2018 IL App (3d) 150567-U

Order filed September 24, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0567 Circuit No. 14-CF-960
MELVIN D. TURNER,	)	Honorable John P. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) Victim's statement to officer was properly admitted to describe the course of the investigation, and any error was harmless.
(2) Trial court erred in overruling defendant's objection to IPI Criminal No. 3.01.

¶ 2 Defendant, Melvin D. Turner, was convicted of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)) for discharging a firearm in the direction of his ex-girlfriend and sentenced to eight years in prison. He appeals, arguing that (1) the trial court erred in admitting the victim's statement under the "course of investigation" exception to the hearsay

rule, (2) the trial court erred in overruling his objection to Illinois Pattern Jury Instructions, Criminal, No. 3.01 (approved October 17, 2014) (hereinafter IPI Criminal No. 3.01), and (3) the case should be remanded for a *Krankel* hearing. Because the trial court erred in giving IPI Criminal No. 3.01, we reverse and remand for a new trial.

¶ 3 At trial, the evidence showed that on December 14, 2014, Turner called 911 to report a confrontation with his ex-girlfriend, Alisha Dean. Officer Tim Wright testified that he was one of the first officers to respond to the scene. He saw defendant walking away from the scene as he pulled up to the sidewalk. As he exited his vehicle, Dean ran toward him. Wright described Dean's demeanor as "pretty hysterical." He testified that "[a]s soon as she saw me, she started screaming that he had a gun and fired at her." Dean then pointed to the apartment building and told the officers that defendant ran into apartment 104. Defense counsel immediately objected, claiming that Wright's testimony was hearsay. The prosecutor stated that it was admissible to show the officer's actions, and the trial court overruled the objection.

¶ 4 Wright testified that he and other officers knocked on the door of apartment 104. Hazel Turner, defendant's mother, answered the door and allowed the officers to enter. They saw defendant standing next to the counter in the kitchen. Defendant turned and ran through the dining room and went out the front door. As Wright followed him, he found another man standing in the dining room and instructed his partner to detain him as he continued after defendant. As defendant ran out the front door, other officers who had arrived at the scene detained him. The other man found in the dining room was later identified as Rickey Smallie.

¶ 5 After detaining both men outside, the officers returned to the apartment. Officer Wright testified that they requested and obtained permission from Hazel to search the premises. During the search, officers found a .22 caliber revolver in a drawer next to the kitchen counter where

defendant was standing. The revolver had one empty chamber and five spent cartridges. Two BB guns were also found in another room of the apartment. Hazel testified that the drawer where the revolver was found was her "junk drawer." She opened it every day. The revolver was not in the drawer when she went to bed the night before. Hazel thought the BB guns belonged to her other son. He often stayed with her and kept his things at her house. Defendant also kept clothes at her house. Both sons had keys to her apartment.

¶ 6 Across the street from where the police first saw Dean, a bullet hole was found in a side panel of a parked vehicle. The owner testified that the vehicle was not operational and had been parked on the street for at least 24 hours.

¶ 7 Detective Amanda Chalus interviewed defendant at the Peoria County jail. She gave defendant his *Miranda* rights verbally. Defendant told her that he and Smallie went to his mother's apartment complex to meet two women. While the two women were driving to the apartment, they called defendant and told him that Dean was following them. Defendant saw Dean's vehicle cut off the other women's car. Dean then got out of her car and approached defendant, waiving a knife. That's when defendant called 911. When the police arrived, defendant and Smallie headed to his mother's apartment to avoid Dean. He denied possessing a firearm that night.

¶ 8 Detective Chalus asked defendant if his fingerprints would be on the revolver officers found in the apartment. Defendant said that his prints would be on the gun because he found it in his mother's apartment two weeks earlier. He also told Chalus that the gun would have five spent cartridges in it. Chalus acknowledged that defendant's statement was not recorded or written. The parties stipulated to defendant's prior felony conviction, and the State rested.

¶ 9 At the jury instruction conference, the State advanced a theory of guilt based on actual possession rather than constructive possession, pointing to defendant's statement to Chalus that he found the revolver two weeks earlier. It then tendered IPI Criminal No. 3.01, which states that the prosecution does not have to prove a specific date of the offense. Defense counsel objected to the instruction, and the court overruled defendant's objection.

¶ 10 During closing argument, the State relied on defendant's statement to Detective Chalus, admitting that he possessed the firearm two weeks before the November 14th incident. The State also relied on Dean's statement to the officers who first responded to the scene on November 14, 2014, that defendant fired the gun at her. The jury acquitted defendant of aggravated discharge but found him guilty of unlawful possession of a weapon by a felon.

¶ 11 On May 19, 2015, the court received a letter from defendant listing several deficiencies in counsel's performance at trial. Specifically, the letter complained that counsel should have called Dean and Smallie to testify. The letter referred to an affidavit executed by Dean but did not include the affidavit or describe its contents.

¶ 12 On June 18, 2015, defense counsel filed a motion for a new trial. Among other things, counsel argued that defendant's conviction should be reversed based on reasonable doubt and that the trial court erred in overruling the objection to IPI Criminal No. 3.01.

¶ 13 The same day, the trial court conducted a hearing on both defendant's letter and counsel's motion. The trial court denied the *pro se* motion and defense counsel motion for a new trial. In its written order, the court found that IPI Criminal No. 3.01 was properly tendered to the jury and that counsel could have proposed further instructions but had not done so.

¶ 14 Following a sentencing hearing, the trial court sentenced defendant to eight years in prison. One week later, defendant sent a letter to the court complaining that counsel was

ineffective. Defendant denied that he had ever seen the revolver found in the drawer and claimed that his statement to the detective had been referring to one of the BB guns, not the revolver.

¶ 15 ANALYSIS

¶ 16 I. Admission of Out-of-Court Statement

¶ 17 Defendant first argues that the trial court erred in admitting Dean's statement to Officer Wright under the "course of investigation" exception to the hearsay rule and failed to limit the jury's use of her statement.

¶ 18 The Illinois Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Hearsay is generally inadmissible, except in those circumstances in which the rules of evidence dictate otherwise. Ill. R. Evid. 802 (eff. Jan. 1, 2011).

¶ 19 Under the definition provided in Illinois Rules of Evidence 801(c), it is axiomatic that an out-of-court statement that is offered into evidence for reasons other than to prove the truth of the matter asserted is not hearsay. See Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). For example, an otherwise inadmissible statement may be admissible to show the effect of the statement on the listener. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008) ("an out-of-court statement offered to prove its effect on a listener's mind or to show why the listener subsequently acted as he did is not hearsay and is admissible"). A statement offered to prove its effect on the listener's state of mind or to show why the listener subsequently acted as he or she did is not hearsay. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106 (2009). As such, an out-of-court statement is admissible where it is offered to show the course of a police investigation and the statement is

necessary to explain the State's case. *People v. Simms*, 143 Ill. 2d 154, 174 (1991). Thus, an officer may testify to investigatory procedures, including the existence of conversations, without violating the hearsay rule. *People v. Jones*, 153 Ill. 2d 155, 159-60 (1992). Some courts have referred to this type of statement as a "course-of-investigation" exception to the rule against hearsay. See e.g. *In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 23. More accurately stated, this type of statement "is not an exception, but rather it is not hearsay in the first place." *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 177.

¶ 20 Here, the challenged testimony was not hearsay because it was not introduced for the truth of what Dean said to the officers, but it explained why the officers searched for and questioned defendant. Before the officers arrived at the scene, they were unaware of the allegation that defendant was wielding a weapon. Dean's statement explained to the jury how the officers came to suspect that defendant possessed a handgun and why he ran into his mother's apartment. The officer's testimony elicited by the prosecutor described the events leading up to the discovery of the gun in Hazel Turner's kitchen. His conversation with Dean was therefore admissible to show the course of his investigation.

¶ 21 Defendant argues that Officer Wright's testimony exceeds testimony admitted in other cases because Wright testified to the substance of Dean's statement. Defendant cites *People v. Gacho*, 122 Ill. 2d 221 (1988), in support of his argument that testimony about the steps of an investigation may not include the substance of a conversation with a non-testifying witness. We find *Gacho* distinguishable.

¶ 22 In *Gacho*, the substance of the conversation was directly related to the charge for which defendant was convicted. *Gacho*, 122 Ill. 2d at 247-48. There, the defendant was convicted of murder, aggravated kidnapping and armed robbery. At trial, a police officer testified to a

conversation he had with the victim in which the victim identified the defendant as the shooter. The court found that use of the substance of the conversation with the victim would have been objectionable as inadmissible hearsay. The court reasoned that if the substance of the conversation came into evidence, it would go to prove the heart of the matter asserted and was directly related to the charges for which defendant was convicted. *Id.* at 248. Here, Wright's testimony that Dean ran toward him screaming that defendant had a gun and had fired it at her was not used as substantive evidence to prove the charge for which defendant was convicted, i.e., possession of a weapon by a felon. Thus, while the substance of the conversation may have been inadmissible hearsay regarding aggravated discharge of a weapon by a felon, Wright's testimony was properly admitted to show the steps of the investigation that lead to the charge in count II.

¶ 23 Even if we assume the admission of Dean's statement to Officer Wright was error, the admission is still subject to harmless error scrutiny. See *Henderson*, 2016 IL App (1st) 142259, ¶¶ 181-182 (error does not require reversal under the rule against hearsay if the error was harmless beyond a reasonable doubt). "The test is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained." *People v. Stechly*, 225 Ill. 2d 246, 304 (2007).

¶ 24 Here, any error in the admission of the challenged statement was harmless. As noted, defendant was not convicted of aggravated discharge of a weapon by a felon. Had the jury considered the substance of Dean's exclamation and considered it for the truth of the matter she asserted, a finding of guilt on the charge of aggravated discharge of a weapon would have resulted. Instead, the jury acquitted defendant of that charge, finding him not guilty of count I but guilty of count II. The jury considered the testimony as a description of the officer's investigation based on his conversation with Dean. It did not believe Dean's accusation that

defendant fired the revolver at her to be true. In light of the jury's verdict acquitting defendant of aggravated discharge of a weapon, it appears beyond a reasonable doubt that any error regarding the admission of Dean's statement did not contribute to the verdict.

¶ 25 II. Use of IPI Criminal No. 3.01

¶ 26 Next, defendant contends that the trial court erred in giving IPI Criminal No. 3.01. Defendant argues that the trial court should have sustained defense counsel's objection to giving a jury instruction that allowed the jury to convict him based on an alleged, but uncharged, firearm possession when there was no true variance in the proofs and when giving the instruction prejudiced the preparation of his defense.

¶ 27 Generally, the State is not bound to prove that the offenses were committed on a particular date stated in the bill of particulars or in the grand jury indictment. *People v. Stawbridge*, 404 Ill. App. 3d 460, 465 (2010). " 'It is the general rule of law that the date alleged in the indictment is not material, and that it is sufficient if the prosecution proves that the offense charged was committed at any time within the period of the statute of limitations ***.' " People *v. Neumann*, 76 Ill. App. 3d 112, 118 (1979) (quoiting *People v. Olroyd*, 335 Ill. 61, 68 (1929)). Thus, an instruction that the State need not prove the date of the offense is not inherently improper. *People v. Whitaker*, 263 Ill. App. 3d 92, 98 (1994) (a jury instruction that states this premise is not inherently improper).

¶ 28 The general rule that the date given in the indictment is not material is reflected in IPI Criminal No. 3.01. That instruction provides: "The [(indictment) (information) (complaint)] states that the offense charged was committed [(on or about)]. If you find the offense charged was committed, the State is not required to prove that it was committed on the particular date charged." IPI Criminal No. 3.01. Where the proof at trial suggests the offense occurred on a

date other than the one charged, IPI Criminal No. 3.01 serves to inform the jury that the difference in dates is not material. *People v. Quiroz,* 253 Ill. App. 3d 739, 747-48 (1993). Giving IPI Criminal No. 3.01 prevents a defendant from claiming that he should be acquitted because of a variance between the charging instrument and the proof at trial. *People v. Thrasher*, 383 Ill. App. 3d 363, 368 (2008).

¶ 29 However, the instruction should be given "only when there is a variance between the date alleged and the evidence, and all dates are within the period of limitations." IPI Criminal No. 3.01, Committee Notes. Where there is no variance, there is no need for the instruction. *People v. Suter*, 292 Ill. App. 3d 358, 363 (1997). Use of the instruction results in reversible error where (1) the inconsistencies between the date charged in the indictment and the evidence presented at trial are so great that the defendant is misled in presenting his defense, or (2) the defendant presents an alibi for the time alleged in the indictment and is therefore prejudiced because he failed to gather evidence and witnesses for the time actually proved by the State. *Thrasher*, 383 Ill. App. 3d at 368. Where the State's evidence points exclusively to a specific date, and the defendant presents a defense based on that date, the jury's consideration of the defendant's guilt should be restricted to that date. *Suter*, 292 Ill. App. 3d at 366.

¶ 30 The indictment in this case stated that possession of the revolver occurred on or about December 14, 2014. In its opening statement and in closing, the State argued that the jury could convict defendant of unlawful possession based on the charged incident or on the testimony of Detective Chalus, who said that defendant admitted that he possessed the revolver two weeks prior to the charged incident. At the jury instruction conference, the State requested IPI. 3.01 in support of that position and to inform the jury that the difference in dates was not material.

Defense counsel objected. The trial court overruled the objection and gave the instruction to the jury.

¶ 31 We find the trial court erred in overruling defense counsel's objection. Notably, a variance did not exist between the date alleged in the indictment and the evidence in this case. At trial, the State pursued a theory of actual possession. The circumstantial evidence demonstrated that on December 14, 2014, a revolver was recovered from a drawer in Hazel's kitchen. That same day, and shortly before the recovery, officer's witnessed defendant standing near the drawer. When defendant saw the officers, he retreated and attempted to escape through the front door of the apartment. The State did not argue continuous possession based on defendant's admission that he found the revolver in his mother's apartment two weeks earlier to the jury. Moreover, there is no evidence in the record that defendant continuously exerted exclusive personal dominion over the revolver for that entire two-week period. See *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000) (actual possession is exclusive present personal dominion over the illicit material). Here, the prior possession and the December 14, 2014, circumstantial possession are separate offenses that occurred on two separate dates. This is not a case of discrepancies in the evidence that created a possible variance in the date the crime was committed. Since there was no evidence that the charged incident occurred on any date other than December 14, 2014, the instruction should not have been given.

¶ 32 Further, we find that the giving of IPI Criminal No. 3.01 was not harmless. The State's case on the charge of possession on December 14 was not strong. Defendant's prior statement, to the extent it could be used, was uncorroborated. In addition, the State abandoned theories on both constructive and prior possession at trial. And the evidence of possession inside Hazel's apartment was circumstantial.

¶ 33 In this case, the use of the instruction was improper because it allowed the jury to convict based on the uncharged prior possession two weeks earlier. Because it was error to give IPI Criminal No. 3.01 under the facts presented to the jury, we reverse and remand for a new trial. See *Suter*, 292 Ill. App. 3d at 366 (citing numerous cases in other jurisdictions where improper jury instruction resulted in reversible error and reviewing court remanded for a new trial). In light of our decision to remand for a new trial, we need not consider whether the cause should be remanded for a *Krankel* hearing on defendant's posttrial claim that counsel was ineffective.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Peoria County is reversed and remanded for a new trial.

¶ 36 Reversed and remanded.

¶ 37 JUSTICE SCHMIDT, concurring in part and dissenting in part:

¶ 38 Because I would affirm the trial court in its entirety, I dissent from that portion of the order which holds that the trial court's error in overruling defense counsel's objections to IPI Criminal No. 3.01 was reversible.

¶ 39 The jury instruction at issue did not hinder defendant's defense. The indictment charged defendant with possessing the revolver on or about December 14, 2014, and the evidence overwhelmingly shows that defendant possessed the revolver on or about this date. The record illustrates that although defendant himself called 911, he ran into the apartment as soon as the police arrived on the scene. Upon entering the apartment, the police observed defendant standing next to a drawer—later identified as the "junk drawer"—right before defendant again attempted to flee the police by running out of the apartment. Why would one who called the police flee from them upon their arrival? This flight was additional evidence of guilt. *People v. Griffin*, 23

Ill. App. 3d 461, 453 (1974) ("In Illinois evidence of an accused's flight has long been admissible as a circumstance from which an inference of guilty may be drawn. It is evidence of a consciousness of guilty and thus probative of guilt itself."). The police later recovered the revolver from the junk drawer. Further, defendant's mother testified that she opens the junk drawer every day and that the revolver was not in the drawer the night before. Accordingly, I would find any error in giving IPI Criminal No. 3.01 harmless.