2014 IL App (3d) 130230-U

Order filed December 31, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0230 Circuit No. 10-CF-2469
CHAKARIS R. EVANS,	)	The Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial counsel was not ineffective for failing to object to the admission of certain evidence.
(2) Defendant's claim that the trial court erred in admitting exhibit 18 is barred by the doctrine of invited error.
(3) The trial court did not err in considering exhibits 15, 16 and 17 as substantive evidence.
(4) The evidence was sufficient to prove defendant guilty beyond a reasonable doubt.
(5) Defendant's 20-year sentence for the offense of home invasion was not excessive.

¶ 2 Defendant, Chakaris Evans, was charged with two counts of home invasion (720 ILCS 5/12-11(a)(1) & (a)(2) (West 2010)), one count of residential burglary (720 ILCS 5/19-3(a) (West 2010)), one count of aggravated battery of a senior citizen (720 ILCS 5/12-4.6 (West 2010)), one count of aggravated battery (720 ILCS 5/12-4(b)(1) (West 2010)) and two counts of aggravated identity theft (720 ILCS 5/16G-20(a)(1) (West 2010)). He was convicted of home invasion, residential burglary, and aggravated battery, and sentenced to 20 years in the Department of Corrections on the count of home invasion. He appeals, claiming that (1) trial counsel was ineffective in allowing the admission of People's Exhibits Nos. 15 through 18 without objection, (2) the trial court erred in admitting People's Exhibit No. 18 and considering People's Exhibits Nos. 15 through 17 as substantive evidence, (3) the evidence was insufficient to prove him guilty beyond a reasonable doubt, and (4) his sentence was excessive. We affirm.

¶ 3 At trial, Paul Evans testified that he lived in Crete, Illinois. On July 2, 2010, around 7 a.m., a young man rang the doorbell to his home. Paul got up and answered it. The young man said he had a book bag for his grandson, Pierre, and asked if he could leave it at the house. He asked Paul if he could open the door. When Paul opened the door, three masked men ran into the house and knocked Paul down. Two of the men had bats, and they began beating him. The two men with bats then ran down the hallway to the bedroom. Paul's wife was in the bedroom and had locked the door. Paul heard a loud noise when they broke down the door. After a few minutes, the two men carrying the baseball bats emerged from the bedroom and ran out the front door. Paul could not identify any of the attackers.

¶ 4 Queenesther Evans testified that she heard her husband screaming "why are you doing this" shortly after the men broke into her house. She was in the bathroom, and she ran into the bedroom and locked the door. She tried to call 911, but her phone wouldn't respond. She pulled

her gun out of the drawer next to her bed, but she was afraid to use it. Two men wearing hoodies and ski masks broke into the bedroom. They took her "netbook," her iPhone and her purse. One of the men hit her on the hand with the bat and grabbed her gun.

¶ 5 Queenesther identified several pictures of the house depicting damage to the front door and the bedroom door. She also identified pictures showing an aluminum bat that had been discarded in the mulch just outside her front door, a latex glove on the bed that was left behind by one of the men, and a roll of tape that the one of them left on a stand in the bedroom.

¶ 6 Rashid McCarthy testified that he knew defendant from high school. McCarthy faced the same charges as the other three co-defendants. He stated that the State agreed to accept his plea of guilty to misdemeanor theft in exchange for his truthful testimony at defendant's trial.

¶ 7 McCarthy testified that around 4 a.m. on July 2, 2010, defendant called him and asked for a ride. McCarthy drove to defendant's house and picked up Paul Evans (the victim's grandson), Jeffery Burks and defendant and drove them to Evans' grandfather's house in Crete. Evans brought a baseball bat with him. Evans gave McCarthy directions to his grandfather's house as McCarthy drove. McCarthy testified that he did not know about the plan to rob Evans' grandfather until he overheard Evans and defendant talking about it on the way to Crete. When they arrived at Evan's grandfather's house, Burks stayed in the car. McCarthy, Evans and defendant walked up to the front door. Evans rang the doorbell, and when Paul opened the door, all three of the men entered the home. They were all wearing masks. Evans and defendant were wearing "doctor" gloves. McCarthy saw Evans striking Paul Evans with the baseball bat. Evans and defendant went into the bedroom. McCarthy testified that he went back to the car. Then Burks, defendant and Evans came out of the house carrying a laptop and some other stuff. He could not remember if anyone else had a baseball bat. After further questioning, he remembered

making a statement to detectives on April 23, 2012, in which he said that defendant left his baseball bat at the residence. McCarthy then testified that upon leaving Crete, the four of them drove to Burlington Coat Factory in Chicago.

¶ 8 On cross-examination, McCarthy testified that Burks came into the house a few minutes after everything "went down." He also said that Evans walked up to the door when they got to Crete with a mask on and that defendant was "right behind him." He testified that all three of them had masks on.

¶ 9 McCarthy also admitted that he gave a statement to two police officers in April of 2012. Defense counsel asked: "In that statement, did you tell them [defendant] went to the door without a mask." McCarthy responded, "No." Defense counsel then asked, "Did you tell them that he was by himself when he went up on the porch." McCarthy again responded, "No."

¶ 10 Evans testified that he is not related to defendant and that Paul Evans is his grandfather. He testified that he, Burks and McCarthy went to his grandfather's house on July 2, 2010, to steal a few things and get some money. He testified that the three of them went to the front door, and when his grandfather opened the door, they pushed their way in. No one was wearing a mask until they got inside the house. He then stated that he was the only perpetrator that went into the bedroom. His grandmother had a gun. Evans took the gun from his grandmother. He then grabbed her purse, an iPhone and the laptop and ran out of the house. He denied that defendant was involved in the crimes.

¶ 11 Evans then testified that after they left the house, they went to Chicago and picked up defendant. Evans and defendant went to Burlington Coat Factory and used the credit cards from his grandmother's purse to purchase clothes.

¶ 12 Evans acknowledged that he is serving a 12-year prison sentence for his participation in the events of that morning. He admitted that he talked to two police officers on November 16, 2010, and told them that defendant was with him when they robbed his grandparents. He claimed that he told the investigators defendant was with him because "that is what they wanted to hear." He maintained that he recounted the real story before the officers recorded anything and that the officers lied. He went along with the officers' story because he wanted to leave.

¶ 13 Jeffery Burks testified that he was sentenced to 6 years and was serving 85% for his involvement in the crimes committed on July 2, 2010. He testified that only he, Evans and McCarthy went to the house in Crete. Burks stated that it was Evans' idea to rob his grandparents. After they broke into the house, they drove back to Chicago. He testified that the only thing the three men took from the house was a credit card. As they drove away from the house, McCarthy was driving and the only other people in the car were Evans and himself.

¶ 14 Burks testified that he was the one who used the credit card at Burlington Coat Factory. He claimed that Evans and McCarthy went along with him to purchase the clothing but denied that defendant was present. He claimed that a credit card was the only item taken from the Evans' home. He testified that no one had a baseball bat when they went into the house. He remembered speaking with investigators on November 17, 2010, but he could not remember anything that was discussed. The prosecutor then asked if Burks remembered several specific questions. Burks responded, "No," to all of them. Burks then testified that the officers supplied him with defendant's name and coerced him into naming defendant as one of the offenders.

¶ 15 Detective James Zdzinicki testified that he is an investigator with the Will County Sheriff's office. On November 16, 2010, he interviewed Paul Evans, and on November 17, 2010, he interviewed Jeffery Burks in relation to the incident that occurred at the Evans' home on July

2, 2010. Officer Dean Morelli was also present. Zdzinicki testified that during the interviews he handed Burks and Evans a photo of defendant to identify. Without suggestion from Zdzinicki, both Evans and Burks gave defendant's name as the identity of the man in the photo.

¶ 16 Zdzinicki then identified People's Exhibit No. 18, as surveillance footage from Burlington Coat Factory and said that it was a true and accurate copy of surveillance from that store from 10:15 a.m. to 10:20 a.m. Exhibit 18 was then admitted into evidence without objection. The video shows two separate transactions. During the first transaction, a man in a red ball cap uses a credit card and cash to purchase two items. In the next transaction, two different men use a credit card to purchase numerous articles of clothing.

¶ 17 At the close of the State's case, the following discussion occurred:

> "PROSECUTOR: Judge, I will offer a stipulation to the defense. And that is items marked as People's 15, 16, 17. People's 15 is a true and accurate copy of the Will County Sheriff's Police interview of Jeffery Burks which was conducted on November 17, 2010, starting at 5:00 o'clock in the evening.
>
> And People's 16 is a true and accurate copy of the Will County Sheriff's Police interview with Paul Evans, and that was conducted on November 16, 2010, starting at 5:13 in the evening.
>
> And People's 17 is a true and accurate copy of the Will County Sheriff's Police interview with Rashid McCarthy, and that occurred on April 23, 2012, at 9:00 o'clock a.m.
>
> And I believe by agreement of the parties would seek to admit them to perfect impeachment. Both parties laid foundation for impeachment with Rashid

McCarthy. And the People seek to admit them to perfect impeachment with Paul Evans and Jeffery Burks.

THE COURT: So stipulated?

DEFENSE ATTY: We will stipulate to that, Judge.

THE COURT: Okay.

PROSECUTOR: With that, we move that People's 1 through 18 be admitted into evidence.

THE COURT: 1 through 11 are all photographs. 12 is the glove. 13, the tape. And 14, the bat. Any objection?

DEFENSE ATTY: No objection, Judge.

THE COURT: They are all admitted without objection.

PROSECUTOR: Judge, as necessary, publish them to the trier of fact. And I think what we will have to do then is for the impeachment, we will have to recess enough time for the Court to review the evidence."

¶ 18 People's Exhibits Nos. 15-17 are the videotaped interviews of the three co-defendants. On the videotapes, all three state that defendant was present in the car as they drove to Crete. They further state that defendant participated in the home invasion and burglary, that he returned to Chicago with the group and that he purchased several items at Burlington Coat Factory using cash and credit cards taken from Queenesther's purse. They are then asked to identify defendant from a photo. They name defendant as the man in the photo, and they again state that defendant was involved in the home invasion and burglary of the house in Crete.

¶ 19 After the exhibits were admitted, defense counsel moved for a directed verdict. The trial court denied the motion for a directed verdict as to counts I through V, but granted the motion as

to counts VI and VII, the charges of identity theft. In denying the motion on counts I through V, the court found that the co-defendants' videotaped statements were not coerced. The court noted that "[t]here was absolutely nothing to indicate there was any stress or threat of any kind or they were told what to say."

¶ 20 Immediately after the court ruled on defendant's motion, both parties presented closing arguments. The trial court found defendant guilty of counts I through V and not guilty of counts VI and VII. Defendant's motion to reconsider was denied.

¶ 21 At the conclusion of the sentencing hearing, the court found that counts I, III, IV and V merged into the charge of home invasion as alleged in count II of the indictment and sentenced defendant to 20 years in prison. Defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 22 ANALYSIS

¶ 23 I

¶ 24 Defendant argues that the trial court erred in admitting the surveillance video into evidence because the State failed to lay a proper foundation.

¶ 25 Under the doctrine of invited error, a defendant is barred from claiming error in the admission of improper evidence where the defendant procured, invited, or acquiesced to the admission. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). An accused may not ask the trial court to proceed in a certain manner and then contend on appeal that the ruling was error. *Id.* A defendant's agreement to the procedure later challenged on appeal "goes beyond mere waiver." *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). To allow a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal would offend notions of fair play and encourage defendants to become duplicitous. *Id.* It also deprives the State of the

opportunity to cure the alleged defect. *People v. Bush*, 214 Ill. 2d 318, 332 (2005). Plain error review is forfeited when the defendant invited the error. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17.

¶ 26 Here, defense counsel did not object to the admission of the surveillance video from Burlington Coat Factory; he agreed to the use of the video as substantive evidence. The question of an objection to the video was posed by the trial court, and defense counsel expressly indicated that he had no objection. Moreover, on cross-examination, defense counsel specifically questioned Officer Zdzinicki regarding the surveillance video. Where, as here, a party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced by the admission. In this case, defendant invited the error and cannot use it to obtain a reversal on appeal. See *Harding*, 2012 IL App (2d) 101011, ¶ 17 (defendant was estopped from raising the issue as plain error where he invited the error).

¶ 27 Additionally, we note that defendant's claim of ineffective assistance is unconvincing. The decision not to object to the admission of the surveillance video was trial strategy and we cannot say that, had the trial court sustained an objection and excluded the video, there is a reasonable probability the outcome of the trial would have been different. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶ 28 II

¶ 29 Next, defendant argues that the co-defendants' videotaped interviews were admitted for impeachment purposes only and that the trial court abused its discretion in considering them as substantive evidence.

¶ 30 Prior inconsistent statements may be admissible both for impeachment purposes and as substantive evidence. *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 60. Substantive evidence

in the form of prior inconsistent statements that satisfies section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 115-10.1 (West 2012)) may be considered by the trier of fact no differently than direct testimony by a witness. *People v. Santiago*, 409 Ill. App. 3d 927 (2011).

¶ 31 Section 115-10.1 of the Code states:

> "In all criminal cases, evidence of a statement by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement-
>
> (1) was made under oath at a trial, hearing, or other proceedings, or
>
> (2) narrates, describes or explains an event or condition of which the witness has personal knowledge, and
>
> * * *
>
> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2012).

Illinois Rules of Evidence 801(d) was adopted in January 2011 to include the language contained in section 115-10.1 of the Code. Rule 801(d)(1) also allows prior inconsistent statements to be admitted substantively into evidence where the witness testifies at trial and where the prior statement narrates or describes an event and is proved to have been accurately recorded by a videotape recording. See Ill. R. Evid. 801(d)(1) (eff. Jan. 1, 2011).

¶ 32 In this case, the record shows that the co-defendants' prior statements were properly admitted for impeachment purposes. McCarthy, Evans and Burks testified that they gave prior statements to police investigators at the Will County sheriff's office. McCarthy testified that he was interviewed by investigators on April 23, 2012, Evans stated that he was interviewed at the Will County sheriff's office on November 16, 2010, around 5 p.m., and Burks testified that investigators interviewed him on November 17, 2010, at approximately 5 p.m. The time and date imprinted on the recordings corresponds with their testimony. Detective Zdzinicki also testified that he interviewed Evans and Burks on November 16 and 17, 2010, and that he recorded their statements in the presence of another officer. At trial, McCarthy denied telling the investigators that defendant went to the door without a mask, and Evans and Burks either denied or claimed they could not remember telling Zdzinicki that defendant was involved in any part of the offenses committed at the Evans home. Where Evans and Burks claimed that they could not remember giving statements to Detective Zdzinicki that implicated defendant in the home invasion, residential burglary and aggravated battery, the trial court did not err in admitting the videotaped statements for impeachment purposes. Moreover, since the videotaped statements were inconsistent with the witnesses' trial testimony and proved to have been accurately recorded by a videotape recording, the trial court did not abuse its discretion in admitted the exhibits as substantive evidence under section 115-10.1 of the Code and Rule 801(d)(1).

¶ 33 III

¶ 34 Defendant contends that trial counsel was ineffective in allowing the admission of the videotaped interviews and then using those exhibits as substantive evidence in closing argument.

¶ 35 Ineffective assistance of counsel claims are measured against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, a

defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88, 694; see also *People v. Edwards*, 195 Ill. 2d 142, 162-63 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 36 As to the first prong, counsel's deficient performance, defense counsel's failure to object to the substantive admission of all three videotaped statements was unreasonable. These exhibits completely undermined two of the witnesses' testimony that defendant was not involved in the crimes committed at the Evans home on July 2, 2010. Counsel's argument in closing that the recorded statements were coerced further compounded the error.

¶ 37 Nevertheless, defendant has failed to establish that counsel's deficient performance resulted in prejudice. As we have previously discussed, the exhibits were properly admissible as substantive evidence under Rule 801(d) and section 115/10.1 of the Criminal Code. See Ill. R. Evid. 801 (eff. Jan. 1, 2011); 725 ILCS 5/115-10.1 (West 2012). Thus, even if counsel had objected to the substantive admission of the prior inconsistent statements, it is not reasonably probable that the result of the proceeding would have been different. Therefore, defendant cannot establish the required prejudice to sustain his ineffective assistance of counsel claim. See *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 76

¶ 38 IV

¶ 39 Defendant also claims that the evidence was insufficient to prove him guilty beyond a reasonable doubt.

¶ 40 In a bench trial, the trial court has the responsibility to assess the credibility of the witnesses, to weigh the evidence and draw reasonable inferences, and to resolve any conflicts in

the testimony. *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 62. It follows that where the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. *People v. Young*, 128 Ill. 2d 1, 49 (1989). In conducting this inquiry, the reviewing court should not retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The reviewing court must examine the record while bearing in mind that it was the fact finder who saw and heard the witness. *Id*. Testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict. *Id*. It may be found insufficient only where the record compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. See *Id*. at 545 (no reasonable person could find the witness' testimony credible); *People v. Schott*, 145 Ill.2d 188, 206-07 (1991) (witness so lacked credibility that a reasonable doubt of defendant's guilt remains).

¶ 41 Defendant argues that the only properly admitted evidence which suggested his involvement in the offenses in this case was the testimony of McCarthy, an incredible witness. Although McCarthy tried to minimize his own involvement in the crime, his trial testimony was credible. He testified that he, defendant and two other men went to the house in Crete, that defendant and Evans approached the front porch of the house, that they entered the home after Paul Evans opened the door, that Evans struck Paul Evans with a bat, and that defendant left his bat at the residence. Moreover, the record does not indicate that the plea agreement undermined McCarthy's credibility. On direct examination, he readily admitted that he plead guilty to misdemeanor theft in exchange for his truthful testimony at trial. Defense counsel thoroughly cross-examined him and clearly attempted to demonstrate that he was not credible. His credibility was for the trier of fact to determine.

¶ 42 In addition, Evans' and Burks' prior statements supported the trial court's finding of guilt. They testified that defendant was not involved in the home invasion on July 2, 2010; but their testimony was inconsistent with their prior statements to investigators that defendant rode in the car with them to Crete, hit Paul Evans with a bat, entered the couple's bedroom by force, struggled with Queenesther, and removed several items from the home. Thus, the trial court did not err in finding defendant guilty beyond a reasonable doubt of the first five counts of the indictment.

¶ 43 V

¶ 44 Last, defendant claims that his sentence is excessive because (1) the trial court used the "particularly disturbing" nature of the offense, a factor implicit in the elements of the offense, as an aggravating factor in sentencing, and (2) it is disparate from his similarly situated co-defendants who received lesser sentences.

¶ 45 A. Improper Use of Factors

¶ 46 Generally, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense. *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed. *Id*.

¶ 47 At sentencing, the court stated that he found this case "particularly disturbing" and sentenced defendant to 20 years in prison. The record indicates that the trial court found this case disturbing because of its unique circumstances, that a group of young men broke into the home of the grandparents of one of the men to commit a burglary. That factor is not implicit in

the offenses of home invasion or residential burglary. We find no evidence that the dual use of a single factor occurred in this case.

¶ 48 B. Disparity of Sentences

¶ 49 A reasoned judgment as to the proper sentence must be based on the circumstances of each individual case and depends on such factors as the defendant's demeanor, age, habits, mentality, credibility and social environment. *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). Arbitrary and unreasonable disparity between the sentences of similarly situated co-defendants is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). However, a disparity of sentences will not be disturbed where it is warranted by differences in the nature and extent of the co-defendants' participation in the offense. *Id.*

¶ 50 Here, the court observed that it had discretion to sentence defendant to an extended term of 60 years in prison. See 730 ILCS 5/5-8-2(a) (West 2010); 730 ILCS 5/5-5-3.2(a)(8) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Although the court believed it would be justified in doing so, the court did not sentence defendant to the maximum term because of his minimal criminal history. The 20 year sentence imposed is well within the 60-year range.

¶ 51 Defendant maintains that he is similarly situated to defendant Evans' case, who only received 12 years in prison. The record does not indicate what crime Evans was convicted of, whether he pled guilty, or whether the judge considered other mitigating factors not present here. Thus, the record contains no basis to determine what factors were used to impose Evans' sentence that would provide grounds to examine any disparity in the sentences. See *People v. Hennon*, 228 Ill. App. 3d 759, 768-69 (1992). Therefore, a reasonable comparison of the sentences cannot be made.

¶ 52 CONCLUSION

¶ 53 The judgment of the circuit court of Will County is affirmed.

¶ 54 Affirmed.