

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 120928-U

Order filed November 21, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0928
v.)	Circuit No. 10-CF-1096
)	
DANIEL MOORE,)	Honorable
)	Stephen A. Kouri,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Wright concurs in the judgment.
Justice McDade specially concurs in the judgment.

ORDER

- ¶ 1 *Held:* (1) The State erroneously impeached its own witnesses, but the error was harmless; and (2) the cause is remanded for the entry of an order enumerating the costs and statutory authority.
- ¶ 2 After a jury trial, the defendant, Daniel Moore, was found guilty of two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and one count of burglary (720 ILCS 5/19-1(a) (West 2010)). The trial court sentenced the defendant to a total of 35 years' imprisonment. On appeal, the defendant argues that: (1) the State erroneously impeached its own witnesses; and (2)

the cause should be remanded to the trial court for the entry of an order enumerating the costs.

We affirm in part, vacate in part, and remand with directions.

¶ 3

FACTS

¶ 4

The defendant was charged by indictment with two counts of armed robbery and one count of burglary. The case proceeded to a jury trial.

¶ 5

At trial, Johnny Hernandez, Derek Templeton, Honorio Santos, and Cesar Gonzales each testified that they were working at the Flat Top Grill in Peoria on June 27, 2010. Around closing time, Hernandez took the garbage out and was met at the dumpster by three masked individuals. One of the individuals pointed a gun at Hernandez and took his cellular telephone and wallet. The individuals then forced Hernandez into a cooler.

¶ 6

Templeton testified that he was the manager of the Flat Top Grill and, around 8:55 p.m. on the date of the incident, he was tabulating the employees' meals in the front of the restaurant when he was approached by a masked individual. The individual placed a gun against Templeton and directed him into the cooler. In total, Templeton saw three masked men. Templeton recognized one of the men as Terry Payton. Payton had previously worked at the Flat Top Grill. After 10 to 20 minutes inside the cooler, Templeton, Hernandez, Santos, and Gonzales forced the cooler door open and called the police.

¶ 7

Timothy Wong, Peoria police department crime scene investigator, testified that he processed the scene for latent fingerprints. Wong discovered a latent fingerprint on a bank bag. Wong compared the print with a list of persons of interest, but did not find a match. The bag was then sent to the Illinois State Police crime lab in Morton. The crime lab matched the fingerprint to Samuel Stewart.

¶ 8

Latorya Lewis testified that in June 2010, she and Stewart dated and shared an apartment

on Wardcliffe Drive in Peoria. On the evening of June 27, 2010, Lewis, Stewart, and the defendant ate pizza at the apartment. After eating, Stewart and the defendant left the apartment. Approximately 5 to 10 minutes later, Stewart returned, but left after a few minutes. Lewis next saw Stewart at 5:30 a.m. the next morning. Lewis did not learn that Stewart had been charged with armed robbery until he was arrested in East Moline.

¶ 9 After Stewart's arrest, the defendant made an unusual visit to see Lewis while she was at her mother's house. The defendant asked Lewis if she had seen the paper and if Stewart was still in jail. At the time, Stewart was incarcerated, and the defendant told Lewis that Stewart was facing a 45-year prison sentence. The defendant made a second visit to Lewis while she was dropping her son off at her mother's house. The defendant asked Lewis if she had spoken with Stewart and gave Lewis his telephone number. The defendant asked if Lewis needed anything and seemed to want Lewis to contact him.

¶ 10 Ronald Batton testified that he had pled guilty to charges connected to the instant case and received a sentence of 24 years' imprisonment in exchange for his cooperation in this case. According to Batton, on June 27, 2010, Payton told Batton that he needed money and "wanted a little snatch and grab." Payton asked for Batton's help, and Batton drove Payton to pick up the defendant on Sterling Avenue. Stewart, who was with the defendant, also got into the car. From Sterling Avenue, Batton drove the men to the Flat Top Grill. During the drive, Payton did "all the talking." Batton thought that Payton and Stewart were going to do the "snatch and grab," but the defendant also got out of the car. Payton, Stewart, and the defendant entered the Flat Top Grill through a rear entrance. At the time, Batton did not know that any of the individuals possessed a gun and did not see anyone with a mask or bandanna. Batton recalled that Stewart and Payton were wearing some kind of gloves.

¶ 11 After approximately five minutes, Payton, Stewart, and the defendant exited the building and returned to the car. Batton drove the group to "some house" where Payton divided the proceeds of the crime. Batton stated that Payton gave him "a few dollars," and the State impeached Batton with his November 2010 statement to Detective Shawn Curry that he received \$800. Defense counsel objected to the State's impeachment, and the trial court initially sustained the objection, but after a sidebar, allowed the line of questioning to proceed. The State also impeached Batton with his prior statements that: (1) the defendant gave Payton a mask; (2) the defendant and Payton used their socks as gloves; (3) Batton knew either the defendant or Stewart had a black handgun; and (4) Payton, along with the defendant, planned the robbery. Batton generally denied making the statements, but admitted that he had identified Stewart, Payton, and the defendant from photographs during the police interview.

¶ 12 Stewart testified that he had received a plea agreement in exchange for his testimony in the instant case.

¶ 13 In June 2010, Stewart lived with his girlfriend, Lewis, in an apartment on the 2600 block of Wardcliffe Drive. On the night of the incident, Stewart and the defendant ate pizza at the apartment and then scouted a Big Lots store as a possible robbery target. While scouting the Big Lots, Stewart left to use the restroom. When Stewart returned, the defendant was with Payton and Batton. Payton and Batton said they needed help with a robbery, so Stewart and the defendant got into Batton's car. The group then went back to Stewart's apartment, where Stewart retrieved some latex gloves. From the apartment, the defendant suggested getting a mask and a gun, and Batton drove to the south end of Peoria to get the items. Stewart was unsure of the caliber of the gun, but admitted that he told Curry in an interview after his arrest that it was a .40-caliber pistol. Defense counsel objected to the testimony. The trial court overruled the objection

and instructed the jury that it could consider Stewart's prior inconsistent statement only for impeachment of the credibility of the witness.

¶ 14 After retrieving a gun and mask, the group proceeded to the Flat Top Grill. During the drive, Payton explained the details of the robbery. Upon arriving, Stewart put on a mask and latex gloves. Payton and the defendant put their socks over their hands, and Payton had the gun. Payton, Stewart, and the defendant approached the back door, and an employee opened the door to take out the trash. Payton grabbed the employee, searched the employee's pockets, took his cellular telephone, and walked the employee into the cooler. The defendant positioned himself by the back door as a lookout, while Payton went to the front of the restaurant and grabbed another employee and Stewart went to the manager's office to find the safe. The safe was unlocked, and Stewart took four deposit bags from inside the safe. Stewart put the deposit bags, along with the money he removed from the nearby cash register, into a bin. Payton asked Stewart to get the manager and handed the gun to Stewart. Stewart gave the defendant the bin of money and went to get the manager. Stewart searched the manager and put him in the cooler. While Stewart got the manager, the defendant dropped the plastic bin. The defendant picked up the contents and kicked the bin to the side. Stewart told the defendant to pick up the bin because his glove had ripped and his fingerprints could be on the bin. Payton brought the last employee to the cooler, and the defendant gave the money to Stewart and helped Payton push an ice machine against the cooler door. The three individuals then left through the back door and drove to the defendant's house to divide the money. Batton received between \$800 and \$900, and the others got between \$1,300 and \$1,400. Stewart later was arrested after his fingerprint was discovered on a money bag at the scene. After the arrest, the defendant offered to help Stewart hire an attorney.

¶ 15 During Stewart's direct examination, the State impeached Stewart with his statement to Curry that he "handed the gun to [the defendant] because [he] had too much stuff in [his] hands." Stewart remembered making the statement, but maintained that he did not give the gun to the defendant. After a sidebar, the court instructed the jury that the "alleged prior statement that [was] being brought into evidence [was] only to be considered by you as to whether or not the testimony of the witness today [was] credible. It is not to be used as what we call substantive evidence."

¶ 16 Curry testified that after the crime, he learned that a fingerprint discovered at the scene belonged to Stewart. Curry located Stewart in Rock Island County, where Stewart had been arrested on an unrelated charge. Curry initially interviewed Stewart at the Rock Island County jail. After the interview, Stewart confessed to his involvement in the Flat Top Grill robbery. In a second interview, Stewart told Curry that Payton, Batton, and the defendant were also involved in the robbery. Thereafter, arrest warrants were issued for Payton, Batton, and the defendant.

¶ 17 On November 4, 2010, Curry interviewed Batton. Batton stated (1) Payton and the defendant planned the robbery, (2) the defendant gave Payton a mask, (3) the defendant and Payton used their socks as gloves, and (4) Batton knew that either the defendant or Stewart had a black handgun.

¶ 18 In its closing argument, the State argued that the defendant was accountable for the charged offenses. Additionally, the State argued that Batton and Payton reported that the group retrieved masks before the robbery. In rebuttal, the State made several references to the fact that Batton and Stewart's testimony aligned.

¶ 19 The court instructed the jury on the legal theory of accountability and prior inconsistent statements. During deliberations, the jury sent several questions to the court regarding: (1)

Payton's failure to testify; (2) Batton and Stewart's pretrial identification of the defendant; and (3) whether the jurors had to agree on all three counts. Eventually, the jury found the defendant guilty of two counts of armed robbery and one count of burglary. The trial court sentenced the defendant to concurrent terms of 35 years' imprisonment on the two armed robbery charges and 14 years' imprisonment on the burglary charge. In its October 25, 2012, sentencing order, the court ordered the defendant to pay "costs, fees, assessments" and noted that the defendant was eligible for day-for-day credit from February 17, 2011, until the date of his transmittal to the department of corrections.

¶ 20 On October 30, 2012, the defendant filed a motion to reconsider sentence. The motion challenged the length of the defendant's prison sentence and made no mention of the costs imposed. The trial court denied the motion, and the defendant appeals.

¶ 21 ANALYSIS

¶ 22 I. Impeachment

¶ 23 The defendant argues that the State improperly impeached its own witnesses after those witnesses' testimony did not affirmatively damage the State's case. The defendant argues that the erroneous impeachment caused substantial prejudice and was characterized as substantive evidence in the State's closing argument. The State concedes, in part, that the impeachment was erroneous. However, the State argues that Batton was properly impeached with his statement that Payton and the defendant planned the robbery and his statement about the masks and gloves. Alternatively, the State argues that any impeachment error was harmless.

¶ 24 Generally, the credibility of a witness may be attacked by any party, including the party calling the witness. Ill. S. Ct. R. 238 (eff. Apr. 11, 2001). "Such an attack may be accomplished by impeaching the witness with evidence of a prior inconsistent statement." *People v. Cruz*, 162

Ill. 2d 314, 358 (1994). To impeach a witness with a prior inconsistent statement, the witness' testimony must affirmatively damage a party's case and be more than merely disappointing. *Id.* Prior inconsistent statements, except those admitted under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2010)), are not to be treated as substantive evidence. *Cruz*, 162 Ill. 2d 314. "Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed on review unless the trial court has abused its discretion." *Id.* at 331.

¶ 25 Here, the State impeached the testimonies of Batton and Stewart with the witnesses' prior inconsistent statements. However, the preimpeachment testimony of Batton and Stewart did not damage the State's case, which was based on a theory of accountability. The accountability theory required the State to prove that the defendant, either before or during the commission of the offenses, and with the intent to promote or facilitate that commission, solicited, aided, or abetted the others in the planning or commission of the offenses. 720 ILCS 5/5-2(c) (West 2012). The testimonies subjected to impeachment related to the details of the crime but did not refute the defendant's participation in the charged offenses. As a result, the State erroneously impeached its own witnesses. However, we must determine whether this error was harmless.

¶ 26 An error is harmless where there is no reasonable probability that the jury would have acquitted the defendant absent the error. *People v. Sangster*, 2014 IL App (1st) 113457. The defendant has the burden to demonstrate prejudice and to establish that there was a reasonable possibility that the error, in light of all the evidence, was a material factor in his conviction. *People v. Villegas*, 222 Ill. App. 3d 546 (1991).

¶ 27 The defendant argues that the erroneous impeachments were material factors in his conviction. In support of this contention, the defendant contends that the State characterized the

prior inconsistent statements as substantive evidence in its closing and rebuttal arguments and the jury asked several questions during deliberations.

¶ 28 In this case, the impeached testimony was not crucial to the determination of the defendant's guilt, and the evidence that was not subject to the State's erroneous impeachment soundly established the defendant's accountability for the armed robberies and burglary. Factors evincing accountability include: (1) the defendant's presence during the commission of the offense; (2) the defendant's continued close affiliation with other offenders after the commission of the crime; (3) the defendant's failure to report the incident; and (4) the defendant's flight from the scene. *People v. Taylor*, 164 Ill. 2d 131, 141 (1995).

¶ 29 The unimpeached testimony satisfied several of the *Taylor* accountability factors. Batton testified that the defendant exited the car and went into the Flat Top Grill after Payton had explained the details of the proposed crime. Stewart testified that the defendant served as a lookout in the restaurant, helped imprison the employees in the cooler, and carried the money. Stewart also stated that after the crime, the group went to the defendant's home to divide the proceeds. There was no testimony that the defendant reported or attempted to report the incident to the police, and the testimonies of Lewis and Stewart regarding the defendant's postoffense actions evidenced a consciousness of guilt. This evidence was so conclusive that the jury would not have acquitted the defendant in the absence of the erroneously admitted testimony. Consequently, the defendant has not demonstrated that the error was a material factor in his conviction.

¶ 30 II. Costs

¶ 31 The defendant argues that the cause should be remanded for the entry of an order of enumerated costs because the trial court did not order any specific monetary assessments, the

circuit clerk imposed the assessments after posttrial motions, and the calculations are subject to multiple errors. The State concedes that the cause should be remanded. We review the imposition of the defendant's fines and fees *de novo*. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 32 After reviewing the record, we find that the instant case is factually similar to *People v. Hunter*, 2014 IL App (3d) 120552. In *Hunter*, a written order assessing the specific costs was entered after the defendant had filed his motion to reconsider sentence, and the defendant was denied an opportunity to challenge the costs in his postsentencing motion. As a result, we remanded the cause to the trial court with directions to review and correct the costs summarized in the circuit clerk's cost sheet and incorporate the correct amount of all financial charges into a written order identifying the amount and nature of each charge.

¶ 33 In the present case, the trial court entered a sentencing order on October 25, 2012, that ordered the defendant to pay cost, fees, and assessments. The order did not specify which assessments were imposed. On October 30, 2012, the defendant filed a motion to reconsider sentence that challenged his prison sentence but did not contest the costs. A case payments sheet, dated January 7, 2013, and appended to the defendant's brief, states the defendant owed \$1,532.20 in costs. Without a specific cost order in the record, the defendant was unable to challenge the imposition of any fines or fees. As a result, consistent with our decision in *Hunter*, we vacate the defendant's fines and fees and remand the cause to the trial court for (1) an order specifically imposing any fines with appropriate statutory authority and (2) reimposition and calculation of the fees imposed.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Peoria County is affirmed in part and reversed in part, and the cause is remanded with directions.

¶ 36 Affirmed in part and reversed in part; cause remanded with directions.

¶ 37 JUSTICE MCDADE, specially concurring.

¶ 38 The majority has held that the State erroneously impeached its own witnesses but that the error is harmless. As the majority sets out, on review we are charged with determining, based on reasonable probability, whether the jury would have acquitted the defendant absent the error. *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 68. This probability is assessed by 1) focusing on the error to determine whether it might have contributed to the conviction, 2) examining other evidence in the case to see if overwhelming evidence supports the conviction, and 3) determining whether the evidence is cumulative - that is, if it merely duplicates properly admitted evidence. *People v. Wilkerson*, 87 Ill.2d 151, 157 (1981). The majority has concluded that there was enough evidence for the jury to convict the defendant even without the improperly admitted evidence. Given our standard of review I would concur with that conclusion and therefore, in the decision.

¶ 39 There is overwhelming evidence supporting the defendant's conviction based on the State's theory of accountability absent the improper impeachment testimony. See *People v. Taylor*, 164 Ill. 2d 131, 141 (1995). The other portions of testimony from both impeached witnesses put Moore at the scene of the robbery, fleeing from it, in later company with others who committed it and failing to report it. In sum, all of the facts necessary to convict based on accountability were properly established without the improper testimony.

¶ 40 I write separately, however, to point out that the error of the improper impeachment, its subsequent substantive use, and the court's failure to give instructions to the jury regarding its limited usage, though not dispositive this time, was far from harmless, and may be dispositive next time. Such errors need to be avoided rather than merely corrected or excused.

The risks attend to impeachment testimony have long been recognized by Illinois courts:

“ ‘While we have recognized the necessity for, and permitted the use of, contradictory *** statements for impeachment, we have also recognized the danger that the out-of-court statement may be taken by the jury as substantive testimony in place of the statement on the stand. *** Accordingly, this court has refused to allow a conviction to be based solely on unsworn statements by witnesses ***, or to permit such unsworn statements to be offered virtually for the purpose of using them as testimony. ***. And, to lessen the risk of the properly admitted prior inconsistent statement of a witness being considered by the jury as testimony, this court has required that the impeachment not be repetitious *** and that the jury be clearly cautioned and instructed to limit its consideration of such evidence for its proper purpose.’ ”
(Citations omitted). *People v. Coleman*, 17 Ill. App. 3d 421, 430 (1974) (quoting *People v. Paradise*, 30 Ill.2d 381, 384 (1964)).

Based on the record before us, I believe the improper testimony in the instant case had a substantive impact on the jurors’ verdict despite the likelihood that the defendant would have been convicted without it.

The State’s use of improper impeachment testimony during direct examination of the witnesses and its availability for use as substantive evidence goes directly against the only purpose of such evidence - impeachment of the witnesses’ credibility. *Coleman*, 17 Ill. App. at 430. To be admissible as impeachment, a prior inconsistent statement must truly be inconsistent

with the trial testimony and must deal with a matter that is more than collateral. *People v. Crowe*, 327 Ill. App. 3d 930, 938 (2002), rehearing denied (citing *People v. Wilson*, 302 Ill. App. 3d 499, 511 (1998)). Here the State has conceded that the impeachment testimony regarding the amount of money Batton was paid and Stewart's testimony as to the caliber of the gun was collateral. It then weakly argues that Stewart's impeached testimony about handing Moore the gun and Batton's statements of Moore's knowledge and additional steps in the robbery are both relevant to its theory of accountability and offered as a presumptive strike against to Moore's *possible* testimony to the contrary. Although the State notes that it could have admitted Stewart's impeached testimony as substantive if it had wanted to under Section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2012)) because it was a videotaped statement, it did not do so. Thus, it is still nothing more than impeachment testimony that should not be used as substantive evidence.

¶ 43 The argument proffered by the defense is more persuasive. The State used improper impeachment testimony of both witnesses to align the witnesses' stories to solidify and emphasize Moore's presence at the scene of the robbery in anticipation of Moore's defensive strategy and not for its singular purpose of impeaching the credibility of the witnesses. As the State clearly noted, the testimony of both witnesses, absent the impeachment portion, places Moore with the other offenders before, during and after the robbery, which was enough to prove their theory of accountability. The impeachment testimony was not only collateral, it served no evidentiary purpose.

¶ 44 This offensive bolstering of the State's theory with improper impeachment testimony is then exacerbated by the court's failure to give the proper instructions regarding the use of the improper impeachment testimony and its limitations. Though the court remembered to do so for

Stewart, its admonishment did not stop the State from adding substantive weight to the improper impeachment testimony by actually repeating it during closing and rebuttal arguments. Moore's possession of the gun, his share of the money, and use of gloves that was revealed to the jury through the impeachment testimony only served to reinforce the State's claim of Moore's involvement in the robbery and did not properly discredit the credibility of the witnesses. This alone could have convinced the jurors that they too should consider the additional information gained from the impeachment testimony for more than just assessing witness credibility.

¶ 45 It is clear that the State wanted the jury to rely on the improper testimony of Batton and Stewart connecting Moore because the prosecutor repeated it in closing and rebuttal argument with the robbery. It is also clear, as evidenced by their questions during deliberation that the jury did in fact rely. It is also clear that there is overwhelming testimony from both witnesses absent the improperly impeached testimony to support a conviction. What is not clear is just how much weight the jury placed upon the improper impeachment testimony of both witnesses. Nonetheless, the improper testimony, its further erroneous repetition by the State, and the lack of limiting instructions regarding it, violates clear rules, perverts the fundamental purpose of impeachment testimony, and flies in the face of our principles of justice and innate fairness.