2013 IL App (1st) 110974-U

SIXTH DIVISION
September 27, 2013

No. 1-11-0974

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. 08 CR 5781
	)	
TONY BENSON, IV,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's convictions of first degree murder and armed robbery where the trial court did not err in refusing to give a jury instruction on the lesser-included offense of theft, and properly admitted codefendant's hearsay statement under the coconspirator's hearsay exception.

¶ 2 Following simultaneous but separate jury trials, defendant, Tony Benson, and codefendant Tyrese Crawford[1], each were convicted of first degree murder and armed robbery. Defendant was sentenced to consecutive terms of 30 years' imprisonment on the murder conviction, and 6 years' imprisonment on the armed robbery conviction. On appeal, defendant argues the trial court erred by refusing to instruct the jury on theft from a person as a lesser-included offense of armed robbery, and by admitting testimony as to a hearsay statement made by his codefendant. We affirm.

¶ 3 The charges against defendant and codefendant arose from the November 4, 2007, shooting

[1] Tyrese Crawford's appeal is pending before this court in appeal number 1-11-1345.

death of Johnny Frazier.

¶ 4 Prior to trial, the State filed a motion *in limine* seeking to introduce, under the coconspirator exception to the hearsay rule, the testimony of Raven Bender describing a statement made by codefendant to defendant shortly before the murder. The State, in support of the motion, set forth evidentiary support for the conspiracy. Defendant, codefendant, and Ms. Bender were passengers in a minivan (van) driven by Mr. Frazier on November 4, 2007. It was defendant's phone call to Mr. Frazier which resulted in defendant and codefendant being passengers in Mr. Frazier's van that night. The State specifically sought to introduce Ms. Bender's testimony that while in the van on that night, codefendant said to defendant as to Mr. Frazier: "this *** has got to go, he gone; don't leave no evidence behind." The State pointed out defendant responded "yeah" to codefendant's statement. After codefendant shot Mr. Frazier, defendant removed items from Mr. Frazier's pockets. The trial court granted the motion, finding the State made a *prima facie* showing that a conspiracy existed to allow the admission of codefendant's statement against defendant.

¶ 5 At trial, Ms. Bender, defendant's girlfriend at the time of the incident, testified that on November 4, 2007, she was with Mr. Frazier driving around Calumet Park while Mr. Frazier sold crack cocaine out of his van. After defendant called Mr. Frazier and told him he wanted to buy marijuana, Mr. Frazier and Ms. Bender picked up both defendant and codefendant near 126th and Throop Streets in Calumet Park. The four drove around and stopped at a drug house to purchase marijuana. Defendant, Mr. Frazier, and Ms. Bender went inside the house while codefendant stayed in the van. When defendant and Ms. Bender, but not Mr. Frazier, returned to the van, codefendant took the seat behind the driver's seat and revealed a gun. Codefendant then stated: "Don't leave no evidence behind. This ***'s dead." Defendant responded by stating "yeah." Mr. Frazier returned to the driver's seat of the van a few minutes later. The group continued driving around Calumet Park, with both defendant and codefendant in the backseat, and Ms. Bender in the front passenger seat. Codefendant then directed Mr. Frazier to drive to 126th Street and Winchester Avenue where

Mr. Frazier parked. Ms. Bender exited the vehicle, but turned and observed codefendant shoot Mr. Frazier in the back of the head. Codefendant ran away from the scene and defendant went through Mr. Frazier's pockets. Defendant then ran from the scene in the same direction as codefendant.

¶ 6 Robert Deel, an investigator with the Chicago police department, testified that when he inspected the van that night, he observed Mr. Frazier's right front pants pocket had been turned inside out, and there was a $100 bill on the front floorboard of the van.

¶ 7 During the police investigation of the incident, defendant was interviewed on videotape. Defendant initially denied any knowledge of the shooting. Later in the interview, defendant explained that he was in the van when codefendant shot Mr. Frazier and that after the shooting, he took approximately $200 out of Mr. Frazier's pocket. Defendant admitted that he fled the scene after taking the money, met with codefendant after the shooting, and told Ms. Bender not to tell the police about the incident. Although defendant contended there was no plan to kill Mr. Frazier, he had known for several months that codefendant wanted to kill Mr. Frazier. On that night, codefendant said to defendant in the van that he was going to kill Mr. Frazier. Defendant stated that he also was aware codefendant carried a gun. Defendant also stated that he thought codefendant was going to rob Mr. Frazier that night because he kept telling Mr. Frazier to drive around the neighborhood.

¶ 8 Defendant rested his case without presenting evidence.

¶ 9 During the jury instruction conference, defense counsel requested that the jury receive an instruction on theft from a person as a lesser-included offense of armed robbery because: defendant was not armed; there was no use of force or threat of force when he took Mr. Frazier's money; and codefendant had already fled the scene when the money was taken. Defense counsel also maintained that defendant's decision to steal Mr. Frazier's money was a crime of "opportunity," and not part of a plan to murder or rob Mr. Frazier. The trial court denied the request.

¶ 10 The jury found defendant guilty of first degree murder and armed robbery. Defendant appeals.

¶ 11 Defendant first argues the trial court erred by refusing to instruct the jury on theft of a person as a lesser-included offense of armed robbery as the evidence supported such an instruction.

¶ 12 A defendant may not be convicted of an offense he has not been charged with committing. *People v. Jones*, 149 Ill. 2d 288, 292 (1992). However, a defendant is entitled to have the jury instructed on a less serious offense which is included in the charged offense if: (1) the charging instrument describes the lesser offense; and (2) the evidence adduced at trial rationally supports the conviction on the lesser-included offense. *People v. Ceja*, 204 Ill. 2d 332, 359-60 (2003). It is proper to instruct the jury on a lesser offense where there is some credible evidence to support that instruction. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). More precisely, an instruction defining a lesser offense should be given if there is any evidence in the record that, if it were to be believed by the jury, would support a finding on the lesser offense. *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 51 (citing *People v. Carter*, 208 Ill. 2d 309, 323 (2003)). As the decision to allow a jury instruction is within the province of the trial court, we generally review the refusal of a proposed jury instruction for an abuse of discretion. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008). However, where the question presented is whether the defendant met "the evidentiary minimum" for a certain jury instruction, it is best categorized as a question of law, and reviewed *de novo*. *Id*. at 1030.

¶ 13 "A person commits robbery when he or she knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS5/18-1(a) (West 1999). "A person commits armed robbery when he or she *** carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm ***." 720 ILCS5/18-2(a)(1) (West 2000). "A person commits theft when he or she knowingly *** obtains or exerts unauthorized control over property of the owner ***." 720 ILCS 5/16-1(a)(1) (West 2006).

¶ 14 There is no dispute that theft from a person is a lesser-included offense of armed robbery. The State argues, however, that there was no evidence to support the requested instruction.

¶ 15 Defendant maintains the evidence was sufficient to warrant an instruction on theft from a

person because: his taking of property from Mr. Frazier was a "crime of opportunity" or "afterthought;" he was not armed and did not personally fire the shot at Mr. Frazier; and, by the time defendant took the money from Mr. Frazier, codefendant and the gun were no longer at the scene. Defendant, thus, asserts that even if defendant and codefendant had conspired together in a criminal enterprise, codefendant's flight from the scene before the theft occurred reasonably suggests that any joint venture was completed after Mr. Frazier was shot. Based on this evidence, defendant maintains his taking of Mr. Frazier's property constituted a separate course of conduct distinct from the use of force or murder. We disagree.

¶ 16 The trial court properly determined that, under the evidence, a jury could not reasonably infer defendant acted without the use of force. The evidence shows defendant took Mr. Frazier's money only after the use of force. Defendant accomplished the robbery after Mr. Frazier was shot in the head by codefendant. The trial court also correctly found codefendant and the gun were not "long gone" when defendant took Mr. Frazier's money as asserted by the defense. The robbery and murder were accomplished contemporaneously and as part of defendant's and codefendant's conspiracy. In addition, the evidence showed defendant's and codefendant's joint venture went beyond Mr. Frazier's murder. Codefendant's statement just before the murder directed defendant not to leave any evidence behind. Moreover, defendant admitted that he knew codefendant was carrying a gun, and knew codefendant intended to rob and kill Mr. Frazier. Defendant also admitted that, after he took money from Mr. Frazier, he fled from the scene, met with codefendant, and instructed Ms. Bender not to talk to police about the incident. The evidence does not show the taking of Mr. Frazier's money was an afterthought or crime of opportunity. Thus, based on the record, a jury instruction on the noncharged lesser-included offense of theft would have been inappropriate. See *People v. Taylor*, 233 Ill. App. 3d 461, 464 (1992) (finding that the trial court did not err in refusing the defense's request for a jury instruction on theft from a person as a lesser-included offense of armed robbery where the jury would have had to ignore the evidence and engage in mere speculation to conclude

the defendant committed a theft).

¶ 17 Defendant next argues the trial court erroneously admitted the hearsay statement of codefendant under the coconspirator exception to the hearsay rule. Defendant contends the State failed to prove, by a preponderance of the evidence, that he and codefendant were engaged in a conspiracy to allow the admission of the statement.

¶ 18 Defendant concedes he forfeited this argument by failing to raise it in a posttrial motion, but seeks review as a matter of plain error. The plain-error doctrine permits review of claims which were not properly preserved for appeal when: (1) the evidence is so close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Before addressing either of these prongs, we must determine whether a clear or obvious error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009).

¶ 19 The admission of evidence lies within the sound discretion of the trial court, and a reviewing court will only reverse the trial court's ruling when there has been an abuse of discretion. *People v. Phillips*, 392 Ill. App. 3d 243, 272 (2009). An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or unreasonable. *Id*.

¶ 20 Section 8-2 of the Criminal Code states that "[a] person commits the offense of conspiracy when, with intent that an offense be committed, he or she agrees with another to the commission of that offense." 720 ILCS 5/8-2(a) (West 2005).

¶ 21 Pursuant to the coconspirator exception to the hearsay rule, a statement made by one coconspirator is admissible against all coconspirators where there is a *prima facie* showing of a conspiracy and the statement is made during the course of and in furtherance of the conspiracy. *People v. Kliner*, 185 Ill. 2d 81, 141 (1998); *People v. Batrez*, 334 Ill. App. 3d 772, 783 (2002). The exception covers statements that have the effect of advising, encouraging, aiding, or abetting the perpetration of the conspiracy." *Id*. The statements are also admissible if they relate to concealment

of either the conspiracy, or the resulting crime. *Id*. For a *prima facie* showing of conspiracy, the State must prove by a preponderance of the evidence that: (1) two or more persons intended to commit a crime; (2) they engaged in a common plan to accomplish the criminal goal; and (3) one or more acts were committed by one or more persons in furtherance of the conspiracy. *People v. Leak*, 398 Ill. App. 3d 798, 825 (2010). There must be independent evidence apart from the statement to establish the conspiracy. *Id*. The existence of the conspiracy may be shown by both direct evidence, or by inference from the surrounding facts and circumstances, including the acts of the accused. *Batrez*, 334 Ill. App. 3d at 783.

¶ 22 Here, the evidence showed that defendant made a phone call to Mr. Frazier on the day of the murder which resulted in Mr. Frazier picking up defendant and codefendant in his van. Codefendant directed Mr. Frazier where to stop "in a quiet area." Ms. Benson got out of the car, but defendant remained. Defendant knew codefendant actually had a gun that night, as was his habit. Defendant knew codefendant wanted to kill and rob Mr. Frazier. Furthermore, defendant removed Mr. Frazier's money immediately after the shooting and ran in the same direction as codefendant. Defendant met with codefendant after the incident, and told Ms. Bender not to talk to the police about the crime. This evidence is sufficient to establish a *prima facie* case that defendant and codefendant were involved in a conspiracy to rob and murder Mr. Frazier. The trial court did not make a clear or obvious error when it admitted codefendant's statement under the coconspirator exception to the hearsay rule. Therefore, the plain-error rule does not apply in this case.

¶ 23 Defendant argues the trial court improperly relied on codefendant's statement itself as evidence of a conspiracy between defendant and codefendant in granting the motion *in limine* and allowing the admission of the statement. Even if the trial court relied on the statement itself as proof of the conspiracy in granting the State's pretrial motion *in limine*, "[i]t is not mandatory that evidence supporting a *prima facie* showing of a conspiracy be introduced prior to admission of the coconspirator's hearsay statement." *Id*. at 784. The trial court mentioned codefendant's statement

in its ruling, but this does not mean that the trial court ignored the other evidence establishing the conspiracy that was independent of the statement itself.

¶ 24 Finally, defendant argues that his trial counsel was ineffective for failing to raise error as to the introduction of codefendant's hearsay statement in a posttrial motion. A defendant alleging ineffective assistance of counsel must establish both his counsel's performance was objectively unreasonable and that defendant was prejudiced by the unreasonable performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We have found the trial court did not err in allowing the statement into evidence. Trial counsel is under no obligation to preserve issues for review where no error occurred. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000) (stating that counsel is not required to make futile motions to avoid charges of ineffective assistance of counsel). Defendant has failed to establish counsel's performance was objectively unreasonable.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.