2011 IL App (4th) 100303-U

Filed 7/25/11

NO. 4–10–0303

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CARNELL WESLEY,	)	No. 09CF398
Defendant-Appellant.	)	
	)	Honorable
	)	G. Michael Prall,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Cook concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and affirmed the trial court's judgment where counsel concludes no meritorious issues could be raised on appeal as to the following issues: whether (1) the State failed to prove defendant guilty beyond a reasonable doubt; (2) the trial court erred when it gave an accomplice-testimony jury instruction; (3) the court committed reversible error when it denied defendant's hearsay objection to identification testimony; or (4) defendant's sentence is excessive.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2009, the State charged defendant, Carnell Wesley, with one count of robbery, a Class 2 felony (720 ILCS 5/18–1(a), (b) (West 2008)). Specifically, the State alleged

that defendant knowingly took property, a "Zune MP3" music player, from the person of Sean Carter, by the use of force.

¶ 5 The evidence presented at defendant's September 2009 trial, which consisted of testimony from Carter, Officer Anne Frye, Detective Brian Larimore, Officer Robert Hospelhorn, and Officer Kevin Kreger for the State, and Sharon Johnson and Ross Johnson for the defense, showed the following.

¶ 6 Carter was outside skateboarding in the parking lot of the apartment complex where he lived when he was approached by two people. Carter testified that defendant was one of the two people. The pair mentioned that they had the same Zune music player Carter had and asked if he could charge theirs. Carter agreed, and when it was done charging, Carter returned the Zune to the pair. At that point, the pair asked for Carter's help finding a trail in a nearby public park. Carter walked to the trail with the pair and then walked down part of the trail with them. One of the two people–Carter was not sure which one–struck Carter from behind. Carter fell to the ground. While on the ground, Carter was struck again, and he saw defendant pick up his Zune and leave. Carter returned home, where his sister called the police.

¶ 7 Frye was the first officer to meet with Carter. Carter described the two people to Frye and stated that one of them was wearing a New York Yankees jersey. Shortly thereafter, Kreger located defendant, who was wearing a New York Yankees jersey, at a nearby gas station and detained him. Frye then escorted Carter to the gas station for a "show-up." Carter identified defendant as one of the people who had robbed him. The other person involved in the robbery was also detained by the police and was later identified as Ross Johnson.

¶ 8 Larimore and Hospelhorn then went to Sharon's apartment because both defendant

and Ross indicated they had been there that evening. Sharon gave the officers permission to search the apartment, and they recovered the Zune belonging to Carter, as well as a hat that, according to Carter, defendant was wearing during the robbery. Sharon told the officers that defendant was her boyfriend and that Ross was her younger brother. Ross lived with her at the apartment and defendant stayed there frequently but did not live there.

¶ 9 Ross and Sharon testified for the defense. Ross, age 17, stated that he was charged with the robbery as a juvenile and had pleaded guilty. Ross went on explain that he was solely responsible for the robbery, and defendant was not present during the incident. Sharon testified that she had been at home with defendant when the robbery occurred so he could not have been present with Ross when Carter was robbed.

¶ 10 The State called Larimore as a rebuttal witness. He explained that he had spoken to Sharon the night of the robbery. Sharon told him that she had only just arrived home and was unaware of anything that had happened earlier in the evening.

¶ 11 Based on this evidence, the jury convicted defendant of robbery. Defendant immediately filed a motion for a new trial. In November 2009, the trial court denied defendant's motion for a new trial and sentenced him to five years and six months in prison with credit for time served. Also in November 2009, defendant filed a motion to reconsider his sentence. In March 2010, the court denied defendant's motion to reconsider his sentence.

¶ 12 This appeal followed, and OSAD was appointed to represent defendant on the appeal. In April 2011, OSAD filed a request to withdraw as defendant's counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional

points and authorities by May 26, 2011, but he did not respond.

¶ 13 II. ANALYSIS

¶ 14 Under *Anders*, a brief must accompany counsel's motion to withdraw, outlining any issue in the record that might arguably support the appeal, explaining why counsel finds those issues frivolous, and concluding that the case presents no viable grounds for appeal. *In re S.M.,* 314 Ill. App. 3d 682, 685, 732 N.E.2d 140, 143 (2000).

¶ 15 OSAD raises the following four potential issues and concludes that all four would be frivolous: (1) the State failed to prove defendant guilty beyond a reasonable doubt; (2) the trial court erred when it gave an accomplice-testimony jury instruction; (3) the trial court committed reversible error when it denied defendant's hearsay objection to identification testimony; and (4) defendant's sentence is excessive. After reviewing the record consistent with our responsibilities under *Anders*, we agree.

¶ 16 OSAD first argues no colorable argument can be made that the State failed to prove defendant guilty of robbery beyond a reasonable doubt. We agree.

¶ 17 When reviewing a jury verdict, "this court considers whether, viewing the evidence in the light most favorable to the State, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). Generally, the trier of fact is in a better position to determine the credibility of witnesses and weigh the evidence, and its decision will not be reversed unless "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Wheeler* 226 Ill. 2d at 115, 871 N.E.2d at 740. In other words, during a jury trial, the jury has the

prerogative to accept or reject the testimony of witnesses called by either the State or the defense. *People v. Roberts*, 189 Ill. App. 3d 66, 69-70, 544 N.E.2d 1340, 1343 (1989).

¶ 18 A person commits a robbery when he takes property from another by the use of force or by threatening the imminent use of force. 720 ILCS 5/18–1(a) (West 2008). At trial, the State presented testimony from Carter that he was knocked to the ground and struck again while he was on the ground, at which point defendant took Carter's Zune and left the area. Though some conflicting testimony was offered by the defense, the jury was in a better position to judge the credibility of the witnesses. The jury returned a guilty verdict after hearing all the evidence from both the State and the defense. Thus, we agree with OSAD that no colorable argument can be made that the State failed to provide sufficient evidence to prove defendant guilty of robbery beyond a reasonable doubt.

¶ 19 OSAD next argues no colorable argument can be made that the trial court erred when it gave an accomplice-testimony instruction to the jury. We agree.

¶ 20 In defendant's motion for new trial, defendant argued that the trial court erred when it gave a jury instruction regarding accomplice testimony. Defendant argued that the instruction regarding accomplice testimony was inappropriate when the accomplice testified on behalf of defendant, rather than against him. However, the jury instruction was given in accordance with Illinois Pattern Jury Instruction No. 3.17 (Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.17)) and was clearly proper. The Committee Notes for No. 3.17 follow *People v. Rivera*, 166 Ill. 2d 279, 292-93, 652 N.E.2d 307, 313 (1995), and recommend giving No. 3.17 any time an accomplice testifies, regardless of whether the testimony is presented by the State or by the defense. IPI Criminal 4th No. 3.17,

Committee Note. In the present case, Ross was an accomplice and testified; therefore, the jury instruction regarding accomplice testimony was properly given. We agree with OSAD that no colorable argument can be made that the court erred in tendering the accomplice-testimony jury instruction.

¶ 21 OSAD next argues no reversible error occurred when the trial court denied defendant's hearsay objection to identification testimony. We agree.

¶ 22 In his motion for new trial, defendant argued that the trial court erred when it overruled an objection to identification testimony during Larimore's testimony. The record shows that the only objection made during Larimore's testimony occurred when the State asked Larimore if Carter had described who had robbed him. After the objection was overruled, Larimore testified that Carter told him one of the people that robbed him was wearing a New York Yankees jersey and a black hat.

¶ 23 Hearsay-identification testimony is admissible under section 115–12 of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure). 725 ILCS 5/115–12 (West 2008). Under that section of the Code of Criminal Procedure, hearsay testimony is admissible "if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115–12 (West 2008). In this case, Larimore testified about statements Carter had made to him, which identified defendant as one of the people who had robbed Carter. Carter testified at the trial, was subject to cross-examination, and the statements were of identification made after Carter had perceived defendant. Thus, we agree with OSAD that no colorable argument can be made that the court erred by rejecting defendant's objection to

identification testimony.

¶ 24 Finally, OSAD argues that no colorable argument can be made that defendant's sentence is excessive. We agree.

¶ 25 The offense of robbery is a Class 2 felony with a nonextended sentencing range between three and seven years. 720 ILCS 5/18–1(b) (West 2008); 730 ILCS 5/5–8–1(a)(5) (West 2008). The presentence investigation report shows that defendant has a fairly extensive criminal history, including two felony convictions for driving on a revoked license. In addition, defendant was on probation pursuant to a conviction for obstructing justice when he committed the underlying offense. The court sentenced him to five years and six months in prison, slightly less than the six years requested by the State and within the sentencing guidelines.

¶ 26 Sentences imposed within the statutory guidelines are presumed to be proper and will not be overturned unless the sentence substantially departs from the spirit and purpose of the law and the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90, 871 N.E.2d 1, 16 (2007).

¶ 27 Here, the trial court sentenced defendant to five years and six months in prison. This is within the statutory range and is supported by defendant's criminal history. Nothing in the record indicates that the court relied on any improper factors when sentencing defendant. Thus, we agree with OSAD that no colorable argument can be made that defendant's sentence is excessive.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we grant OSAD's motion and affirm the trial court’s judgment.

¶ 30 Affirmed.