2016 IL App (1st) 141851-U

FIRST DIVISION
OCTOBER 31, 2016

No. 1-14-1851

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	) Appeal from the Circuit Court of) Cook County, Criminal Division
v.	) No. 06 CR 15300-01
DEMORRIS HILL, Defendant-Appellant.	) Honorable Gregory Ginex,) Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence at trial established that defendant was guilty of armed robbery beyond a reasonable doubt. Trial counsel was not ineffective for failing to file a motion to quash an inventory search of a vehicle. The trial court did not abuse its discretion holding that impeachment evidence would be admissible if defendant testified. The 15-year sentence enhancement violated the proportionate penalties clause and is vacated.

¶ 2 Following a jury trial, defendant Demorris Hill was convicted of armed robbery and sentenced to 27 years of imprisonment in the Illinois Department of Corrections (IDOC). Defendant appeals his conviction and sentence arguing that: (1) the trial court erred in adding a 15-year enhancement to his sentence of 12 years; (2) trial counsel was ineffective for failing to

attempt to quash the search of a vehicle; (3) the trial court erred in holding that defendant's recorded IDOC conversations and letters would be admissible as impeachment evidence if he testified; (4) the evidence presented at trial was insufficient to establish his guilt beyond a reasonable doubt, and (5) his sentence was excessive. We affirm defendant's conviction for armed robbery, we vacate defendant's 15-year sentence enhancement and remand the case for resentencing.

¶ 3 BACKGROUND

¶ 4 The State's first witness at trial was Ronald Buczko ("Ron"), owner of Ron's Auto Sales, located at 5727 W. Roosevelt Road, in Cicero, Illinois. Ron testified that he, Walter Flores ("Walter") and Jorge Ortiz ("Jorge") were working at the car dealership on February 28, 2006. At about 4:00 p.m., Ron was standing at his desk when Jorge, his car salesman, brought two black males into his office. One man was in his twenties and the other man in his fifties or sixties ("co-offender"). Ron said the two men were going to fill out a credit application for the purchase of a car. Ron identified the younger black male as defendant.

¶ 5 Ron stated that, after the two men walked into his office, the co-offender stood by the desk while defendant stood near the office door. Ron heard Jorge ask defendant for his identification for the credit card application and simultaneously the co-offender pulled out a gun and said "give it to me." Ron testified that he did not give defendant the money right away.

¶ 6 The co-offender moved forward toward Ron holding his gun. Defendant said "shoot him." As co-offender began to pick up his gun, Ron grabbed the gun, held it down, and pushed the co-offender. The gun discharged into the cement floor. Fragments of the bullet grazed Ron's foot and Walter's eye. Walter was standing in Ron's office by the garage door, opposite from defendant's position.

¶ 7 Ron then removed his hand from co-offender's gun, reached into his own pocket and gave co-offender a couple of thousand dollars. This money was from a recent car sale and was to be deposited in the bank. Ron testified that he didn't remember exactly who he gave the money to. Ron then observed co-offender and defendant as they fled through the door which was previously opened by a delivery driver.

¶ 8 Ron and Jorge ran out the door and saw the co-offender and defendant run south down 57th Court, about 3 houses down. The co-offender and defendant fled on foot to an older black Chevy Cavalier, but were unable to get into the car. Ron then heard sirens and saw the co-offender and defendant run down 57th Court. Ron identified defendant in a photo array, in a lineup and at trial.

¶ 9 Jorge testified that he was a sales manager at Ron's Auto Sales on the day in question. Jorge stated he showed both defendant and co-offender two vehicles and had about a 15-minute interaction with both men. Jorge then invited the men into the office to fill out a credit application. Jorge entered Ron's office which had two desks and Ron was standing by his desk. Jorge went to his desk to retrieve the credit application and heard the co-offender ask Ron for money. When Jorge turned around, he saw co-offender about 4 feet away holding a black revolver, and defendant who was about 2 feet away. Ron told the co-offender to calm down and heard defendant say "shoot him."

¶ 10 Jorge witnessed the co-offender raise his gun to Ron, and then Ron pushed the gun down. The gun then discharged and Ron told the co-offender to relax and then reached into his own pocket and gave money to one of the men. Jorge does not recall which man Ron gave the money to. The men then immediately left the office and ran down the street.

¶ 11 Jorge waited to see if anyone was hurt. Walter had come into the office and was holding his head and stated he had a graze wound from the discharged gun. Ron, Walter and Jorge went outside and saw defendant and co-offender about 40 feet away trying to enter a Chevy Cavalier which was facing north. Police sirens were heard and defendant and co-offender then took off on foot heading south.

¶ 12 Jorge did not talk to the police on that day but testified that Ron talked to them. Cicero police returned on March 7, 2006, and showed Jorge a photo array where he identified defendant as "the one that told the [co-offender] to shoot us." He was then asked to go to the police station on June 12, 2006, where he identified defendant in a lineup. He also identified the Chevy Cavalier and the bullet hole in the floor of Ron's Auto.

¶ 13 Pablo Garcia worked at Ron's Auto for 12 years. On February 28, 2006, at about 4:00 p.m., he was across the street from the office in an adjacent lot working with an advertiser when he heard a loud bang that sounded like a gunshot. Pablo had his back to the office but turned around and witnessed two men running southbound toward a vehicle a couple of houses away. Pablo identified a Chevy Cavalier as the vehicle he witnessed the men attempting to get into. He testified that the Chevy Cavalier stood out since it was an older model and not one that he saw as being parked in the residential area near Ron's Auto.

¶ 14 Pablo said he didn't see Ron until about a minute after hearing the gunshot. Ron was standing near the entrance gate to the dealership with Jorge and Walter. By the time Pablo crossed the street, he heard sirens. Pablo stated that the car lot where he was standing was on the same side of the street and down the block to where the males were running toward their car.

¶ 15 Officer Daniel Contreras testified that he was a detective with the Cicero police department and assisted Detective Donegan regarding an armed robbery on February 28, 2006, at

Ron's Auto. Contreras and Donegan met with Ron on March 2, 2006, and showed him a photo lineup where Ron identified defendant as one of two offenders in the armed robbery.

¶ 16 Officer Manuel Velazquez testified that he was a detective with the Cicero police department and worked with Donegan on the armed robbery at Ron's Auto. Velasquez towed a 1992 Chevy Cavalier from in front of Ron's Auto because the license plate did not match the VIN number. Subsequently, during an inventory of that vehicle, an Illinois State police citation was found on the floorboard. That citation was issued to defendant whose photograph was included in the photo lineup shown to Jorge. Jorge identified defendant from that lineup.

¶ 17 Velasquez stated he also obtained defendant's address, 1722 N. Luna, Chicago, Illinois, from the citation. On March 14, 2006, Velasquez went to defendant's home and met Patricia Bullock who identified herself as defendant's mother. She told Velasquez that the Chevy Cavalier belonged to defendant. Velasquez testified that he asked permission to look in defendant's room, and Ms. Pullock gave her permission. He and his partner searched the bedroom and found ammunition cartridges and another citation bearing defendant's name with the car information on it. Defendant was not home on March 14, 2006, but subsequently called the police station to inform authorities that he was going to turn himself in. Velasquez obtained a warrant for defendant's arrest on April 26, 2006, since he failed to turn himself into authorities.

¶ 18 Velasquez testified that he arrested defendant on June 12, 2006, during a traffic stop where defendant was a passenger. Velasquez placed defendant in separate lineup proceedings for Ron and Jorge to view. Both Ron and Jorge positively identified defendant as the person that directed the co-offender to shoot at Ron.

¶ 19 After the State rested its case, defendant made a motion for directed verdict which the trial court denied. The jury found defendant guilty of armed robbery. Defendant filed a motion

for a new trial which was denied. Subsequently, the trial court sentenced defendant to a total of 27 years, 12 years for the armed robbery with an additional 15-year enhancement for using a firearm in the commission of the robbery. Defendant filed a motion to reconsider the sentence which the trial court denied. This appeal follows.

¶ 20 ANALYSIS

¶ 21 Ineffective Assistance of Counsel

¶ 22 Defendant argues that his trial counsel was ineffective for failing to file a motion to quash the inventory search of the car that was towed after the crime was committed. Defendant contends that the police officers searched the car without any justification and that the search does not appear to be performed in good faith. Following the search of the car, the officers found a citation with defendant's name. According to defendant, the citation was the basis of identifying defendant which was the only reason that the police were able to find defendant's home. As such, defendant claims that the fruits of the invalid search should not have been admitted at trial and that trial counsel's failure to move to quash this search and the subsequent arrest of defendant amounted to ineffective assistance of counsel.

¶ 23 To establish ineffective assistance of counsel, a defendant must show both: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) that the substandard representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's decision whether to file a motion to suppress is generally a matter of trial strategy that is entitled to great deference. *People v. White*, 221 Ill. 2d 1, 21 (2006). In *People v. Henderson*, 2013 IL 114040, ¶ 15, our supreme court held that, to successfully challenge defense counsel's failure to file a motion to suppress, "the defendant must demonstrate that the un-argued suppression motion is meritorious, and that a reasonable probability exists that

the trial outcome would have been different had the evidence been suppressed." In making this determination, the court considered the circumstances under which an ineffective assistance of counsel claim should be considered on direct appeal versus a collateral attack. *Id*. ¶ 21.

¶ 24 Where a defendant files a direct appeal challenging defense counsel's failure to file a motion to suppress, "the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose." *Id*. ¶ 22. Therefore, in situations such as those, a collateral attack is a more appropriate mechanism for challenging the effectiveness of defense counsel because the defendant would have the opportunity to create a record specifically developed to address whether the motion to suppress was meritorious. *Id*. ¶¶ 21–22.

¶ 25 Although the supreme court ultimately found such a record existed in *Henderson*, the present case is distinguishable. Unlike the record presented in *Henderson*, we have no specifically developed record created in this case to guide our decision. Defendant claims that none of the proper purposes allowing an inventory search were present. But this issue was never addressed or litigated in the proceedings below. While Detective Velasquez testified that the car was properly towed because the VIN did not match the license plates, the State did not elicit testimony regarding the standard police procedures in conducting inventory searches. Similarly, defendant's counsel did not question any of the officers on cross examination regarding the proper inventory procedures. Since there is no record documenting this issue, we cannot conclude that the inventory search was improper. Thus, because this matter concerns a claim outside of the record on appeal, it would be appropriately addressed through postconviction proceedings, where defendant would have an opportunity to call witnesses and present evidence to develop a sufficient record for review.

¶ 26 Impeachment Evidence

¶ 27 Defendant next argues that he was denied his right to a fair trial when the State failed to disclose impeachment evidence it intended to use against defendant until after the trial had begun. The impeachment evidence consisted of defendant's recorded IDOC phone calls and letters where he attempted to allegedly elicit perjured testimony and to present a false alibi. Defendant contends that the trial court erred when it decided that this evidence would be admissible despite the untimely disclosure and its unfairly prejudicial nature.

¶ 28 On appeal, for the first time, defendant presents this claim in the context of a discovery violation. No such motion was argued nor did defendant asked for sanctions in the proceedings below. Therefore, this issue is fortified. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). To overcome the default, defendant bears the burden to argue his claim under plain error review. We will grant relief to a defendant under plain error in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) if the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id*. at 178-79 (2005).

¶ 29 Here, defendant not only fails to acknowledge the forfeiture, he fails to argue plain-error altogether. When a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Since defendant failed to argue for plain-error review, he cannot meet his burden of persuasion of establishing plain error. Accordingly, we can reject defendant's claim on this basis alone.

¶ 30 We note that the issue below was the admissibility as impeachment evidence of the alleged fake testimony requested by defendant in his IDOC phone recordings and letters. The admissibility of evidence at trial is ultimately within the sound discretion of the trial court and we will not overturn the court's decision absent a clear abuse of discretion, *i.e.*, where the court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Boston*, 2016 IL App (1st) 133497, ¶ 57 citing *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). The prosecution is entitled to use all of the impeaching evidence it possesses in order to impact the credibility of the defendant if he chooses to testify. *People v. McKibbins*, 96 Ill. 2d 176, 189, (1983).

¶ 31 The trial court did not abuse its discretion in this matter. During the hearing on the admissibility of this evidence, the State informed the court that defense counsel asked what would be offered in rebuttal or cross-examination if defendant testified. The State made an offer of proof that Sean Furlow, an IDOC employee, would lay the foundation for the phone calls and procedures in securing the calls as well as for the intercepted letters from defendant to a potential witness, Kenya Bullock, "setting out what he wanted her to say at his trial." The prosecutor stated he would use this evidence to cross-examine defendant "because they are consciousness of guilt … trying to set up a fraudulent defense." In turn, defense counsel objected to the timeliness of the documents, but stated "I know the State was attempting to use due diligence to tender them to defense as soon as possible. And I did have a chance to look at them. That's when the trial was already started."

¶ 32 Upon hearing the State's proffer and the parties' arguments, the trial court balanced the relevant value and the undue prejudice posed by this evidence, and ruled that the evidence would be admissible as impeachment evidence if defendant testified. The trial court properly observed

that if there were issues of falsehood that defendant was attempting to produce in his case, although prejudicial, the evidence would be "most relevant" as it would affect defendant's credibility. In addition, although the State tendered the evidence after the trial started, defendant was allegedly eliciting false testimony the day before his trial begun. Certainly, disclosure during defendant's trial of evidence obtained by the State on the eve of the trial was not untimely. Based on this record we cannot say that the trial court abused its discretion in holding that impeachment evidence was admissible if defendant testified.

¶ 33 Proof of Guilt Beyond a Reasonable Doubt

¶ 34 Defendant argues that the evidence was insufficient to prove his guilt beyond a reasonable doubt. Defendant concedes that he was present during the armed robbery but challenges the sufficiency of the evidence regarding whether he was accountable for his co-offender's actions. Defendant contends that the evidence proved nothing more than defendant was present when another unidentified individual committed the armed robbery.

¶ 35 The due process clause of the Fourteenth Amendment to the United States Constitution requires that a person may not be convicted in state court "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). When we review a claim for sufficiency of the evidence to sustain a conviction, "the question is 'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original) *Cunningham*, 212 Ill. 2d at 278-79, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "The *Jackson* standard applies in all criminal cases, regardless of the nature of the evidence."

Cunningham, 212 Ill. 2d at 279. In applying this standard, "a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *Id*. at 280.

¶ 36 In order for a defendant to be convicted of the offense of armed robbery with a firearm, the State must prove, beyond a reasonable doubt, that (1) the defendant has taken property from a person by the use of force or the threat of the imminent use of force, (2) while carrying a firearm on or about his person, or otherwise being armed with a firearm. 720 ILCS 5/18–2(a)(2) (West 2012). Section 5-2 of the Criminal Code provides that, "[w]hen 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts." 720 ILCS 5/5–2 (West 2012). Individuals, such as the defendant in this case, may be charged, and their guilt established, through proof of the behavior of another with whom they engaged in a common criminal design. See *People v. Stanciel*, 153 Ill. 2d 218, 233 (1992). A conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts of the group. *People v. Cooper*, 194 Ill. 2d 419, 435 (2000).

¶ 37 The evidence of record in this case is more than sufficient to support defendant's conviction for armed robbery under an accountability theory. Defendant and co-offender acted in concert from the time they entered the car lot manifesting an interest to purchase a car until they ran out of the store after taking money and shooting at the victim. Proving the point, both men got into the sales office after speaking with Jorge Ortiz, and defendant held the door open with his foot when the co-offender took the money from Rob Buczok at gun point.

¶ 38 Two eyewitnesses, victims Ron Buczko and Jorge Ortiz, testified to the circumstances of the armed robbery. Ron Buckzo stated that the co-offender brandished a gun and asked for money; Rob hesitated and defendant told co-offender to "shoot him," referring to Ron. Jorge Ortiz, the sales manager, heard defendant and the co-offender demand money from the victim, saw the co-offender brandish a gun, and heard defendant direct the co-offender to "shoot" the victim. When the co-offender fired the gun, the bullet grazed Ron's foot and Walter Flores' eye. Both Ron and Jorge observed defendant and co-offender run toward defendant's Chevy Cavalier. They were not able to get into the car and fled on foot, leaving the car behind. Ron and Jorge indentified defendant in two separate photo arrays, lineup proceedings and at trial.

¶ 39 Based on the evidence presented, we cannot say that defendant was simply observing the co-offender committing the crime. Instead, defendant was actively implicated in the armed robbery when, along with the co-offender, pretended that they were buying a car, held the door open with his foot while the co-offender took money from the victim at gun point, directed the co-offender to shoot the victim, and fled along with the co-offender. See *People v. Cooper*, 194 Ill. 2d at 435. Therefore, the State proved beyond a reasonable doubt defendant's guilt for armed robbery.

¶ 40 Defendant's Sentence

¶ 41 Defendant argues, and the State agrees, that the 15-year firearm enhancement added to defendant's sentence of 12 years should be vacated. Defendant committed the instant offense on February 28, 2006. Since then the 15-year mandatory firearm sentencing statute has been found to be unconstitutional as it violated the proportionate penalties clause and was void *ab initio*. *People v. Hauschild*, 226 Ill.2d 63, 86-87 (2007). The enhancement was not revived until after the offense was committed, upon the passage of Public Act 95–688 (eff. Oct. 23, 2007).

Although the parties initially agreed that the appropriate remedy would be to vacate the enhancement and remand for resentencing, in his reply brief, defendant maintained that this court should strike the unconstitutional enhancements and impose a sentence of 12 years.

¶ 42 Our supreme court held that when a sentencing statute has been found to violate the proportionate penalties clause, "the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment." *People v. Hauschild*, 226 Ill. 2d at 88-89. The purpose of remand is "to allow the trial court to reevaluate defendant's sentence." *Id*. Even where a trial court distinguishes a sentencing enhancement from the proper portion of a sentence, such as this case, remand is appropriate because the trial court is in a better position than an appellate court to impose a sentence, as it had the opportunity to view and weigh the significance of all the evidence. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 29, see also *People v. Gibson*, 403 Ill. App. 3d 942, 955 (2010) (although the trial court delineated between the proper portion of the sentence and the improper sentence enhancement, remand for resentencing was necessary). Accordingly, we conclude that the appropriate remedy in the instant case is to remand for resentencing in order to allow the trial court to determine defendant's sentence. In light of our holding, we need not address defendant's claim that his sentence was excessive.

¶ 43 CONCLUSION

¶ 44 Based on the foregoing, we affirm defendant's conviction for armed robbery and we vacate defendant's sentence and remand the case for resentencing.

¶ 45 Affirmed in part, vacated in part.

¶ 46 Remanded for resentencing.