2014 IL App (1st) 110664-U

SECOND DIVISION
May 27, 2014

No. 1-11-0664

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	No. 08 CR 23073
BLAKE GORDON,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Stanley Sacks
	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion by deciding that testimony regarding a specific instance of violent conduct by the driver of the vehicle at which defendant fired his gun, which occurred 17 months after the shooting at issue, was not relevant to prove the driver's propensity for violence at the time of the shooting. Defense counsel was not ineffective for failing to argue to the court that an eyewitness' testimony that the murder victim previously shot him was admissible to prove the victim's propensity for violence because it is not reasonably probable that the result of the trial would have been different had that testimony been admitted into evidence. The court did not abuse its discretion by allowing the jury to consider a witness' grand jury testimony as substantive evidence, as the witness' trial and grand jury testimony were inconsistent regarding the events which transpired on the night of the shooting. The prosecutor did not misrepresent the content

> of that grand jury testimony during closing argument, as the witness' testimony gave rise to the reasonable inference that he saw defendant begin firing his gun before he ran down a hallway as defendant fired additional gunshots.

¶ 2 Following a jury trial, defendant Blake Gordon was found guilty of first degree murder and attempted first degree murder and sentenced to concurrent terms of 50 and 10 years' imprisonment. On appeal, defendant contends that the trial court erred by barring evidence regarding the propensity for violence of two people who were in the vehicle at which he fired his gun and by allowing the jury to consider a witness' grand jury testimony as substantive evidence and that the prosecutor misrepresented the content of that grand jury testimony during closing argument. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with the first degree murder of Dominique Conyers and the attempted first degree murder of Victor Barton in connection with a shooting that took place in the overnight hours between August 19 and 20, 2008. The evidence presented at trial showed that defendant fired numerous gunshots at a dark blue vehicle that was being driven by Tracy Smith. Barton was sitting in the front passenger seat of the vehicle and Conyers was sitting in the back seat. The evidence also showed that Smith, Barton, and Conyers were members of the Titanic Stones gang, defendant was a member of the Mafia Vice Lords gang, and the two gangs were fighting at the time. Defendant raised a theory of self-defense at trial, and both the State and the defense presented evidence regarding that issue.

¶ 5 Smith testified that he was in custody and charged as an armed habitual criminal, had two prior felony "gun convictions," and did not reach an agreement with the State in exchange for his testimony. Smith also testified that he was driving the vehicle at issue when he slowed down as he approached a speed hump. Defendant emerged from behind a tree located on the passenger side of the vehicle and began firing an automatic weapon as he walked toward the automobile.

The first gunshot went through the windshield and Barton ducked to avoid the oncoming bullets. By doing so, Barton accidentally put the vehicle in neutral, causing it to remain stuck on the speed hump for five or six seconds until Smith could drive away. Although a lot of people were in the area when the shooting occurred, the only person Smith recognized was Jeremy Powell.

¶ 6 Smith testified that the vehicle's windows were rolled up at the time of the shooting because the air conditioning was on and identified a photograph of the vehicle that was taken after the shooting and in which the rear passenger window is rolled up. Smith also testified that he did not turn off the vehicle's headlights as he was driving and that at no point did anybody in his vehicle point a gun out the window. Smith further testified that there was a gun in his vehicle at the time of the shooting and stated on cross-examination that he knew the gun was loaded.

¶ 7 Barton testified that he had two prior felony "gun convictions." Barton also testified that he ducked down in the vehicle when the shooting began and that he saw someone he recognized as Andrew Lucas just prior to the start of the shooting. Barton further testified that all of the vehicle's windows were rolled up when the shooting occurred and that nobody pointed a gun out of the vehicle. On cross-examination, Barton stated that he was not paying attention to what happened in the back seat of the vehicle and that he did not know there was a gun in the vehicle.

¶ 8 Andrew Lucas testified that he had a prior felony conviction for unlawful manufacture or delivery of cannabis and that he was a member of the Black P Stones gang, of which the Titanic Stones gang was a faction. On the night of the shooting, Lucas saw a drug addict directing drug customers away from an area controlled by the Titanic Stones and toward an area controlled by the Mafia Vice Lords. Lucas told defendant that he needed to stop the drug addict from directing

customers toward Mafia Vice Lords territory. Defendant told Lucas to "hold on" and went inside a nearby house. When defendant emerged from the house, he stood on the front steps, pulled out a gun from the back of his pants, and started firing. Lucas saw a blue vehicle with the windows rolled up drive by as defendant began firing his gun and then ran away.

¶ 9 Jeremy Powell testified that he had a prior felony conviction for possession of a controlled substance with intent to deliver and that he was a member of the Mafia Vice Lords. Powell also testified that he was standing on the porch of a house and speaking with defendant on the night of the shooting when a blue vehicle approached them. Powell saw that Conyers, Barton, and "T Man" were in the vehicle and, when the vehicle neared Powell and defendant, Powell heard gunshots and ran inside the house. Powell testified that he was outside when he heard the gunshots, but then testified that he could not see who was firing the gun because he was inside the house at the time. Powell admitted that he testified at a grand jury proceeding that he saw the vehicle slow down and stop as it approached a speed bump and that he saw defendant, who was standing by a tree, begin firing his gun at the vehicle when it came to a stop. Powell also admitted to testifying that he heard over ten gunshots as he ran down a hallway and that defendant was the only person in the area he saw firing a gun.

¶ 10 On cross-examination, Powell stated that he encountered the vehicle about 30 minutes before the shooting and that the occupants of the vehicle were making gang signs which showed disrespect to the Mafia Vice Lords at that time. Powell also stated that, just prior to the shooting, he saw the vehicle slow down and saw that its headlights were turned off. Powell was shouting warnings about the vehicle when he saw a gun emerge from the back passenger window and then

ran away. Powell further stated that he told the investigators that he saw a gun pointed out of the vehicle's window, the investigators disregarded his statement about the gun, and he was never asked about the gun when he testified before the grand jury. Powell also stated that Conyers had previously shot him, and the court sustained the State's objection to that statement.

¶ 11 On redirect examination, Powell testified that he initially told the police that he was two blocks away from the shooting when it occurred and admitted that he related in his grand jury testimony that defendant was the only person he saw with a gun on the night of the shooting. On further cross-examination, Powell stated that he would have testified that one of the occupants of the vehicle had a gun if he had been asked that question at the grand jury proceeding.

¶ 12 Following Powell's testimony, the State informed the court that it was going to introduce portions of the transcript of Powell's grand jury testimony into evidence and that the State would be able to perfect the impeachment of Powell. Defense counsel objected, asserting that there was no reason to call an assistant State's Attorney (ASA) to testify to perfect the impeachment. The court agreed with defense counsel that the impeachment had already been perfected when Powell admitted to providing the testimony contained in the grand jury transcript.

¶ 13 Although the State presented the testimony of Jimmy Johnson, who allegedly witnessed the shooting, his testimony is not included in the record on appeal. The record does include the testimony of ASA Emily Leuin, who examined Johnson before a grand jury and was allowed to publish the transcript of Johnson's grand jury testimony to the jury at trial. ASA Leuin related that Johnson testified that the driver of the vehicle slowed the vehicle and turned off its lights and that defendant then grabbed a gun, stood behind a tree, and started shooting at the vehicle

when it passed him and he could see who was seated inside.

¶ 14 Defendant testified that around 10:35 p.m. on the night of the shooting, he was a block away from the place where the shooting ultimately occurred when a blue vehicle drove by and the occupants of the vehicle made gang signs which were disrespectful to the Mafia Vice Lords. Later that evening, Lucas told defendant that someone was going to die that night if a drug addict did not stop diverting drug customers from the Titanic Stones' territory, then went away. Around midnight, Lucas returned and said something about stopping defendant from selling drugs when defendant noticed a blue vehicle driving toward him and saw someone in the back seat of the vehicle point a silver and black gun in his direction. Defendant was scared and thought he was going to be killed, so he ran and retrieved a gun from the porch of a nearby house and fired the gun at the vehicle multiple times.

¶ 15 On cross-examination, defendant stated that he was standing on the front steps of the house from which he retrieved the gun, he could not run inside the house because it was locked and abandoned, and he could not run down the gangway between the houses because he was already on the porch. On redirect examination, defendant testified that the vehicle's lights were turned off as it approached him, when led him to believe that a drive-by shooting was about to occur.

¶ 16 Upon the conclusion of defendant's testimony, defense counsel attempted to call a police officer, Officer McDermott, asserting that his testimony was admissible under *People v. Lynch*, 104 Ill. 2d 194 (1984), to prove Smith's propensity for violence. Defense counsel stated that Officer McDermott would testify that he arrested Smith on January 19, 2010, he pursued Smith

on foot prior to arresting him, and Smith tossed a handgun to his cousin during the chase and told him to shoot Officer McDermott. The court decided that the testimony was inadmissible because Smith was not a victim of the shooting, evidence of Smith's conduct in 2010 was not relevant to show his propensity for violence in 2008, defendant did not testify that Smith was the initial aggressor at the shooting, and the prejudicial effect of the evidence to the State outweighed its probative value. Following closing arguments, the jury found defendant guilty of the first degree murder of Conyers and the attempted first degree murder Barton.

¶ 17 ANALYSIS

¶ 18 I. Propensity for Violence

¶ 19 Defendant contends that the trial court abused its discretion by barring evidence of the propensity for violence of Smith and Conyers. A trial court's ruling regarding the relevance and admissibility of evidence will not be reversed absent an abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). A court abuses its discretion when its decision is arbitrary, fanciful, or so unreasonable that no reasonable person would adopt its view. *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 20 A defendant who raises a theory of self-defense may present evidence of the victim's aggressive and violent character because such evidence is relevant to determine which person was the aggressor. *Lynch*, 104 Ill. 2d at 200. A victim's violent character may be admissible to support a defendant's theory of self-defense because the defendant's knowledge of the victim's violent tendencies will affect the defendant's perceptions of and reactions to the victim's behavior and may tend to support the defendant's version of the facts when there are conflicting accounts

of what happened. *Id.* at 199-200.

¶ 21 A. Tracy Smith

¶ 22 Defendant asserts that Officer McDermott's proposed testimony that Smith tossed a gun to his cousin and told him to shoot Officer McDermott was admissible as evidence of Smith's propensity for violence because there were conflicting accounts of what happened at the shooting and Officer McDermott's testimony tended to support defendant's version of the facts. The State initially responds that this court should reject defendant's claim because he was not prejudiced by the exclusion of Officer McDermott's testimony, as Smith's violent character had already been established by Smith's testimony that he had two prior felony "gun convictions."

¶ 23 A charge of unlawful possession of a firearm does not show a propensity for violence (*People v. Cruzado*, 299 Ill. App. 3d 131, 137 (1998)) because the mere possession of a gun does not indicate that the offender was violent (*People v. Costillo*, 240 Ill. App. 3d 72, 82 (1992)). In this case, Smith testified that he had two prior felony "gun convictions," but there is no evidence that he used the firearms in a violent manner. As such, Smith's testimony regarding his prior convictions does not establish that he had a violent character.

¶ 24 The State, citing *People v. Figueroa*, 381 Ill. App. 3d 828 (2008), maintains that defendant was not entitled to present evidence of Smith's violent character because Smith was not a victim of the shooting. In *Figueroa*, this court held that the defendant was not entitled to present evidence regarding the propensity for violence of the drivers of the vehicles at which he fired his gun because he did not properly raise a theory of self-defense at trial. *Id.* at 843. This court also held that the defendant could only present propensity for violence evidence regarding

the victim of his crime and the drivers of the vehicles at which he fired his gun were not victims of the murder for which he was charged because they were not struck by any of the his gunshots. *Id.* However, in *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 33, this court recognized that the holding in *Figueroa*, to the extent it provides that propensity for violence evidence is only admissible as to the victim of the crime for which the defendant is charged, is inconsistent with the doctrine of transferred intent, under which a defendant's intent to shoot his assailant in self-defense is transferred to the unintended victim. Thus, the fact that Smith was not the victim of the first degree murder and attempted first degree murder charges for which defendant was being prosecuted does not alone render evidence of Smith's propensity for violence inadmissible.

¶ 25 In addition, there is no dispute that defendant shot Barton and Conyers and that Smith was the driver of the vehicle at which defendant fired his gun. Although the State maintains that there was no evidence that Smith was defendant's intended victim, defendant's theory of self-defense was based on evidence showing that he fired his gun at the vehicle because he believed he was about to become the victim of a drive-by shooting based on his observations that the vehicle's lights were turned off as it was slowly driven in his direction. Smith, as the driver of the vehicle, was a necessary participant in the perceived drive-by shooting and was among those at whom defendant fired his gun. Thus, defendant was entitled to present evidence of Smith's propensity for violence to attempt to show that Smith was an aggressor and an intended victim in support of his theory of self-defense.

¶ 26 The State also maintains that the court did not abuse its discretion by excluding Officer McDermott's testimony because the court correctly determined that evidence of an incident that

occurred on January 19, 2010 had little to no relevance as to Smith's propensity for violence on August 19, 2008. Rule 405(b)(2) of the Illinois Rules of Evidence (eff. Jan. 1, 2011) provides that "when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's *prior* violent conduct." (Emphasis added.) Although defendant attempted to introduce Officer McDermott's testimony on December 2, 2010, roughly a month before Rule 405(b)(2) became effective, the Special Supreme Court Committee on Illinois Evidence, which was charged with the responsibility of codifying the law of evidence in Illinois, related that, with the exception of two areas of evidentiary law which are not at issue in this case, "the Committee incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years." Ill. R. Evid. Committee Commentary (eff. Jan. 1, 2011).[1] In addition, while defendant cites to *People v. Ciavirelli*, 262 Ill. App. 3d 966, 972-73 (1994), in which this court stated that evidence which postdated the shooting might be relevant to support the defendant's contention that the victim was the aggressor, that statement was *dictum*, as it was not essential to the outcome of the case or an integral part of the opinion because the court held that evidence of the victim's propensity for violence was not relevant in that case due to the lack of evidence showing that anyone other than the defendant was the aggressor. In light

[1] Although one of the "exceptions" to this general principle involves Rule 405, that exception only relates to subsection (a), which adds opinion testimony to reputation testimony and specific instances of conduct as a method for proving character, and does not affect subsection (b), which pertains to how character may be proved by evidence of specific instances of conduct. Ill. R. Evid. Committee Commentary (eff. Jan. 1, 2011).

of Rule 405(b)(2), which provides that a defendant may introduce evidence of specific instances of prior violent conduct, and *Lynch*, 104 Ill. 2d at 201, where the victim's propensity for violence was established by his prior convictions for battery, we conclude that the trial court's decision that Officer McDermott's testimony about conduct which occurred 17 months after the shooting at issue in this case was not relevant to prove Smith's propensity for violence at the time of the shooting was not so arbitrary, fanciful, or unreasonable to constitute an abuse of discretion.

¶ 27 B. Dominique Conyers

¶ 28 Defendant also asserts that the court abused its discretion when it sustained the State's objection to Powell's statement on cross-examination that Conyers had previously shot him because defendant was entitled to introduce evidence of Conyers' propensity for violence. The State initially responds that defendant forfeited this claim by failing to include it in his posttrial motion for a new trial.

¶ 29 To preserve an issue for appellate review, a defendant must make a timely objection at trial and raise the issue in a posttrial motion. *People v. Leach*, 2012 IL 11534, ¶ 60. Defendant alleged in his posttrial motion for a new trial that the trial court violated his right to confront the witnesses presented against him by sustaining the State's objections to the cross-examination of Powell. Although defendant also alleged that the court improperly excluded evidence of Smith's propensity for violence, he did not allege that the court prevented him from presenting evidence of Conyers' propensity for violence. On appeal, defendant contends that the court improperly prevented him from presenting evidence of Conyers' propensity for violence. Thus, defendant has forfeited his claim that the court improperly excluded evidence of Conyers' propensity for

violence by failing to include that issue in his posttrial motion for a new trial.

¶ 30 In the alternative, defendant asserts that defense counsel was constitutionally ineffective for failing to argue to the trial court that Powell's testimony was admissible to prove Conyers' propensity for violence and make an offer of proof as to Powell's testimony. To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a claim of ineffective assistance. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). To establish deficient performance, the defendant must overcome the presumption that the challenged action may have been the product of sound trial strategy (*People v. Simms*, 192 Ill. 2d 349, 361 (2000)) and show that counsel's performance fell below an objective standard of reasonableness (*People v. Manning*, 241 Ill. 2d 319, 326 (2011)). To establish prejudice, the defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Simms*, 192 Ill. 2d at 362. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 31 The State responds that defendant cannot establish that he was prejudiced by counsel's alleged deficiency because the evidence of his guilt was overwhelming. Defendant maintains that it is reasonably probable that the result of the trial would have been different if he had been able to present evidence showing that Conyers had previously shot Powell because the evidence at trial was closely balanced and evidence of Conyers' propensity for violence would have

supported defendant's theory of self-defense. Defendant claims that the evidence was closely balanced because the credibility of Smith and Lucas was diminished by their prior convictions and defendant's testimony was corroborated by Powell's trial testimony and Smith's testimony that there was a loaded gun in the vehicle.

¶ 32 Although portions of Powell's trial testimony were consistent with defendant's testimony and his theory of self-defense, Powell also admitted that he was in the same gang as defendant and that he provided grand jury testimony relating that he saw defendant, who was standing by a tree, begin firing his gun at the vehicle as it was stopped at a speed bump and that defendant was the only person in the area he saw with a gun. Thus, Powell's credibility was diminished by his gang association with defendant and his prior inconsistent grand jury testimony, and the effect of any testimony that he had previously been shot by Conyers would have been equally diminished. Also, while defendant claims that the credibility of Smith and Lucas was diminished due to their prior convictions, Powell also admitted to having a prior felony conviction. Unlike *Lynch*, 104 Ill. 2d at 201, in which the court noted that the victim's prior convictions for battery constituted "reasonably reliable evidence of a violent character," here the evidence of Conyers' propensity for violence would have been introduced through the testimony of Powell, whose trial testimony the jury necessarily rejected in finding defendant guilty. As such, we conclude that it is not reasonably probable that the result of defendant's trial would have been different if Powell's testimony that he had previously been shot by Conyers had been entered into evidence and that defendant was not denied the effective assistance of counsel.

¶ 33 II. Grand Jury Testimony

¶ 34 Defendant contends that the court erred by allowing the jury to consider Powell's grand jury testimony as substantive evidence. In criminal cases, a witness' prior inconsistent statement may be admitted as substantive evidence if the statement is inconsistent with the witness' trial testimony, the witness is subject to cross-examination regarding the statement, and the statement was made under oath at a trial, hearing, or other proceeding. 725 ILCS 5/115-10.1(c)(1) (West 2010). A reviewing court will not disturb the trial court's ruling as to whether a witness' prior inconsistent statement may be admitted as substantive evidence absent an abuse of discretion. *People v. Harvey*, 366 Ill. App. 3d 910, 922 (2006).

¶ 35 Defendant asserts that Powell's grand jury testimony was not admissible as substantive evidence because it was not inconsistent with his trial testimony, as he admitted at trial that he provided the grand jury testimony in the transcript. A witness' prior statement is inconsistent with his trial testimony "when it has the tendency to contradict the trial testimony," and need not directly contradict the witness' testimony at trial to be considered inconsistent. *People v. Zurita*, 295 Ill. App. 3d 1072, 1076-77 (1998).

¶ 36 At trial, Powell testified that he saw someone point a gun out the back passenger window of the vehicle and that he could not see who was firing the gun at the shooting. However, Powell testified before the grand jury that he saw defendant begin firing his gun at the vehicle and that defendant was the only person he saw with a gun on the night of the shooting. Thus, Powell's grand jury testimony and trial testimony were inconsistent regarding whether he saw defendant fire a gun and whether he saw someone point a gun out the back window of the vehicle. While Powell admitted to providing the testimony in the grand jury transcript, that admission does not

negate the inconsistencies between the substance of the testimony he provided at trial and before the grand jury regarding the events which transpired on the night of the shooting. As such, we conclude that the trial court did not abuse its discretion by allowing the jury to consider Powell's grand jury testimony as substantive evidence.

¶ 37 In addition, to the extent defendant maintains that the trial court initially ruled that Powell's grand jury testimony could not be used as substantive evidence and then incorrectly changed its ruling during closing arguments, the record does not reflect that the court ever ruled that Powell's grand jury testimony could only be used for impeachment purposes. Instead, the record shows that the court held that the State need not call a witness to perfect the impeachment of Powell because Powell had admitted to providing the testimony in the grand jury transcript.

¶ 38 Defendant further asserts that the prosecutor misrepresented the substance of Powell's grand jury testimony during closing argument. A prosecutor is accorded wide latitude regarding the content of closing arguments and may comment on the evidence and any fair and reasonable inference the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). A prosecutor, however, may not argue assumptions or facts that are not based upon the evidence in the case. *People v. Adams*, 2012 IL 111168, ¶ 17.

¶ 39 Defendant maintains that the prosecutor gave the jury the incorrect impression during closing argument that Powell testified before the grand jury that he actually saw defendant fire his gun at the vehicle when, in fact, Powell testified that he only heard the gunshots and did not see defendant fire a gun. The record shows that Powell testified at the grand jury proceedings that defendant "opened fire" on the occupants of the vehicle. ASA Leuin then asked Powell,

"[w]hen you say [defendant] opened fire on them, what did you see [defendant] do?" Powell responded that defendant was standing by a tree and that, when the vehicle stopped, defendant started shooting at the occupants seated therein. Thus, when Powell was asked about what he saw defendant do on the night of the shooting, he responded that he saw defendant fire his gun at the vehicle. Although Powell later answered a question asking how many times defendant fired his gun by answering that "I just heard it because I ran in the hallway," Powell's testimony, when viewed as a whole, gives rise to the reasonable inference that he saw defendant begin firing his gun at the vehicle before he ran down the hallway as defendant fired additional gunshots at the vehicle. As such, the challenged comments did not misrepresent the content of Powell's grand jury testimony or exceed the proper bounds of closing argument.

¶ 40 CONCLUSION

¶ 41 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 42 Affirmed.