2013 IL App (1st) 103206-U

Third Division
November 21, 2012
Modified Upon Denial of Rehearing February 13, 2013

No. 1-10-3206

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.	)	98 CR 30103
	)	
ERIC BLACKMAN,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it denied the defendant's motion to exclude evidence that he invaded the homes of two potential witnesses shortly after the shooting. The trier of fact could find that the evidence showed the defendant's consciousness of guilt. The trial court did not commit plain error when it failed to strike evidence that during the invasions the defendant also frightened children. The prosecutor's use of the other crimes evidence in closing argument, during his discussion of the credibility of prosecution witnesses, does not amount to plain error. The trial court did not commit plain error by admitting into evidence, without foundation, a document on the letterhead of the Cook County Assessor's Office. The defendant's counsel's failure to object to the document that lacked

foundation did not prove ineffective assistance of counsel, because the document had little prejudicial or probative value. The trial court did not abuse its discretion when, after a retrial, it imposed on the defendant a sentence 10 years greater than the sentence imposed after the initial trial, because events since the first trial indicated that defendant had increased his involvement in gangs.

¶ 2 This case comes before us for a second time. At the retrial following our remand from the prior appeal, a jury found the defendant, Eric Blackman, guilty of first degree murder. The trial court sentenced him to 55 years in prison, which was ten years more than the sentence imposed after Blackman's first trial. On appeal, Blackman argues that the court erred by allowing the prosecution to present evidence that Blackman invaded the homes of two prosecution witnesses, and by admitting into evidence, without foundation, a document that to some extent impeached Blackman's testimony. Blackman also claims that his counsel provided ineffective assistance by failing to object to the foundation for the document, and the court lacked adequate justification for increasing his sentence following the retrial. Because we find that the trial court did not abuse its discretion, and counsel did not provide ineffective assistance, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 Around 10 p.m., on October 15, 1998, Wanda Vickers heard loud moans near her home. She went to the window and heard more groans coming from an abandoned car near her home. She saw the flash of a gunshot in the car. She watched a man get out of the car and climb over a fence. Police found Lawrence Strong in the car, dead from a contact gunshot wound to the head. Later that night, Vickers described to police the man she saw leaving the car. She did not name the man. Police also spoke to Jermon Murphy at the

scene.

¶ 5 A week later, around midnight on October 22, 1998, Blackman and another man kicked in the door of Vickers's home and Blackman asked Vickers, "[W]ho said I did that?" Also on that night, Blackman and the other man kicked in the door of Murphy's home, and Blackman said to Murphy's mother, Annette McCauley, "tell him I didn't do it."

¶ 6 The next day, October 23, 1998, Vickers told police about the home invasion, and she said that she saw Blackman get out of the abandoned car right after she saw the gunshot on October 15. Police arrested Blackman and charged him with murder and home invasion. Blackman pled guilty to charges that he invaded Vickers's home and Murphy's home.

¶ 7 A trial on the murder charges, held in 2002, resulted in a finding of guilt and a sentence of 45 years in prison. *People v. Blackman*, 359 Ill. App. 3d 1013 (2005). This court reversed the conviction and remanded for a new trial because of a discovery violation.

¶ 8 Before the retrial, Blackman moved to exclude evidence of the home invasions. The trial court denied the motion, but agreed to instruct the jurors that they could use the testimony only as evidence of Blackman's consciousness of guilt.

¶ 9 Courtney Crosby testified that on October 15, 1998, he drank alcohol and smoked marijuana with his friends, Blackman, Murphy and Javon. Blackman showed them he had a gun. Strong drove up and made gang signs to them. Blackman said, "We ain't folks." Strong drove over to his girlfriend's home and got out of his car. Blackman and Javon started walking towards Strong before Crosby left the scene.

¶ 10 Murphy testified that he, too, noticed that Strong drove past and Blackman walked

towards Strong's car. Murphy saw Blackman push Strong into an abandoned car. Loud moaning preceded a gunshot within the car. Police officers arrived shortly after the shooting. Murphy told one of the officers that Blackman shot Strong, but Murphy did not admit that he saw the shooting. Murphy testified that he did not tell the police what he saw because he feared Blackman. The day after Blackman kicked in the door to his home, Murphy told the police he saw Blackman shoot Strong.

¶ 11 Vickers also testified that she feared Blackman, and that explained her decision not to tell police at first that she saw the gunshot and she saw Blackman get out of the car where police found Strong's corpse. Vickers knew Blackman from the complex where they both lived. She testified that on October 22, 1998, when Blackman kicked in her door, she ran from her bedroom to the door to protect her children. She saw Blackman and the other man waiting for her. Blackman held a gun to her head when he asked, "[W]ho said I did that?" The police put her family in protective custody once she identified Blackman as the shooter. The state paid more than $20,000 for her family's living expenses while they remained in protective custody.

¶ 12 McCauley testified that when Blackman and the other man kicked in the door to her home, Blackman asked where Murphy was. McCauley said he was not at home. Blackman told the other man to guard McCauley, and said, "[I]f she moves, shoot her." Blackman then went upstairs, to the rooms of McCauley's children. McCauley heard a smack, and she heard one of her children holler. McCauley said to the man guarding her, "you're going to have to kill me because if he hurt one of my children, I'm going upstairs." The man went up the

stairs and said to Blackman that they should leave. McCauley, briefly unguarded, ran out of the house and slammed the door. She explained that she hoped the two men would chase her and leave her children alone. She hid behind a bush and watched as Blackman and the other man ran past and away from her home.

¶ 13 Blackman testified that he stayed with his girlfriend Laura on October 15, 1998, at her home. He did not remember Laura's last name, but he remembered her address as 422 East 42d Place. When Blackman heard that Murphy said he killed Strong, he became upset and went to confront Murphy in his home. He kicked in the door when no one responded to his knock. He left when he learned that Murphy was not at home. He went to Vickers's home the same night to confront Vickers's son, and asked why he said Blackman killed Strong when Vickers's son knew that was not true. Blackman said he did not carry a gun to his confrontations with Vickers and McCauley.

¶ 14 In rebuttal, prosecutors presented a fax on a letterhead of the Cook County Assessor's Office, purportedly showing assessment records for 422 East 42d Place. The fax indicated that the land stood vacant from before 1994 through 2008. Blackman's counsel did not object to the exhibit.

¶ 15 The prosecutor, in closing, argued:

> "Ms. Vickers certainly didn't tell the police that night what she had seen. ***
>
> Ms. Vickers told you, she was afraid. And quite frankly with good reason, the event of October 22nd. Was she afraid and did she

> have good reason? Absolutely. And it wasn't until after the defendant invaded her home, putting a gun to her head and her son's head, that she was willing to take the chance that maybe she would have to trust the police to make sure she was safe. She couldn't hold her peace any longer. She had to tell the police, not only who invaded her home, but who killed that boy in the parking lot.
>
> [Murphy] is the same thing. He told you he is afraid. He again is that guy of the streets. He is a guy that lives in a world where it's not a good idea to tell the police what you saw, even if you don't know the people. And it's certainly not a good idea to snitch out your childhood friends. That causes you problems. That's why [Murphy] didn't say what he saw until his mother was invaded by the defendant because he no longer could risk – there is one thing when he is worrying about [himself], but now this guy is going into his mother's apartment and putting a gun on his mother, threatening, demanding to know who said I killed that boy, tell them I didn't do it."

Defense counsel did not object.

¶ 16 The jury found Blackman guilty of first degree murder. The trial court denied Blackman's motion for a new trial. At the sentencing hearing, a prison guard testified that in 2010, the guard caught Blackman carrying a sharp metal shank. Also in 2010, the sheriff's department transported Blackman and several other inmates in a van. The back of the van,

where Blackman sat, sustained damage from vandalism, with seats ripped up and steel rods bent.

¶ 17 An investigator testified that Blackman had risen in the ranks of the Gangster Disciples while in prison, and Blackman, in a writing sent to another inmate, identified himself as the "Institutional Coordinator" for Gangster Disciples in the prison. Blackman wrote that a certain inmate should be "smashed on sight and vacated from general population."

¶ 18 The trial court found that Blackman's conduct in prison showed that he had no interest in rehabilitation. The court sentenced Blackman to 55 years in prison. Blackman now appeals.

¶ 19 ANALYSIS

¶ 20 On appeal, Blackman contends that the trial court erred by admitting excessive evidence of other crimes, by admitting into evidence the fax without foundation, and by imposing an unjustified sentence. He also contends that his counsel provided ineffective assistance when she failed to object to the admission of the fax into evidence.

¶ 21 Other Crimes

¶ 22 Usually, the trial court should not permit the prosecution to present evidence that the defendant committed crimes other than those for which he is on trial. *People v. Butler*, 31 Ill. App. 3d 78, 80 (1975). However, the court may admit such evidence if it is relevant to prove a material question at trial, such as motive, intent or consciousness of guilt. *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991). "Even where other-crimes evidence is relevant for

a permissible purpose, the circuit court must weigh the prejudicial effect of admitting the other-crimes evidence against its probative value. [Citation.] The court should exclude evidence of other crimes where its prejudicial effect substantially outweighs its probative value." *People v. Placek*, 184 Ill.2d 370, 385 (1998). "If other crimes evidence is admitted, it should not lead to a mini-trial of the collateral offense; the court should carefully limit the details to what is necessary to illuminate the issue for which the other crime was introduced." *People v. Nunley*, 271 Ill. App. 3d 427, 432 (1995). The trial court has discretion to decide whether to admit evidence of other crimes. *Placek*, 184 Ill. 2d at 385. We will not overturn the trial court's judgment on the basis of improper evidence of other crimes unless the trial court abused its discretion (see *People v. Bedoya*, 325 Ill. App. 3d 926, 938 (2001)), and the evidence constituted "a material factor in [the] conviction such that without the evidence the verdict likely would have been different." *People v. Cortes*, 181 Ill. 2d 249, 285 (1998).

¶ 23 Here, the trial court permitted the prosecution to elicit testimony that Blackman invaded the homes of Vickers and Murphy as evidence of his consciousness of his guilt for the murder of Strong. Although Blackman argued at trial that the evidence showed only that the false murder charges angered him, he admits that the trier of fact could infer that Blackman tried to intimidate potential witnesses, and that courts may admit such evidence to show consciousness of guilt. See *People v. Abernathy*, 402 Ill. App. 3d 736, 749 (2010).

¶ 24 Blackman also argues that the court erred by admitting evidence whose prejudicial effect far outweighed its probative value. Vickers did not at first tell police she saw Blackman leaving the car right after she heard the shot. She explained that she feared

Blackman. The court allowed Vickers to testify that Blackman kicked in her door and held a gun to her head, and that he let her know he did so because he suspected she had accused him of killing Strong. A trier of fact could conclude that this evidence, which showed that Blackman intimidated potential witnesses, thereby showed consciousness of guilt. We find that the prejudicial effect of this evidence did not so clearly outweigh its probative value that we can say the trial court abused its discretion by admitting this testimony into evidence. See *People v. Illgen*, 145 Ill. 2d 353, 375-76 (1991).

¶ 25 McCauley's testimony similarly supports the inference that Blackman sought to intimidate potential witnesses because he knew of his guilt. According to McCauley, Blackman kicked in her door and demanded to speak to Murphy. When McCauley said Murphy was not at home, Blackman, armed with a gun, told her to tell Murphy he "didn't do it." We cannot say that the trial court abused its discretion when it denied Blackman's motion to bar this evidence.

¶ 26 Blackman points out that the evidence of other crimes went far beyond the evidence needed to show that he invaded the homes of potential witnesses. Vickers added, without objection, that police put her entire family in protective custody. McCauley provided more vivid testimony about the threat to her children, as she said Blackman carried a gun upstairs to her children's rooms. She heard a smack and then she heard her son holler. She told the jury, without objection, about the desperate steps she took to protect her children. She testified that she told the man guarding her that he would have to kill her to prevent her from going upstairs if Blackman hurt her children. When that man left her unguarded for a few

seconds, she tried to draw Blackman and his accomplice away from her children by slamming the door as she left her home.

¶ 27 Although Blackman admitted that he invaded Vickers's and McCauley's homes, he strenuously disputed their accounts of the encounters. He admitted that he kicked in their doors around midnight when they did not respond to his knock, but he testified that he carried no gun and he threatened no one. He only asked Vickers's son why he had said Blackman killed Strong, and he told McCauley to tell her son, Murphy, that Blackman did not kill Strong. The disputed evidence led to a mini-trial on the issue of whether Blackman threatened the families of Vickers and Murphy with a gun. The evidence of a smack and the hollering of McCauley's child could, arguably, severely prejudice a jury against Blackman without great probative value on the issue of whether Blackman's conduct showed consciousness of guilt. But defense counsel did not object at trial when the witnesses testified about the effects of the home invasions on their children.

¶ 28 Neither did Blackman's counsel object to the prosecutor's use of other crimes evidence in closing argument. The prosecutor argued that Vickers did not at first tell police what she saw because she "was afraid," "with good reason, the event of October 22nd," when Blackman "invaded her home, putting a gun to her head." The prosecutor said Murphy, too, did not tell police what he saw until his mother "was invaded by the defendant." Blackman now contends that the prosecutor's argument used the other crimes evidence to bolster the credibility of prosecution witnesses, and our supreme court has held that courts should not permit the prosecutor to use other crimes evidence for this purpose. See *People v. Romero*,

66 Ill. 2d 325, 330-32 (1977).

¶ 29 We find that the trial court correctly denied defense counsel's motion *in limine* to exclude testimony about other crimes because, with proper restrictions, the probative value of the testimony outweighed its prejudicial effect. See *Abernathy*, 402 Ill. App. 3d at 749. Blackman also filed a motion *in limine* before trial in which he asked the court to prevent the prosecution from eliciting evidence that Blackman threatened the children of McCauley and Vickers. The trial court denied that motion. But defense counsel did not object at trial when the witnesses testified about the effects of the home invasions on their children. To preserve an issue for review after the trial court has denied a motion *in limine* to bar certain evidence, a party must make an appropriate objection at trial when the other party offers the evidence. *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002). Blackman's counsel failed to raise at trial any objections to testimony in excess of that necessary to explain the other crimes, and about the improper use of the testimony in closing argument. Therefore, we review these issues only for plain error. See *People v. Enoch*, 122 Ill. 2d 176, 190 (1988).

¶ 30 Blackman notes that he filed a posttrial motion in which he asserted that he asked his counsel to object to the improper use of other crimes evidence in closing argument, and his counsel refused to lodge the objection. He asserts, without citing supporting legal authority, that this motion adequately preserves his objection to the closing argument so that we should review the argument without reference to the plain error doctrine. We disagree. Because defense counsel did not object to the prosecutor's closing argument, defendant did not preserve the issue for appeal, and we review the argument only for plain error. See *Enoch*,

122 Ill. 2d at 186.

¶ 31 The plain error doctrine "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and 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 (2) a clear or obvious error occurs and that 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).

¶ 32 We cannot say that the court committed a "clear or obvious error" when it did not, *sua sponte*, strike testimony from Vickers and McCauley about the effect of the home invasions on their children. See *People v. Sparkman*, 68 Ill. App. 3d 865, 870-71 (1979). Neither can we say that the prosecution committed a "clear or obvious error" by using the home invasions not only to show that Blackman tried to intimidate potential witnesses, but also, to some extent, to bolster the credibility of Vickers and Murphy. See *People v. Glasper*, 234 Ill. 2d 173, 211 (2009). Because we cannot characterize either of the alleged errors as clear or obvious, the evidence of the effect of the home invasions on children and the use of the other crimes evidence in closing argument do not warrant reversal here.

¶ 33 Faxed Document

¶ 34 Next, Blackman argues that the trial court committed plain error when it admitted into evidence a fax appearing on the letterhead of the Cook County Assessor's Office. Blackman points out that the fax bears no seal or certification, and the prosecution offered

no testimony to provide a foundation for the document. The admission of a document into evidence without a proper foundation can constitute plain error. *People v. Johnson*, 376 Ill. App. 3d 175, 180 (2007). We find that the admission of this document into evidence does not challenge the integrity of the judicial process, so the second prong of plain error review does not apply. See *Piatkowski*, 225 Ill. 2d at 565.

¶ 35 For the first prong of plain error review, we must assess the strength of the evidence against the defendant and the strength of the evidence in his favor. No physical evidence tied Blackman to the crime scene or the murder weapon. The conviction rests on the testimony of two eyewitnesses who said they saw Blackman at the murder scene at the time of the murder. Murphy, a convicted felon, admitted that he had consumed some alcohol and smoked marijuana before the murder, and this admission may make his testimony less credible. See *People v. Di Maso*, 100 Ill. App. 3d 338, 342 (1981). Vickers admitted that when she first reported the crime, she did not tell police she saw Blackman get out of the car, and once she named him as the offender, the State relocated her and provided her $20,000 in living expenses. For the defense, Blackman testified that he stayed with his girlfriend at the time of the murder, although he could not remember his girlfriend's last name. We find the evidence against Blackman less than overwhelming.

¶ 36 However, we find that the uncertified document likely had only marginal effect on the outcome. The presence of a vacant lot at the address Blackman recalled showed only that his memory of the address had become somewhat unreliable. He admitted that he could not even remember his girlfriend's last name, and he visited her home only seven times in the

course of their relationship that ended 12 years before the trial. In this circumstance, his failure to remember the address accurately is not strong evidence that he fabricated the alibi. We hold that the faxed document alone did not threaten to tip the scales of justice against Blackman.

¶ 37 Blackman adds that his attorney's failure to object to the faxed document shows ineffective assistance of counsel. But for the same reason that the admission of this evidence does not amount to plain error, we find no reasonable probability that Blackman would have achieved a better result if his attorney had objected to the uncertified document. See *People v. Perry*, 224 Ill. 2d 312, 342 (2007). We find that the admission of the faxed document into evidence does not warrant reversal here.

¶ 38 Sentence

¶ 39 Finally, Blackman argues that the trial court erred by imposing a sentence of 55 years in prison, when his first trial resulted in a sentence of 45 years in prison. Section 5-5-4(a) of the Unified Code of Corrections provides:

> "Where a conviction or sentence has been set aside on direct review ***, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence *** unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing." 730 ILCS 5/5-5-4(a) (West 2010).

¶ 40 We review the imposition of a new sentence following remand for abuse of

discretion. *People v. Hickey*, 138 Ill. App. 3d 749, 753 (1985). When events subsequent to the original trial shed new light on the defendant's "life, health, habits, conduct, and mental and moral propensities" (*Williams v. New York,* 337 U.S. 241, 245 (1949)), the trial court may impose on the defendant a sentence different from the sentence imposed after the initial trial. *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969). To justify an increased sentence, the trial court must "point to specific conduct on the part of defendants occurring subsequent to their original sentencing, which warrants a heavier sentence." *People v. Rivera*, 166 Ill. 2d 279, 295 (1995).

¶ 41 Here, the prosecution showed that Blackman acquired and hid a shank, and our supreme court has held that the acquisition of shanks in prison may warrant an increased sentence. *Rivera*, 166 Ill. 2d at 293-94. The prosecution also presented evidence that Blackman had risen in his gang's hierarchy, and that he had directed members of his gang to "smash[] on sight" another inmate. We agree with the trial court that this evidence shows that Blackman has not used his time in prison to rehabilitate himself or to distance himself from crime. Instead, he has become more deeply involved in gang crime. We cannot say that the trial court abused its discretion when it imposed on Blackman a sentence of 55 years in prison for this murder.

¶ 42 CONCLUSION

¶ 43 The trial court did not abuse its discretion when it permitted the prosecution to elicit testimony that Blackman invaded the homes of two potential witnesses a week after the murder. Blackman did not object when the witnesses further testified about Blackman's

threatening behavior towards children in the homes. We find no plain error in the court's failure to strike the arguably excessive testimony *sua sponte*. We also find no plain error in the prosecutor's use of the other crimes evidence in closing argument in his discussion of the reasons the witnesses did not at first tell police they saw Blackman at the scene of the crime. We further find that the court did not commit plain error when it allowed the prosecution to introduce into evidence, without foundation, an uncertified document on the county assessor's letterhead. Blackman has not shown that he received ineffective assistance of counsel, as he has not established a reasonable probability that he would have achieved a better result if his counsel had objected to the foundation for the uncertified document. We find no abuse of discretion in the imposition of a sentence of 55 years for Blackman's crime. Accordingly, we affirm the judgment of the trial court.

¶ 44 Affirmed.