2016 IL App (1st) 141672-U

THIRD DIVISION
July 20, 2016

No. 1-14-1672

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. 11 CR 14137
	)	
CLYDE HEARD,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Trial court did not abuse its discretion in limiting defendant's cross-examination for purposes of bias, motive or interest of a witness who had been convicted of a crime two years prior to trial. Trial court abused its discretion in limiting examination of witness who had pending violation of probation at time of trial. However, error was harmless beyond a reasonable doubt where the State's evidence was strong.

¶ 2 Following a jury trial, defendant Clyde Heard was convicted of first degree murder and sentenced to 65 years' imprisonment. On appeal, he contends that the trial court denied him his right to present a defense and confront witnesses with evidence of their bias and motive to testify falsely. We affirm.

¶ 3 Defendant was arrested and charged for the fatal shooting of the victim, Ewonte Butler, on July 29, 2011, at Washington Boulevard and Lotus Avenue in Chicago.

¶ 4 At trial, Chicago police officer Michael Rivera testified that at 7 p.m. on July 29, 2011, he was working with his partner when they received an assignment regarding a person shot at Washington Boulevard and Lotus Avenue in Chicago. When Officer Rivera arrived at that intersection, he saw the victim on the ground. The victim was transported to Stroger Hospital, where he was rushed to surgery for multiple gunshot wounds.

¶ 5 There was a police pod camera, which is a video camera located on the top of a pole, at the corner of Washington Boulevard and Long Avenue, which captured views of the Washington Boulevard and Lotus Avenue intersection. Officer Rivera went to the police station to view the pod camera footage. The video showed a group of people standing at the corner of Washington Boulevard and Lotus Avenue. In the "very distance," he could see a person on a bicycle and a person on the ground. The person on the bicycle cycled eastbound on Washington Boulevard then turned northbound onto Long Avenue where the pod camera was located. Officer Rivera testified that, "[a]t the time" he watched the video, he "believe[d]" the person on the bicycle was a heavyset black male.

¶ 6 Diveda Duplessis testified that at 7 p.m. on July 29, 2011, she was in the area of Washington Boulevard and Lotus Avenue visiting her family. She was "hanging out on the

block" talking with her mother on the southwest corner of Washington Boulevard and Lotus Avenue. At 7:12 p.m., she saw the victim, whom she knew from the neighborhood and by the nickname, Too Fee, standing across the street from her. Defendant rode his bicycle up to the victim, and when he was a few feet away from the victim, he shot him. She heard several gunshots. Duplessis identified defendant in court as the shooter. Defendant was wearing a white tee shirt and dark jeans when she saw him shoot the victim. He also had tattoos on his neck, and shoulder length dreadlocks. She had seen defendant twice before in the neighborhood. Duplessis testified that she saw defendant ride eastbound down Washington Boulevard. She then lost sight of him.

¶ 7 Duplessis further testified that, on August 2, 2011, she viewed a physical lineup at the police station and identified defendant as the shooter. The individuals in the lineup all had their necks covered. Duplessis was shown a photograph of defendant in court and noted that it showed his tattoos as she had observed them on the day the victim was shot. Duplessis noted that nothing blocked her view of the shooting. She also explained that she had identified another man on a bicycle to police but that he was nowhere near the victim and defendant when she heard the gunshots and saw defendant raise his arm to shoot the victim. When police interviewed her at her home and later recorded her interview at the police station, she told them she saw two people on bicycles, but only one of them was the shooter. Duplessis did not recall if she told police about the tattoos on defendant's neck. She told them that defendant's hair had "a twisted braided something." She did not recall what description she gave of the other bicyclist.

¶ 8 Duplessis testified that she was leaning against a gate near the corner of Washington Boulevard and Lotus Avenue when the shooting occurred and was a car length away from the

actual corner. She recalled telling police and the assistant State's attorney (ASA) that she was two car lengths away from the corner. She did not recall telling police she was on the east or west side of Lotus Avenue. She recalled telling them that she was right across the street on the corner of Washington Boulevard and Lotus Avenue. Duplessis testified that she knew where she was standing during the shooting, which was "right directly across the street on Lotus and Washington on the opposite side of where the shooting occurred." She further testified that the victim was friends with her nephew.

¶ 9 Theodis Washington testified that he was at the corner of Washington Boulevard and Lotus Avenue with the victim, Montana Harris and Dantrell McIntyre. He knew the victim and Harris for eight years from school and McIntyre from the neighborhood. Defendant rode up on a bicycle, dropped it to the ground, and fired his gun at the victim, who was standing several feet away from Washington. Washington immediately ran away. As he was running, he looked back and noticed that defendant was light skinned, and had braids and a lot of tattoos on his neck and chest. Defendant was wearing blue jeans and a white tee shirt. He rode off on his bicycle. Washington identified defendant in court as the shooter.

¶ 10 Washington testified that, on August 1, 2011, he went to the police station and identified defendant as the shooter in a photo array in which the necks of the individuals in the photographs were covered.

¶ 11 On cross-examination, defense counsel asked Washington if, at the time of the offense, he had a pending criminal case. The State objected and a side bar was held. The State advised the court that defendant was arrested for possession of a controlled substance and received "410 probation" (720 ILCS 570/410 (West 2012)) on April 6, 2012, for a crime that occurred on

January 29, 2011, before the shooting.[1] Counsel told the court that she was not addressing the felony conviction but the timing of it, which would go towards Washington's motive at the time he spoke with the police and cooperated with the State's attorney office. Counsel maintained that the questioning went to Washington's bias and motive and was "absolutely relevant."

¶ 12 The court noted that, as Washington's case was pending from the day of his arrest in January 2011 through April 6, 2012, it was pending at the time of the shooting. It then stated:

> "The State is required to tender if they made any promises or anything. I think that's a little bit too speculative to admit. I'm not going to let you go down that road. If he had a pending case now that would be a different situation, but not from something back then without any evidence whatsoever. I'm not going to allow it."

Defense counsel then stated, "[j]ust so we're clear though, [Washington] had a pending case at the time he cooperated with the police department and the state's attorney office." The State responded that there was "no evidence of that."

¶ 13 Following Washington's testimony, counsel informed the court outside the presence of the jury but on the record that she had a similar matter regarding witness Montana Harris. She explained that Harris had a pending case, a Class 4 possession of a controlled substance, for

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[1] Under 410 probation, when a first offender is sentenced to probation for violation of the Illinois Controlled Substances Act, the court defers further proceeding in the case until the conclusion of the probation period or until the filing of a petition alleging violation of a term of condition of probation. If the terms and conditions of probation are fulfilled, the court shall discharge the person and dismiss the proceedings against him. Accordingly, discharge and dismissal under this section is not a conviction for purposes of the Illinois Controlled Substances Act, but if the defendant violates the terms or condition of probation, the court may then enter a judgment on its original finding of guilt. 720 ILCS 570/410 (West 2012).

which he received probation on July 19, 2012, and there was a current violation of probation charge (VOP) pending. Counsel wanted to bring this to the jury not for impeachment purposes but to bring out any motive or bias for Harris's testimony. The State responded that Harris pleaded guilty in that matter 10 days before the murder, and, therefore, it was not relevant.

¶ 14 The court denied leave to cross-examine Harris regarding the pending charge. It stated that although defense counsel was not raising the matter for impeachment purposes, "it's a stretch" and speculative to show potential motive or bias, without some information that the State was offering "some sort of a deal." The court asked the State whether it gave Harris a deal for the VOP. The State responded, "[a]bsolutely not." The court then ruled that Harris's pending case was a "710" (720 ILCS 550/10 (West 2012)) rather than a conviction, was too speculative, and it would not allow it to be brought up in cross-examination.[2] The State then proceeded with its case.

¶ 15 Jessica Lofton testified that on July 29, 2011, she lived at 100 North Lotus Avenue, which was on the corner of Lotus Avenue and Washington Boulevard. Her bedroom was on the second floor and looked out on Washington Boulevard. Her bedroom window was about 20 feet from the corner. At 7 p.m., she was looking out her bedroom window and saw a group of boys hanging out. Defendant then rode up on his bicycle wearing a white tee shirt and dark jeans, and fired a gun at the group. Lofton heard five gunshots and saw the victim fall to the ground. Nothing obstructed her view of the incident. Lofton called the police. Defendant rode away east on Washington Boulevard. Lofton identified defendant in court as the shooter.

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[2] 710 probation is similar to 410 probation, except that it is for violation of the Cannabis Control Act. 720 ILCS 550/10 (West 2012).

¶ 16 Lofton further testified that on August 2, 2011, she went to the police station. She told police defendant was wearing a white tee shirt and dark jeans but did not tell them anything about any marks on his body or his hairstyle. Lofton identified defendant as the shooter in a physical lineup in which the men in the lineup all wore scarves around their necks and hats on their heads.

¶ 17 Lofton further testified that the first time she saw defendant on his bicycle he was heading westbound on Washington Boulevard and turned onto Lotus Avenue headed northbound. She lost sight of defendant for a short period of time. As she was continuing to look out her window, she heard gunshots before she saw anything happen. She then saw defendant by the group of boys with his bicycle on the ground.

¶ 18 Montana Harris testified that he and the victim were outside listening to music and were sharing the same headphones. While they were on the corner of Washington Boulevard and Lotus Avenue, Harris heard gunfire. Harris saw defendant on a bicycle shooting at the victim. Defendant fired the gun five times. He was wearing a white tee shirt and blue jeans. Harris testified he had seen defendant before in the neighborhood but did not know his name. Harris identified defendant in court as the shooter. Harris testified that defendant had tattoos on his neck and arm.

¶ 19 Harris went to the police station on August 1, 2011, and identified defendant in a photo array as the shooter. The following day, he returned to the police station and identified defendant as the shooter in a lineup. Harris testified that he told police that defendant's hair had dreads or braids.

¶ 20 The parties stipulated that, if called to testify, Chicago police detectives Carney and Xanos would testify that, on August 1, 2011, they interviewed Duplessis at her home and that she stated she observed two black men riding their bicycles eastbound on Washington Boulevard, and that, after the shooting, they rode eastbound on Washington Boulevard. The parties further stipulated that Detectives Carney, Xanos and Tedeschi would testify that Duplessis, in describing the shooter, did not describe the shooter as having tattoos on his neck. At the close of evidence, the jury found defendant guilty of first degree murder.

¶ 21 Defendant filed a motion for a new trial. He then filed a supplemental motion for a new trial, alleging, *inter alia*, that the court erred in sustaining the State's objection to defense counsel questioning Washington regarding the criminal case he had pending at the time of the shooting. Defendant argued the questioning was relevant to the issue of Washington's bias, interest or motive in not only cooperating with police, but in testifying for the State, and that evidence of any promises made to Washington was not required. Defendant further alleged that the court erred in denying counsel's request to elicit from Harris that, at the time of his testimony, he had a pending VOP. Defendant argued that the inquiry was relevant to Harris's bias, interest or motive for his testimony, as the same office prosecuting his VOP was the office prosecuting the case in which he was testifying. Defendant again argued that evidence of any kind of "deal" was not required before inquiry regarding the pending VOP was permissible.

¶ 22 The court denied the motion. It noted that, in Washington's prior case, he was arrested 6 months before the murder occurred in the instant case, he pleaded guilty 10 months after the murder, and his testimony came almost 2 years after the "disposal" of his drug case. "So in other words, it was over." The court explained that, as Washington's case was not pending at the time

of trial, he had no motive to testify falsely and nothing to gain or lose and the State had no leverage. The court found that Washington's prior case was "remote, uncertain."

¶ 23 With regards to Harris's pending VOP, the court stated that this offense came closer to the type of pending charge relevant for potential bias and motive to testify falsely and the court should perhaps have allowed it in on cross-examination. However, the court found the impact speculative where defendant presented no information regarding the basis of the VOP. The court further stated that, even if it erred in barring the cross-examination, defendant was entitled to a fair trial, not a perfect trial. Noting there were four eyewitnesses, strong corroborative evidence with the pod camera footage and other corroborating circumstantial witnesses, the court found "[t]his was a very strong case," and the outcome would not have changed had it allowed counsel to cross-examine Harris on the pending VOP. The court sentenced defendant to 65 years' imprisonment.

¶ 24 On appeal, defendant contends that the court deprived him of his right to present a defense and confront Washington and Harris with evidence of their bias and motive to falsely testify. In particular, defendant contends he should have been allowed to question Washington regarding the pending criminal charges he was facing at the time he first cooperated with police and question Harris regarding the VOP pending at the time he testified. He requests that we reverse his conviction and remand for a new trial.

¶ 25 As an initial matter, defendant contends that this court should review the legal question of whether he was denied his constitutional right to confrontation *de novo*. He claims that cross-examination to show bias, interest or motive to testify falsely is a matter of right which the court has no discretionary power to deny. The State responds that we should review this issue for an

abuse of discretion because the scope of cross-examination is within the sound discretion of the trial court.

¶ 26 A defendant has a federal and state constitutional right to confront witnesses against him. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art I, § 8. This right includes cross-examining witnesses to show any interest, bias, prejudice or motive to testify falsely. *People v. Klepper*, 234 Ill. 2d 337, 355 (2009). It is well established that cross-examination to show that a witness might be vulnerable to pressure, whether real or imagined, from the State regarding a pending charge is a matter of right. *People v. Nutall*, 312 Ill. App. 3d 620, 627 (2000) (citing *People v. Tomes*, 284 Ill. App. 3d 514, 520 (1996)). "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original.) *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

¶ 27 The right to cross-examination is not subject to the court's discretion, but the scope does rest within the discretion of the trial court. *Nutall*, 312 Ill. App. 3d at 627. The trial court's discretion to restrict the scope of cross-examination only comes into play after the court has permitted, as a matter of right, sufficient cross-examination to satisfy the constitutional guarantee. *People v. Edwards*, 218 Ill. App. 3d 184, 194 (1991). Discretion to impose reasonable limits on cross-examination assuages concerns about harassment, prejudice, jury confusion, witness safety or repetitive and irrelevant questioning, but this discretionary authority arises only after the court has permitted sufficient cross-examination to satisfy the Confrontation Clause. *People v. Blue*, 205 Ill. 2d 1, 13 (2001); see *People v. Averhart*, 311 Ill. App. 3d 492, 499 (1999) ("We need not review the discretionary authority of the trial court to restrict cross-examination,

[where] defendant's constitutional right to witness confrontation has not been satisfied.").

¶ 28 To determine the constitutional sufficiency of cross-examination, this court should look to not what a defendant had been prohibited from doing, but to what he had been allowed to do. *Edwards,* 218 Ill. App. 3d at 194. "If the entire record indicates that the jury was made aware of adequate factors concerning relevant areas of impeachment of a witness, then no constitutional question arises merely because defendant was prohibited from pursuing another line of questioning." *Id.* Where there is no constitutional question, the trial court's limitation of cross-examination as it relates to bias is subject to review under the abuse of discretion standard. *People v. Wilson*, 2012 IL App (1st) 092910, ¶¶23-24.

¶ 29 Defendant was not denied his right to confront the witnesses regarding his theory of defense for the case, which was misidentification. He was allowed ample opportunity to confront, cross-examine and test the truth of the testimony of Washington and Harris. The record thus indicates that the jury had sufficient information to determine whether their testimony was worthy of belief, and defendant was not denied his right of confrontation. *Edwards,* 218 Ill. App. 3d at 194-95. Thus, the trial court's limit of the cross-examination of these two witnesses failed to raise any constitutional issues. *People v. Green*, 339 Ill. App. 3d 443, 456 (2003). Accordingly, as the court permitted sufficient cross-examination to satisfy the Confrontation Clause, we review the court's limitations on cross-examination of Harris and Washington for abuse of discretion. *Blue,* 205 Ill. 2d at 13.

¶ 30 Evidence of bias, interest or motive to testify falsely must not be remote or uncertain because the evidence must potentially give rise to the inference that the witness has something to gain or lose by his testimony. *People v. Triplett,* 108 Ill. 2d 463, 475-76 (1985). The defendant

need not show that a promise of a special favor has been made to the witness or even that an expectation of a special favor exists in the mind of the witness. *People v. Boand*, 362 Ill. App. 3d 106, 127-28 (2005). Rather, the evidence need only give rise to the inference that the witness has something to gain or lose by testifying. *Id.*

¶ 31 Here, the witness Washington was arrested for possession of a controlled substance 6 months before the murder, pleaded guilty to the possession charge 10 months after the murder, and gave his testimony in the instant case almost 2 years after the "disposal" of his drug case. The trial court found, therefore, that "it was over" and denied leave to cross-examine on the charge. We find that the trial court's decision to prohibit counsel from examining Washington regarding his prior case was not an abuse of discretion as the case was too remote and uncertain to give rise to the inference that Washington had something to gain or lose by testifying falsely for the State in defendant's case. *People v. Bull*, 185 Ill. 2d 179, 206 (1998) (citing *Triplett*, 108 Ill. 2d at 475-76). As for defendant's claim that Washington had a pending contempt charge during trial that defendant was not told of until after Washington testified, defendant has presented no argument or law on this contention, thereby waiving it for review. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People v. Phillips*, 215 Ill. 2d 554, 565 (2005).

¶ 32 Regarding Harris, he had a pending VOP at the time of trial. He might, therefore, be vulnerable to pressure, either real or imagined, from the authorities in connection with continuing his probationary status. *People v. Baptiste*, 37 Ill. App. 3d 808, 811 (1976) (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974)) (reversible error to restrict cross-examination of witness on probation at time of trial); see generally *People v. Flowers*, 371 Ill. App. 3d 326, 329-30 (2007) (court erred in precluding cross-examination regarding leniency where the witness was

on parole at time of trial, even though there was no evidence witness had an agreement to cooperate with the State). We, therefore, find that the trial court abused its discretion in limiting counsel's cross-examination of Harris because his pending VOP at the time of trial was not too remote or uncertain to lead to the inference that he might have something to gain or lose by testifying falsely for the State. Although the State did note at the sidebar that there was no agreement, Harris' vulnerability to pressure could be imaginary. *Nutall*, 312 Ill. App. 3d at 627.

¶ 33 That said, the court's error in denying leave to cross-examine Harris regarding his pending charge was harmless beyond a reasonable doubt. Where error is shown, even though it encroaches on a constitutional right, it does not require reversal where it is shown to be harmless beyond a reasonable doubt. *People v. Harmon*, 2015 Ill App (1st) 122345, ¶103. An error is harmless beyond a reasonable doubt where the strength of the State's case is strong. *Id.* ¶¶104-05.

¶ 34 The evidence against defendant, as the trial court noted, was "very strong." There were four eyewitnesses who identified defendant as the shooter, including Harris and Washington. Even if the testimony of Harris and Washington is entirely discredited, the testimony of the other two witnesses, Duplessis and Lofton, was ample to prove defendant guilty beyond a reasonable doubt. Duplessis and Lofton had a clear, unobstructed view of the murder. Duplessis testified that she observed defendant ride up on a bicycle and shoot the victim several times. She was across the street from the shooting. Although she told police she saw two men on bicycles present during the shooting, she explained at trial that the other man was nowhere near the victim and defendant at the time she heard the gunshots and saw defendant raise his arm and fire the gun at the victim. Duplessis recognized defendant as she had an unobstructed view of the murder and had seen him twice before.

¶ 35 Lofton testified similarly that she had a clear, unobstructed view of the murder, from her second floor bedroom window which was 20 feet away from the corner where the incident took place. She saw defendant on his bicycle shoot the victim and identified him in a photo array, lineup and in court. Her identification was consistent and absolute. Duplessis's identification of defendant in court as the shooter was similarly categorical. Accordingly, Duplessis and Lofton's testimony was strong evidence of defendant's guilt. *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009) (the testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict). We, therefore, find the error in denying leave to cross-examine Harris regarding his pending VOP case harmless beyond a reasonable doubt.

¶ 36 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.