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2013 IL App (3d) 110503-UB

Order filed November 29, 2012.
Modified upon denial of rehearing June 6, 2013

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

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. 3-11-0503
)	Circuit No. 10-CF-1120
ADAM M. BUTTS,)	
)	Honorable
Defendant-Appellant.)	Stephen A. Kouri,
)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) The evidence was sufficient to convict defendant of armed robbery and vehicular hijacking; (2) defendant waived plain error review of his one-act, one-crime challenge by not raising it in his brief or reply brief; and (3) the 15-year mandatory sentence enhancement of the armed robbery statute does not violate the proportionate penalties clause of the Illinois Constitution.

¶ 2 Defendant, Adam M. Butts, was convicted at a jury trial of armed robbery (720 ILCS 5/18-2 (West 2010)), attempted aggravated vehicular hijacking (720 ILCS 5/8-4, 18-4 (West 2010)), and

unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). He was sentenced to concurrent terms of imprisonment of 30 years, 15 years, and 14 years, respectively. Defendant now appeals, making the following challenges: (1) the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of armed robbery and attempted aggravated vehicular hijacking; (2) defendant's concurrent convictions for armed robbery and attempted aggravated vehicular hijacking violate the one-act, one-crime rule; and (3) defendant's sentence violates the proportionate penalties clause of the Illinois Constitution.

¶ 3

FACTS

¶ 4 At a jury trial, the victim, Sergio Figueroa, testified through an interpreter that on October 31, 2010, he pulled his Lincoln Navigator into a Circle K gas station to inflate a flat tire. While filling his tire, Figueroa was approached by a man in a black jacket who pointed a gun at him and ordered him into the passenger seat of the Lincoln. The man got into the driver's seat and demanded the ignition keys. Figueroa relinquished the keys, and the man inserted the key into the ignition, but did not start the engine. Figueroa then offered the man his cellular phone and necklace. The man took the cellular phone but gave back the necklace because he thought it was a fake. While the man attempted to buckle his seat belt, Figueroa grabbed the keys out of the ignition, exited the vehicle, and ran into the gas station to call for help. The cashier called the police. By the time police arrived at the gas station, the man was gone, having fled on foot.

¶ 5 Officer Jason Beck arrived at the Circle K and took a short statement from Figueroa before allowing him to leave. Taking Figueroa's description of the events was difficult because English was not Figueroa's first language and he did not speak it well. Officer Steven Cover arrived at the Circle K and saw a man running east on nearby Arcadia Avenue. Cover pursued the man on foot but lost

him behind a house. Officer John Briggs arrived on the scene, and Cover told him to continue the pursuit on Arcadia Avenue. Briggs caught up to the man, who was eventually subdued by three officers. Officers found an unloaded pistol across the street, but could not recover any fingerprints from the weapon. Officer Jacob Bradford, who found the gun, testified that it was dry although the ground around where it was found was moist. The man apprehended by the officers was defendant.

¶ 6 Beck brought Figueroa back to the scene to identify defendant. Defendant was in handcuffs, standing next to a police vehicle. Figueroa stood across the street from defendant, and police shone a spotlight on defendant's face. Figueroa identified defendant as the man who had used a gun to force him into the Lincoln. Beck testified that Figueroa said "yes, it's him, a hundred percent." At trial, Figueroa testified that he was able to make the on-scene identification of defendant "because he was dressed the same way[,]" and defendant looked the same as the man who attempted to steal his vehicle.

¶ 7 At trial, Figueroa was asked to make an identification of defendant in the courtroom. After Figueroa described the earlier identification at the scene, the following exchange occurred between the prosecutor and Figueroa:

"Q: And is that person in the courtroom today?

A: Si.

(By the Interpreter): Yes.

Q: Could you please point him out and describe something he has on today?

A: (By the Interpreter): No, it's not him. It's not him.

Q: It's not him? Are you sure?

A: (By the Interpreter): It doesn't look like him. It doesn't look—. It doesn't look like

him. He's dressed in a different way. He doesn't look even like he's been in jail.

Q: Well, were you sure the night that the police took you that you identified the right person?

A: Si.

(By the Interpreter): Yes.

Q: And you don't believe this is the same person?

A: (By the Interpreter): I need for him to remove his hands from his face.

(Defendant Butts complies.)

(By the Interpreter): I think it is him.

Q: But you're—you're not sure?

A: (By the Interpreter): At this moment, I'm not sure. I'm not sure because a lot of time has passed.

[The State]: Nothing further."

¶ 8 Detective Keith McDaniel testified that following his arrest, defendant denied accosting Figueroa in the Circle K parking lot. Defendant claimed that he was in the area attempting to buy crack cocaine. When he saw police, he fled and hid because he believed he had an outstanding parole violation warrant. The parties stipulated that defendant was on parole on October 31, 2010.

¶ 9 Nakeshia Hollins testified on defendant's behalf. Hollins testified that she lived near the Circle K and that defendant was attending a birthday party at her residence on October 31, 2010, when he decided to go out to buy cigarettes. According to Hollins, defendant was wearing a black and yellow jacket and was not carrying a visible weapon. Laquasha Paskins also testified that defendant was visiting at Hollins's residence until he left to buy cigarettes.

¶ 10 The jury found defendant guilty of armed robbery (720 ILCS 5/18-2 (West 2010)), attempted aggravated vehicular hijacking (720 ILCS 5/8-4, 18-4 (West 2010)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). The jury also found that defendant was armed with a firearm during the commission of the armed robbery. Defendant filed a posttrial motion for judgment notwithstanding the verdict, arguing that the State had failed to prove defendant guilty beyond a reasonable doubt. The court denied the motion.

¶ 11 The court sentenced defendant to 15 years' imprisonment for armed robbery, which automatically became a 30-year sentence under section 18-2(a)(2) of the Criminal Code of 1961, because the jury found that defendant was armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). The court sentenced defendant to 15 years' imprisonment for attempted aggravated vehicular hijacking and 14 years' imprisonment for unlawful possession of a weapon by a felon. All three sentences were to run concurrently.

¶ 12 ANALYSIS

¶ 13 I. Sufficiency of the Evidence

¶ 14 Defendant claims that the evidence was insufficient to prove him guilty beyond a reasonable doubt of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and attempted aggravated vehicular hijacking (720 ILCS 5/8-4, 18-4 (West 2010)). When considering a challenge to the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985).

¶ 15 Defendant argues that Figueroa's identification of defendant at the scene of the crime and at trial were not reliable enough to support defendant's convictions.

¶ 16 First, Figueroa's identification of defendant at the scene was reliable and sufficient to sustain defendant's convictions. Evidence of an identification is inadmissible where the identification was the result of "unnecessarily suggestive circumstances, conducive to an irreparable mistaken identification." *People v. Ruffolo*, 64 Ill. App. 3d 151, 157 (1978). Typically, a proper identification requires a line-up, unless there are exigent circumstances that make a line-up infeasible. *Id.* In the present case, the police were justified in conducting the one-person showup because they needed to quickly determine whether the man who had committed the armed robbery of Figueroa had been apprehended. See *Id.* at 157 ("A one-person showup within a short time of the commission of the offense is justified because a prompt identification is necessary to determine whether the offender has been apprehended or whether the police should continue the search"). The lighting conditions were favorable at the time, and the identification took place shortly after the crime occurred. Defendant stated at the time of the identification, and reiterated at trial, that at the time of this identification, he was certain that the man he identified was the man who had attempted to hijack his vehicle.

¶ 17 Second, Figueroa's uncertain identification of defendant at trial does not affect the reliability of his earlier identification made shortly after the commission of the crimes. Earlier identifications are admissible despite a witness's inability to make an in-court identification. *People v. Gonzalez*, 292 Ill. App. 3d 280, 287 (1997) ("A reliable identification occurring only minutes after the crime should not be kept from the jury solely because the witness is unable, several months later and under the pressure of testifying in court, to identify the defendant"). Figueroa testified that he was unable to identify defendant in court because so much time had passed since the crimes occurred and defendant was wearing different clothing. However, the reliability of Figueroa's earlier identification

is unaffected by his later uncertainty.

¶ 18 Defendant's convictions were also bolstered by the circumstantial evidence that defendant was fleeing police near the crime scene shortly after the crimes had been committed. Thus, viewing the evidence in the light most favorable to the State, a rational juror could have found defendant guilty of the offenses.

¶ 19 II. One-Act, One-Crime

¶ 20 Defendant argues that his convictions for armed robbery and attempted aggravated vehicular hijacking violate the one-act, one-crime rule.

¶ 21 In order to preserve an issue for review, a defendant must make a timely objection at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176 (1988). In the present case, defendant raises this issue for the first time on appeal. As a result, the issue is waived.

¶ 22 Unpreserved errors may be considered on appeal under the plain error rule when those errors affect substantial rights of the defendant. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999); *People v. Herron*, 215 Ill. 2d 167 (2005). However, an argument that the plain error rule should apply will be deemed waived if not raised in the appellant's brief or reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Nieves*, 192 Ill. 2d 487 (2000) (plain error argument was waived where argument consisted of only one sentence); *cf. People v. Williams*, 193 Ill. 2d 306 (2000) (argument that plain error rule should apply was not waived when raised for the first time in appellant's reply brief). In the present case, defendant did not address the issues of waiver or plain error in either the appellant's brief or reply brief, despite the State raising the waiver and plain error issues in its appellee's brief.

¶ 23 Because defendant did not preserve this issue below and has not argued that the plain error rule should apply to allow review, defendant has waived review of this issue.

¶ 24

III. Proportionate Sentence

¶ 25 Defendant argues that the 15-year mandatory sentencing enhancement in the armed robbery statute (720 ILCS 5/18-2(b) (West 2010)) violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). He claims that the armed robbery statute (720 ILCS 5/18-2 (West 2010)) and the armed violence statute (720 ILCS 5/33A-2(a) West (2010)) provide different sentences for identical conduct, something prohibited by the proportionate penalties clause.

¶ 26 The constitutionality of a statutory penalty may be raised at any time. *People v. Christy*, 139 Ill. 2d 172 (1990). Review of a statute's constitutionality is *de novo*. *People v. Brown*, 2012 IL App (5th) 100452.

¶ 27 The proportionate penalties clause prohibits establishing different penalties for offenses with identical elements. *People v. Sharpe*, 216 Ill. 2d 481, 522 (2005) ("If the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense"). In *People v. Hauschild*, 226 Ill. 2d 63 (2007), *superseded by statute as stated in People v. Clemons*, 2012 IL 107821, our supreme court held that the 15-year enhancement under the armed robbery statute violated the identical elements prohibition of the proportionate penalties clause. At the time of the *Hauschild* decision, the armed robbery statute (720 ILCS 5/18-2(a)(2) (West 2000)) provided a greater sentence than that provided by the armed violence statute (720 ILCS 5/33A-2(a) (West 2000)) for the same conduct. *Hauschild*, 226 Ill. 2d 63. The armed robbery statute's more severe penalty was therefore unconstitutional. *Id.*

¶ 28 Shortly after the *Hauschild* decision, the legislature amended the armed violence statute so that it no longer punished conduct identical to that of the armed robbery statute, thereby alleviating the proportionate penalties issue. Pub. Act 95-688 (eff. Oct. 23, 2007) (amending 720 ILCS 5/33A-

2(a)); *Brown*, 2012 IL App (5th) 100452 (holding that Public Act 95-688 cured the proportionate penalties problem with the armed robbery statute). The amended version of the armed violence statute reads, in relevant part:

"A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law, except *** any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." 720 ILCS 5/33A-2(a) (West 2010).

The armed robbery statute (720 ILCS 5/18-2(b) (West 2010)) makes the possession of a firearm—a "dangerous weapon"—a mandatory sentencing factor that increases the sentencing range. Accordingly, under the amended armed violence statute, conduct that constitutes armed robbery no longer constitutes armed violence. The statutes no longer punish identical conduct and, therefore, may provide different sentences. There is no longer a proportionate penalties issue.

¶ 29 Our position is confirmed by the Illinois Supreme Court's recent decision in *People v. Blair*, 2013 IL 114122. In *Blair* the court held that Public Act 95-688, by amending the armed violence statute, cured the proportionate penalties issue and revived the sentencing enhancement of the armed robbery statute (720 ILCS 5/18-2(b) (West 2010)). As a result, in the present case, defendant's enhanced sentence under the armed robbery statute was constitutional.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons the judgment of conviction of Peoria County is affirmed.

¶ 32 Affirmed.