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2012 IL App (3d) 100737–U

Order filed August 23, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-10-0737
)	Circuit No. 09-CF-618
ALI LAMONT EVANS,)	
)	Honorable
Defendant-Appellant.)	James E. Shadid,
)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court erred in denying defendant's motion to suppress statements he made after he invoked his right to counsel. Defendant did not initiate further conversation and subsequent interrogation by the police without the presence of counsel violated defendant's fifth amendment rights.
- ¶ 2 Defendant Ali Lamont Evans was convicted by a jury of first degree murder and sentenced to 58 years' imprisonment. Prior to his trial, he moved to suppress statements he made to police admitting his role in the murder. Evans argued that the police violated his fifth amendment rights by

continuing to interrogate him after he invoked his right to counsel. The trial court denied his motion and the statements he made were admitted at trial. He appealed. We reverse and remand

¶ 3

FACTS

¶ 4 Defendant Ali Evans was charged by indictment with felony first degree murder predicated on armed robbery. 720 ILCS 5/9-1(a)(3); 18-2(a)(2) (2008). The charges arose from the May 27, 2009, armed robbery of a gas station in which Evans and his co-defendant participated. The gas station clerk was shot and killed. Evans was at the Peoria police station on May 31, 2009, on an unrelated matter when he was interviewed regarding the instant offense. Peoria police detectives Keith McDaniel and Shannon Walden conducted the interview, which was videotaped.

¶ 5 The videotape shows that McDaniel started the interview by informing Evans that a witness placed him at the gas station at the time of the shooting and they were seeking his assistance in the investigation. McDaniel gave Evans the *Miranda* warnings and explained again to Evans that Evans had been identified as present at the gas station. Evans denied he was in the area of the gas station and provided an alibi, stating that he had been at the home of his girlfriend, Alexis Tate, when the shooting occurred. Alexis lived with her mother, who could also verify that Evans was at their home at the time of the murder. He gave Tate's telephone number to McDaniel and Walden and urged them to check his alibi. Neither detective wrote down the number. They explained Evans was there to participate in a lineup because a witness had identified him. The witness was acquainted with Evans because he had been involved in an altercation with a friend of hers some years prior. Evans continued to deny his participation. The interrogation proceeded, and after approximately one-half hour, Evans accused the detectives of "egging him on" about being at the scene. The following dialogue occurred.

EVANS: "I don't want any more questions. I want my lawyer, bro. I ain't saying shit else."

MCDANIEL: "What we're going to do from here is put you in an in[-]person line up."

EVANS: "I ain't saying shit else."

MCDANIEL: "Next, you'll be in the lineup."

EVANS: "I ain't saying shit else."

MCDANIEL: "At that point, you get to choose which number you want to be in the in-person lineup. Okay, and we'll go from there."

¶ 6 Evans then complained about harassment by the police while "on the street." The three briefly discussed his harassment accusations and Walden urged Evans to pick a number for the lineup, explaining to him that his participation in the line-up was not optional. Evans persisted in his alibi. As the detectives were leaving the interrogation room, Evans stated, "I'm gonna get my lawyer for this. I hate being harassed, man."

¶ 7 McDaniel returned to the interrogation room to get contact information for Evans's alibi witnesses. Evans said he understood that the detectives would suspect him based on information they received. McDaniel continued to engage in a conversation with Evans, informing that a witness placed him at the scene and they were here to verify the information. McDaniel told Evans he would need an explanation if he was the scene and that McDaniel was there "to paint a picture and tell a story." McDaniel left the interrogation room and approximately 45 minutes later, he and Walden returned, seeking information on Evans's height and weight for the lineup. The lineup took place.

The following dialogue took place after the lineup was completed and Evans was returned to the interrogation room. McDaniel stated:

“All right Mr Evans, did the in[-]person lineup. You were positively ID’d as the person who was leaving out of the station with the other male who was in possession of the handgun ***. At this time you are being charged with murder. Do you understand? So I’m going to take down this information ***. I did make contact with your girlfriend’s mother. She obviously has a dislike for the police. You agree? She has a total dislike for the police. She places you there at 4:30 or 5:00, but after that she says she can’t recall if you were there or not. She didn’t want me talking to ***Alexis and she said she’d try to find Alexis to contact you. But she didn’t think that Alexis will talk to me because Alexis takes after her and she don’t [*sic*] like the police.

We, as detectives, all we do is paint the picture. We go with what we have. At this point in time, you’ve been ID’d as being in the area. That is all we have to go on. OK? So make sure we got this right ***.”

¶ 8 McDaniel then asked Evans for his name, address and other booking information. The following dialogue took place.

EVANS: “So why are y’all charging me with murder when I ain’t killed nobody?”

WALDEN: “We weren’t able to talk to you about it because

you've requested a lawyer. We can't go over the details but you're I.D.ed as being there so you're involved in it."

EVANS: "I didn't do this, man."

WALDEN: "We can't talk to you."

EVANS: "Fuck all that, man. I'm gonna tell you who it was."

WALDEN: "Whoa, hold on, we got to go through some procedures, my friend, because when you requested a lawyer...."

EVANS: "Fuck that lawyer, man!"

WALDEN: "Hold on for a minute; slow up. Once you request a lawyer, we have to go through... We don't want to violate anybody's rights. Do you remember your rights as read to you earlier?"

EVANS: "Yeah, I remember but I am waiving that shit. I am going to tell y'all."

¶ 9 Evans and the detectives then engaged in additional discussion regarding the murder charge. Evans denied he killed anyone. Walden again told Evans that they could not talk to him because he invoked his rights. McDaniel left the room to get a supervisor. While he was gone, Evans and Walden engaged in the following conversation.

EVANS: "I ain't going down for something I didn't do."

WALDEN: “I wouldn’t expect you to do that. It wouldn’t be a wise thing to do.”

WALDEN: “How many kids you got?”

EVANS: “One and one on the way.”

WALDEN: “Gotta take care of your family.”

¶ 10 McDaniel’s supervisor joined the interrogation and questioned Evans regarding his understanding of the situation and the rights that had been read to him earlier. Evans indicated he understood his rights and wished to waive them. McDaniel read each *Miranda* right to Evans, who initialed his understanding on the waiver form. Evans reiterated that his waiver was voluntary. The interrogation continued and Evans identified his co-defendant. He subsequently admitted that he participated in the robbery and that his co-defendant shot the gas station clerk.

¶ 11 Prior to trial, Evans filed a motion to suppress the statements he made on May 31 as violative of his fifth amendment rights. Evans’s motion was heard and denied. The trial court found that questioning of Evans ceased after he invoked his right to counsel and that Evans initiated the subsequent discussion in which he made inculpatory admissions. The trial court further found that the statements were knowingly, intelligently and voluntarily made.

¶ 12 A jury trial took place. Testimony established that on May 27, 2009, officers responded to a robbery and shooting at a gas station. The gas station clerk was killed. An eyewitness identified Evans from photographs shown to her by detectives. She also identified him in a lineup. The witness knew of Evans from an altercation in which he had previously been involved with her friend. She did not know him personally. Another eyewitness could not identify Evans. A gun was recovered from

the home of Evans's co-defendant's sister. A print on the gun belonged to Evans's co-defendant. Bullets fired from the gun were found at the gas station. The videotapes of the May 31 interview of Evans were played for the jury. A videotape of a June 1 interview of Evans, in which he repeated his admissions, was also played for the jury. The jury found Evans guilty of first degree murder and also found that a firearm was used by one for whom he was legally responsible. The jury further found the State did not prove Evans discharged the firearm. The trial court sentenced Evans to a 58-year term of imprisonment. He appealed the denial of his motion to suppress.

¶ 13

ANALYSIS

¶ 14 The issue on appeal is whether the trial court erred when it denied Evans's motion to suppress his statements. Evans argues that his fifth amendment rights were violated when the police ignored his request for a lawyer. He maintains that the police continued to engage him in conversation, which was elicited to and did, invoke an incriminating response. In reviewing the trial court's denial of Evans's motion to suppress, we will uphold the trial court's findings of fact unless they are against the manifest weight of the evidence. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). We review *de novo* the ultimate issue of whether the statements should be suppressed. *Pitman*, 211 Ill. 2d at 512.

¶ 15 The fifth amendment protects an accused from being "compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. An accused has a right to have counsel present during a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). Where a defendant clearly asserts his right to counsel, all questioning must cease until counsel is made available. *Smith v. Illinois*, 469 U.S. 91, 98 (1984). A defendant may waive his *Miranda* rights; however, when he has invoked his right to counsel, additional safeguards are required to ensure that any subsequent waiver of his rights is valid. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Once an accused requests an

attorney, he is not subject to further interrogation without counsel present unless he “initiates further communication, exchanges, or conversations with the police.” *Edwards*, 451 U.S. at 484-85. If he does not, and the police interrogate him without the presence of counsel, his *Miranda* waiver is not valid and his statements are inadmissible. *Edwards*, 451 U.S. at 487. A valid waiver cannot be established by showing that the defendant responded to interrogation initiated by the police, even if he had been advised of his *Miranda* rights. *Edwards*, 451 U.S. at 484. The rule pronounced in *Edwards* is designed to “ ‘ “prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” ’ ” *People v. Woolley*, 178 Ill. 2d 175, 198 (1997), quoting *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990), quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

¶ 16 Courts engage in a two-part inquiry to determine the admissibility of statements given after a defendant has invoked counsel. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-46 (1983). The first question is whether the police or the accused initiated further discussion. *Bradshaw*, 462 U.S. at 1044. If the police initiated further communication, the statements are inadmissible. *Bradshaw*, 462 U.S. at 1044. However, where the defendant initiated the discussion, the court must consider under the totality of the circumstances whether the defendant knowingly and intelligently waived his right to counsel. *Bradshaw*, 462 U.S. at 1046. When an accused is re-interrogated after invoking right to counsel, the State bears the burden of proof that he waived his right. *Bradshaw*, 462 U.S. at 1044.

¶ 17 Evans relies on *People v. Olivera*, 164 Ill. 2d 382 (1995). In that case, the defendant invoked his right to counsel; thereafter participated in a lineup and was identified as a murder suspect; asked officers what resulted from the lineup and learned he was positively identified; and inquired as to the next step. *Olivera*, 164 Ill. 2d at 387. He was given *Miranda* warnings, waived his rights, and admitted his participation in the murder. *Olivera*, 164 Ill. 2d at 387. The trial court denied his motion

to suppress but on review, the supreme court found that the questions it did not “evinced on the defendant’s part a willingness and desire for a generalized discussion concerning the investigation.” *Olivera*, 164 Ill. 2d at 390-91. The *Olivera* court determined that when a defendant invokes his right to counsel and then asks a question that could result in incriminating statements, the proper response of the police is to advise the defendant of his rights. *Olivera*, 164 Ill. 2d at 392. The State relies on *People v. Miller*, 393 Ill. App. 3d 1060 (2009). In *Miller*, after the defendant invoked his right to counsel, he asked officers a question concerning the towing of his car. *Miller*, 393 Ill. App. 3d at 1062. The officer did not answer and re-Mirandized the defendant, who signed a written waiver and gave a statement. *Miller*, 393 Ill. App. 3d at 1062. The trial court suppressed the statements but the reviewing court reversed, finding that the defendant’s questions exceeded inquiry into the “incidents of the custodial relationship” and “evinced his willingness to speak about the investigation without counsel present.” *Miller*, 393 Ill. App. 3d at 1069. It noted that the officer responded appropriately to Miller’s question by advising him of his rights, rather than answering the question. *Miller*, 393 Ill. App. 3d at 1070.

¶ 18 We consider the instant case more aligned with *Olivera* than *Miller*. Here, like the detectives in *Olivera*, McDaniel and Walden did not cease questioning Evans once he unequivocally invoked his right to counsel. Rather, the detectives continued to engage him in conversation. Unlike the officers in *Miller*, who immediately responded to the defendant’s question by reminding him of his *Miranda* rights before answering, McDaniel and Walden responded in a manner that was likely to elicit an incriminating response from Evans, attempting to gather information purportedly needed to conduct the lineup. Importantly, the record does not establish that Evans initiated further conversation in a manner evincing a willingness to discuss the shooting. To the contrary, he

continued to assert that he “ain’t saying shit else.”

¶ 19 When McDaniel returned to the interrogation room, supposedly in order to obtain contact information for Evans’s alibi witnesses, he continued to discuss the investigation with Evans. McDaniel’s conversation was not directed at the routine elements of the booking process or custody. Rather, he discussed again that Evans was placed at the scene by an eyewitness and that the detectives were there to verify the information. He urged Evans to provide an explanation for his presence at the gas station. After the lineup, McDaniel informed Evans he had been positively identified and was being charged with murder. He also told Evans that his girlfriend’s mother did not provide an alibi for him. As set forth above, McDaniel peppered his update of the investigation with questions, continuing to engage Evans in the discussion and trying to elicit an incriminating response from him. After McDaniel secured booking information, Evans asked why he was being charged with murder. Walden replied that they had not been able to talk to Evans about the investigation because he had invoked his right to counsel. Both Walden and McDaniel continued to tell Evans they were interested in his story but that he chose not to share it. Even after McDaniel left the room to find a supervisor to witness Evans’s subsequent *Miranda* waiver, Walden continued discussing the investigation with Evans and reminding Evans that he needed to take care of his family.

¶ 20 The statements and questions addressed to Evans by McDaniel and Walden were not routine matters relating to the custodial relationship but were attempts to badger Evans into confessing. Under the subterfuge of gathering information for the lineup and booking procedures, they sought to elicit incriminating statements from Evans. They did not at any point in the more than two hours of interrogation stop their conversation with him. Moreover, they failed to provide counsel for Evans during that time or the next day when the interrogation continued. Accordingly, we find that Evans’s

statements were inadmissible as violative of his fifth amendment right to counsel. Because Evans's fifth amendment right to counsel was violated, his subsequent *Miranda* waivers were invalid, and the trial court erred when it denied his motion to suppress his statements.

¶ 21 We next consider the State's contention the erroneous admission of Evans's statements constituted harmless error and the verdict would not have been different if the statements were excluded.

¶ 22 Constitutional errors do not automatically require that a conviction be reversed. *People v. Patterson*, 217 Ill. 2d 407, 423 (2005). Constitutional errors that occur during the presentation of evidence are considered trial errors and may be "quantitatively assessed" in light of the other evidence to determine whether the error was harmless. *Patterson*, 217 Ill. 2d at 424, quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-8 (1991). Violations of the fifth amendment may be considered trial errors subject to the harmless error analysis. *People v. Mitchell*, 152 Ill. 2d 274, 327 (1992); *Fulminante*, 499 U.S. at 310. To decide whether error is harmless, the reviewing court (1) considers whether the error contributed to the conviction; (2) examines the properly admitted evidence to determine whether it was sufficient to convict; or (3) determines whether the evidence that was improperly admitted was cumulative or duplicative of properly admitted evidence. *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008). The test is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict. *Rolandis G.*, 232 Ill. 2d at 43.

¶ 23 The State argues that the statements did not materially contribute to Evans's conviction, that the properly admitted evidence overwhelming supports the guilty verdicts, and that the improperly admitted statements were cumulative of his subsequent admissions. We disagree with each of the State's contentions. On these facts, we cannot conclude that the improperly admitted confessions did

not contribute to Evans's conviction. Evans's admissions made during the May 31 interrogation established his participation in the planned robbery. The eyewitness testimony on which the State relies as dispositive of Evans's guilt is countered by the testimony of the second eyewitness, who was unable to positively identify Evans and gave a different account of Evans's role in the crime. The State's reliance on Evans's subsequent admissions made on June 1 as cumulative to his earlier statements is misplaced. We consider that the June 1 interrogation was a continuation of the May 31 interrogation and any admissions Evans made during it were also inadmissible as continued violation of his right to counsel. *Edwards*, 451 U.S. at 487 (statement made without access to counsel did not amount to a valid waiver). We find the improper admission of Evans's confession was not harmless error.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause remanded.

¶ 25 Reversed and remanded.