner, Keys, and Blakemore, who testified at defendant's sentencing, each identified defendant based on their observations of him during the August 25, 2005 home invasion and robbery. Each witness stated that defendant had pointed a gun at them and was in the house for approximately 45minutes to an hour. Each witness had an opportunity to view defendant while they were being tied up with phone cords and duct tape, prior to be covered by a blanket. There is nothing to suggest that there were any discrepancies between any pre-lineup description and the defendant's actual description, any identifications prior to lineup of another person, any identifications by picture of the defendant prior to the lineups, or any failure to

identify the defendant on a prior occasion. In addition, only five months had passed between the time of the home invasion and robbery and the lineup identification.

¶ 29 Based on a balancing of the *Wade* factors, we find that the in-court identification by Mejia was based on her observation of defendant at the time of the incident and therefore, was admissible at trial and that the in-court identifications by Joiner, Keys, Barker, and Blakemore were similarly admissible at sentencing. With regard to those latter four witnesses, we also note that at sentencing, the ordinary rules of evidence are relaxed. *People v. Bouyer*, 329 Ill. App. 3d 156, 165 (2002). Evidence may be admitted so long as it is both relevant and reliable. *People v. Harris*, 375 Ill. App. 3d 398, 408 (2007). The source and type of admissible information is virtually without limits. *People v. Rose*, 384 Ill. App. 3d 937, 940-41 (2008). A court " 'may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense.' " *People v. LaPointe*, 88 Ill. 2d 482, 495 (1981) (quoting *People v. McWilliams,* 348 Ill. 333, 336 (1932)). The decision to admit particular types and sources of evidence during a sentencing hearing lies within the broad discretion of the sentencing judge. *People v. Fikara*, 345 Ill. App. 3d 144, 156 (2003). Therefore, it was well within the trial court's discretion to permit Joiner, Keys, Barker, and Blakemore, to testify as identification witnesses at defendant's sentencing hearing.

¶ 30 Next, defendant contends that the trial court erred in sentencing him to an extended term on the attempted armed robbery count after sentencing him to an extended term for first degree murder and asks this court to vacate the sentence and remand for resentencing. Pursuant to 730 ILCS 5/5-8-2 (West 2005), when a defendant is sentenced to natural life for murder, the trial

court may impose an extended term sentence on the next most serious offense for which defendant was convicted. *People v. Terry*, 183 Ill. 2d 298, 302-03 (1998). Therefore, defendant asserts, the trial court could only sentence him to an extended term on the next most serious charge, armed robbery, and not for the attempted armed robbery. The State agrees. Therefore, we vacate that portion of defendant's sentence and reduce to 15 years, the maximum nonextended term for defendant's attempted armed robbery conviction. "Pursuant to Supreme Court Rule 615, a reviewing court may correct the mittimus without remanding the cause to the trial court." *People v. Hill*, 402 Ill. App. 3d 920, 929 (2010).

¶ 31 Lastly, defendant contends that the trial court entered a mittimus that incorrectly reflects that he is entitled to 1707 days of credit for the time he spent in custody prior to sentencing, when he is actually entitled to 1710 days of credit. The State concedes the error. Accordingly, we order the clerk of the court to correct the mittimus to reflect the correct sentence. 134 Ill.2d R. 615(b)(1).

¶ 32 For the foregoing reasons, we affirm defendant's convictions but reduce to 15 years the sentence on defendant's attempted armed robbery conviction. We also order the clerk of the court to correct the mittimus to reflect that defendant is entitled to 1710 days of credit for the time he spent in custody prior to sentencing

¶ 33 Affirmed as modified.