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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-249
)	
ROBERT L. BOSTIC,)	Honorable
)	George Bridges,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly denied defendant's motion to dismiss the indictment because of misstatements by the State's witness before the grand jury, as the misstatements were not significant enough to have induced the grand jury to indict; (2) the trial court properly denied defendant's motion to suppress his statements under *Miranda*, as under the circumstances defendant was not in custody when he made his statements.

¶ 2 In 2011, a grand jury indicted defendant, Robert L. Bostic, for the 1982 murder of Carlton Richmond. An arrest warrant was issued and Round Lake Beach police officers, in cooperation with local authorities, arrested defendant at his Tennessee home. Defendant moved to suppress

statements he made to the officers during an interview in his home and to dismiss the indictment for prosecutorial misconduct. The trial court denied both motions. Following a jury trial, defendant was convicted of first-degree murder (Ill. Rev. Stat. 1981, ch. 38, § 9-1(a)(1)) and sentenced to 30 years' imprisonment. Defendant appeals, contending that the trial court erred in denying his pretrial motions. We disagree and affirm.

¶ 3 Richmond was shot at the clubhouse of the Wheelmen motorcycle club in Round Lake Beach. Police initially interviewed numerous members of the club. However, the police found them to be uncooperative, and the investigation languished for nearly 30 years.

¶ 4 For reasons not entirely clear from the record, the investigation was reopened in 2010, when Detective Gary Lunn was given the file. He reinterviewed some of the witnesses with whom the police first spoke in 1982, as well as some witnesses who had not been interviewed during the original investigation. During this renewed investigation, Lunn obtained statements from three club members implicating defendant in the murder, and an arrest warrant was issued. Thus, Lunn and fellow Round Lake Beach detective Michael Scott drove to Tennessee, where defendant was living at the time, to talk to him and serve the warrant. Lunn spoke with two officers from the Roane County sheriff's department and explained that they planned to arrest defendant the following day.

¶ 5 The next day, the four officers drove to defendant's house. They were in plain clothes and rode in unmarked vehicles. Lunn approached defendant, who was on the porch. Lunn identified himself as a police officer and said that he wanted to talk. Defendant invited the officers inside the house. Lunn sat on the couch with defendant, while Scott sat in a chair. Lunn thought that one of the Tennessee officers was also inside the house, but may have been "in and out," while the other officer waited outside in a car.

¶ 6 Lunn said that he was investigating the murder of Carlton Richmond and asked for defendant's version of events. Defendant said that he was at the clubhouse on the night in question. He was sitting at the bar drinking with Richmond when the latter became aggressive. Defendant left the clubhouse, and the victim was murdered a short time later. Near the end of the conversation, Lunn told defendant he wanted to speak to him at the sheriff's department. Defendant asked whether he was under arrest and whether Lunn had a warrant. Lunn answered both questions affirmatively. Defendant was then escorted from the house, although he was not in handcuffs.

¶ 7 In March 2011, the case was presented to a grand jury. Lunn was the only witness before the grand jury and testified as follows. During his investigation of Richmond's murder, John Winandy told him that he was sitting at the bar when he heard a gunshot. He turned and saw defendant standing a few feet from the victim. Richmond was looking at defendant and said, "You shot me." Jeff Paradise said that he had been inside the garage when he heard a gunshot. He turned to see defendant holding a gun and standing a few feet from Richmond. Richmond looked at defendant and said, "You shot me." Lance Balberg told Lunn that, several days after the shooting, defendant admitted to Balberg that he had shot Richmond.

¶ 8 Lunn further testified that an unnamed witness was in the clubhouse when defendant "pulled the .22" and shot Richmond. Kevin Williamson also told Lunn that, after hearing a gunshot, he turned to see defendant standing about three feet away from Richmond, who looked at defendant and said, "You shot me." The grand jury indicted defendant for first-degree murder.

¶ 9 Defendant moved to suppress the statements he made during the interview in his home. He argued that, under the facts described above, he was actually in custody at that time, but was not

given *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial court denied the motion, finding that defendant was not in custody.

¶ 10 Defendant then moved to dismiss the indictment. He alleged that the prosecution, through Lunn, presented misleading and inaccurate information to the grand jury. Attached to the motion were numerous documents, including a transcript of the grand jury proceedings, the Wheelmen's bylaws, and numerous witness statements taken from police reports.

¶ 11 At a hearing on that motion, Lunn testified that he appeared before the grand jury on March 2, 2011. There, in response to a leading question from the prosecutor, he agreed that, according to the Wheelmen's bylaws, "no one was allowed to talk to police except a high ranking member or senior member if no club officer was present." He further testified, before the grand jury, that another club member, Kevin Williamson, had said in a statement that defendant "pulled the .22 and shot" Richmond. He answered "yes" when asked whether two other witnesses had claimed to have seen a gun in defendant's hand immediately after Richmond was killed. Lunn agreed that this was inaccurate because Richmond was killed by a .25-caliber bullet. He further agreed that no one had claimed to have actually seen defendant "pull" the gun from a holster or from his pocket. Rather, Lunn inferred that defendant must have gotten the gun in his hand somehow.

¶ 12 Defendant argued that numerous aspects of Lunn's grand jury testimony were inaccurate. Specifically, defendant argued that Lunn said that defendant pulled a .22 when the victim was shot with a .25-caliber bullet, no one actually saw defendant take out the gun, and only one witness claimed to have seen this, not three as Lunn testified. Defendant further argued that the Wheelmen's bylaws did not prohibit anyone from talking to the police. Rather, the bylaws, which were attached to the motion to dismiss, provided that the "[h]ighest ranking member or highest in seniority if no officers are present will be the only one to talk to police or other authorities."

¶ 13 After taking the matter under advisement, the trial court denied the motion. The court found that the misstatements did not affect the grand jury's decision to indict defendant. Thus, the prosecution did not violate his due process rights.

¶ 14 Following trial, the jury found defendant guilty. After denying his posttrial motion, the trial court sentenced him to 30 years' imprisonment. Defendant timely appeals.

¶ 15 Defendant first contends that the trial court erred by denying his motion to dismiss the indictment. While acknowledging that such motions are not favored, defendant contends that a number of significant misstatements, and perhaps intentional lies, by the prosecution witness, Lunn, contributed to the grand jury's decision to indict defendant, and thus deprived him of due process.

¶ 16 As noted, challenges to grand jury proceedings are limited. In general, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury. *People v. Rodgers*, 92 Ill. 2d 283, 287 (1982). A defendant may not challenge the sufficiency of the evidence considered by a grand jury if at least some evidence was presented establishing probable cause to believe that the defendant committed an offense. *People v. DiVincenzo*, 183 Ill. 2d 239, 255 (1998); *Rodgers*, 92 Ill. 2d at 290. "A defendant may, however, challenge an indictment that is procured through prosecutorial misconduct." *DiVincenzo*, 183 Ill. 2d at 255. To warrant dismissal of the indictment, however, a defendant must show that any prosecutorial misconduct affected the grand jury's deliberations. *Id.* at 259 (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256-57 (1988)). In other words, prosecutorial misconduct must rise to the level of a deprivation of due process or a miscarriage of justice. *Id.*

¶ 17 A trial court has the inherent authority to dismiss an indictment where there has been "an unequivocally clear denial of due process." *People v. Lawson*, 67 Ill. 2d 449, 456 (1977); see also

People v. Knop, 199 Ill. App. 3d 944, 949 (1990). However, this power should be used sparingly, and a due process violation will warrant dismissal only where the violation is clear and can be ascertained with certainty. *People v. Polonowski*, 258 Ill. App. 3d 497, 500 (1994). A defendant's due process rights can be violated if a prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. *Id.* On review, the question is whether any evidence was presented to the grand jury tending to connect the accused to the charged offense. *Rodgers*, 92 Ill. 2d at 290. A due process violation based on false testimony will be found only where, without the evidence, the grand jury would not have indicted the defendant. *People v. Oliver*, 368 Ill. App. 3d 690, 696-97 (2006). The issue is one of law that we review *de novo*. *Id.* at 695.

¶ 18 Defendant argues that several misstatements by Lunn may have influenced the grand jury's decision, and thus denied defendant due process. Defendant specifically points to Lunn's testimony that Richmond was shot with a .22-caliber, rather than a .25-caliber, weapon; that the Wheelmen bylaws flatly prohibited members from talking to the police; and that three people had seen defendant standing near Richmond with a gun.

¶ 19 The State responds that defendant forfeited his principal argument, that Lunn said that three people had seen defendant with a gun, because he did not raise it below. The State contends that the failure to raise the issue goes beyond mere procedural default because, had defendant raised the issue during the hearing, Lunn might have been able to explain the alleged discrepancies between his grand jury testimony and the witness statements defendant relied on during the hearing. The State further argues that, in any event, the misstatements were not so serious that they could have affected the grand jury's decision to issue an indictment. The State argues that the unchallenged evidence,

including evidence that at least one witness saw defendant standing near Richmond with a gun, was sufficient to procure an indictment.

¶ 20 We agree with the State. Initially, we note that defendant did not raise in the trial court any issue about Lunn's testimony that three witnesses had seen defendant with a gun in his hand immediately after the shooting. Generally, to preserve an issue for review, a defendant must raise the issue in the trial court and may not raise it for the first time on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Had defendant questioned Lunn on this point, Lunn would have had the opportunity to explain the statement.¹ Instead, defendant now asserts on appeal that Lunn's testimony was a "bald faced lie."

¶ 21 In any event, to the extent the testimony was inaccurate, we agree with the State that it would not have affected the grand jury's decision. Evidence introduced at the hearing tended to show that at least two witnesses placed defendant at the scene immediately after the shooting and heard the victim accuse defendant of shooting him. The grand jury also learned that defendant confessed to Balberg that he shot Richmond.

¶ 22 Defendant objects that Lunn failed to note Balberg's qualification that defendant claimed the shooting was an accident. The State argues that, in light of the other evidence, Lunn was justified in disregarding defendant's self-serving attempt to minimize his responsibility for Richmond's death. In any event, the prosecution has no duty to present exculpatory evidence to the grand jury. *United States v. Williams*, 504 U.S. 36, 52 (1992) ("It is axiomatic that the grand jury sits not to determine

¹The State speculates that the two other witnesses may have been drawn from a statement by Williamson in 1982 that, after the murder, two other club members, Gary Schoeman and Milton Holdorf, told Williamson that they saw a gun in defendant's hand at the time of the shooting.

guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.”); see also *People v. Beu*, 268 Ill. App. 3d 93, 97 (1994). Grand jury proceedings are “not intended to approximate a trial on the merits” (*People v. Fassler*, 153 Ill. 2d 49, 59 (1992)), and the prosecutor’s only duty is to present to the grand jury information that tends to establish probable cause (*id.* at 60).

¶ 23 The additional misstatements to which defendant refers were minor and could not have affected the grand jury’s decision. Lunn conceded that he misspoke when he testified that Richmond was shot with a .22-caliber weapon. However, defendant does not explain how this error could have affected the grand jury’s deliberations.

¶ 24 Defendant’s point about the Wheelmen’s bylaws is largely a semantic distinction. The clear import of the provision is that rank-and-file members were discouraged from cooperating with the police. Moreover, defendant has failed to convince us that the grand jury would have refused to indict him had it known that the Wheelmen’s bylaws permitted club officers and senior members to speak with the police.

¶ 25 Even without the disputed statements, ample evidence was presented to the grand jury to establish probable cause that defendant was responsible for Richmond’s murder. The misstatements could not have affected the grand jury’s decision. Accordingly, the trial court did not err in denying defendant’s motion to dismiss the indictment.

¶ 26 Defendant’s second principal contention is that the trial court erred by failing to suppress statements he made to the police during the interview in his Tennessee home. Defendant argues that he was in custody at that time, but that he was not given *Miranda* warnings.

¶ 27 Under *Miranda*, a statement taken from a defendant is inadmissible in the State’s case unless the State demonstrates, by a preponderance of the evidence, that the defendant was first given

Miranda warnings and knowingly and intelligently waived the privilege against self-incrimination. *People v. Dennis*, 373 Ill. App. 3d 30, 42 (2007). A suspect's right to *Miranda* warnings is triggered by custodial interrogation. *People v. Melock*, 149 Ill. 2d 423, 439 (1992).

¶ 28 Whether a defendant is “in custody” for *Miranda* purposes involves “[t]wo discrete inquiries ***: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Thus, in determining whether a person is “in custody” for *Miranda* purposes, we first ascertain and examine the circumstances surrounding the interrogation, and then ask if, given those circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *People v. Patel*, 313 Ill. App. 3d 601, 604 (2000). With respect to the latter inquiry, the accepted test is what a reasonable person, innocent of any crime, would have thought had he or she been in the defendant's shoes. *People v. Fair*, 159 Ill. 2d 51, 67 (1994) (citing *People v. Wipfler*, 68 Ill. 2d 158, 166 (1977)). When examining the circumstances of the interrogation, the following factors have been found relevant in determining whether a statement was made in a custodial setting: the location, time, length, mood, and mode of the interrogation, the number of police officers present, the presence or absence of the family and friends of the accused, any indicia of formal arrest, and the age, intelligence, and mental makeup of the accused. *People v. Braggs*, 209 Ill. 2d 492, 506 (2003); *Patel*, 313 Ill. App. 3d at 604-05.

¶ 29 A trial court's ruling on a motion to suppress evidence presents mixed questions of law and fact. On review, we will uphold the trial court's findings of historical fact unless they are against the manifest weight of the evidence. However, we remain free to undertake our own assessment of

the facts in relation to the issues presented and to draw our own conclusions when deciding what relief, if any, should be granted. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004).

¶ 30 Here, the interview occurred in defendant's home. While there is no *per se* rule that an interview in a suspect's home can never be custodial, this factor tends to support a finding that defendant was not in custody. See *People v. Vasquez*, 393 Ill. App. 3d 185, 191 (2009) (questioning at police station more likely to be custodial than questioning at suspect's home).

¶ 31 Recent cases from other jurisdictions have found that suspects were not in custody under circumstances similar to those here. In *People v. Vieou*, 966 N.Y.S.2d 284, 285 (2013), for example, the defendant was interviewed in his home. He was not restrained, he was cooperative, and the conversation was cordial. *Id.* In *State v. Harrison*, 66 A.3d 432 (R.I. 2013), the defendant voluntarily admitted police officers into his home. He willingly answered questions in an atmosphere that was described as “ ‘not aggressive.’ ” *Id.* at 442. Defendant cites no case in which a defendant was found to be in custody under similar circumstances.

¶ 32 Thus, here, the circumstances do not establish that defendant was in custody. The tone of the interview was relatively informal. The officers approached defendant while he was on his porch, and he invited them inside. Defendant and Lunn sat on a couch while Scott sat on a chair in the living room. The questioning occurred in the daytime and apparently lasted about 45 minutes. Defendant was not handcuffed or otherwise restrained, and no other indicia of a formal arrest were present. The officers wore plain clothes and arrived in unmarked vehicles. Although four officers drove to defendant's house, only Lunn actually questioned defendant. One of the Tennessee officers was “in and out” and the other remained outside.

¶ 33 We note that defendant did not testify at the suppression hearing and that, as a result, there was no direct evidence that he did not feel free to leave. In any event, a reasonable person would have felt at liberty to terminate the interrogation. Considering these factors, we cannot conclude that the trial court erred in deciding that defendant was not in custody during the interview and that *Miranda* warnings were not required.

¶ 34 Rather than addressing these traditional factors, defendant argues that two additional factors mandate suppressing his statements. He points out that the officers drove 600 miles to speak to him and that they had an arrest warrant that they intended to execute. Defendant concludes that, based on these circumstances, he must have been in custody from the time the officers arrived at his home, because the officers drove to Tennessee for the sole purpose of arresting him. However, absent some evidence that they communicated this intention to him before the interview, these facts have no bearing on whether a reasonable person in defendant's position would have felt that he was not free to leave. Lunn testified that he did not tell defendant beforehand that he had a warrant or that he intended to arrest him. Thus, while the officers may have engaged in some deception by implying that they were there only to talk to him, the objective circumstances do not show that defendant was in custody during the interview.

¶ 35 Based on our conclusion that defendant was not in custody, we need not consider the State's alternative argument that any error was harmless because defendant did not incriminate himself during the interview. The trial court did not err by denying defendant's motion to suppress.

¶ 36 The judgment of the circuit court of Lake County is affirmed.

¶ 37 Affirmed.