

No. 1-12-1209

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 14647
)	
ERIC HOGAN,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices LAMPKIN and REYES concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant forfeited for review his contention that the trial court abused its discretion in denying his motion for a mistrial based on allegedly improper testimony by a State's witness that the witness observed defendant with a firearm on an occasion prior to the date that defendant shot and killed two men.
- ¶ 2 Following a jury trial, defendant Eric Hogan was convicted of two counts of first-degree murder for the shooting deaths of Edlonzo Thomas and Anthony Spencer, and was sentenced to natural life in prison. Defendant appeals his convictions, contending that the trial court abused

its discretion in denying his motion for a mistrial after one of the State's witnesses testified in contravention of the trial court's order *in limine* when the witness testified that he saw defendant with a gun prior to the shooting incident that resulted in the victims' deaths.

¶ 3 Rather than engage in an extensive discussion of the facts, this court will state only those facts necessary to addressing the threshold procedural issue of whether defendant has forfeited review of this issue.

¶ 4 Defendant made a pretrial motion *in limine* to preclude State's witness Jayonda Porter from testifying that he observed defendant with a shotgun a week prior to the shooting, and the court granted the motion. The evidence at trial revealed that, according to several occurrence witnesses, a group of men were standing in a lot across the street from defendant's apartment building. The group included the victims, Thomas and Spencer, and State's witness Porter. Porter and another man got into a fistfight. After the fight, defendant argued with the men and punched Porter in the chin. The following exchange occurred during the State's direct examination of Porter:

Q: How many times did he do that [punch Porter]?

A: Just once.

Q: And what happened to you? What did you do?

A: I had a busted chin but when he punched me, he said I'm fittin' to go and get my gun so I had ran because I had seen the gun before and I know he had it.

Q: Slow down one second please. Now, when you said you had a busted chin, what does that mean?

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Porter's testimony never returned to the mention of him seeing defendant with a gun on a prior occasion.

¶ 5 Additionally, the State's occurrence witnesses, including two of defendant's neighbors who lived across the hall from him and observed the incident from their living room window above the area of the shooting, testified that they observed the argument between defendant and the men. They witnessed defendant go into their apartment building and then return to the group of men while wearing white gloves and carrying a 12-gauge shot gun. Defendant first shot Thomas in the torso, then shot into the crowd of men scattering after defendant shot Thomas. Spencer fell to the ground while attempting to run away, and defendant walked up to him and shot him twice. Then, defendant returned to where Thomas lay begging for his life and shot him in the face. Defendant walked around the side of the building, stopping first and making eye contact with the neighbors observing from the window, and disposed of his weapon and white gloves in a dumpster behind their apartment building.

¶ 6 Porter identified defendant as the man who punched him in the face and said he was going to get his gun. Various other witnesses, including the neighbors, also identified defendant as the shooter in court, a photo array and a line-up.

¶ 7 After Porter testified and was cross-examined by defense counsel, the trial adjourned for the day. Prior to the continuation of the trial the following morning, the trial court addressed evidentiary issues, at which time, defense counsel moved for a mistrial based on Porter's testimony that he saw defendant with a firearm on a previous occasion. Defense counsel noted that the State moved off the subject quickly and that he did not want to highlight the testimony any more after Porter made the statement. In response, the trial court stated that "no one raised

the issue,” and that doing so was “an attempt not to highlight the issue.” The State also explained that it admonished Porter on multiple occasions not to go into that area of testimony. In denying defendant’s motion for mistrial, the court concluded that the “State moved off of it quickly *** [.] I believe we did the best we can.” After additional evidence was presented, the jury found defendant guilty of the first-degree murders of Spencer and Thomas. During his motion for a new trial, which the trial court denied, defendant again raised the issue of Porter’s allegedly improper testimony. He was subsequently sentenced to mandatory natural life imprisonment. Defendant now appeals.

¶ 8 Defendant contends on appeal that the trial court abused its discretion in denying his motion for a mistrial. He argues that Porter’s statement that he had previously seen defendant with a shotgun was prejudicial because the statement improperly bolstered Porter’s identification of defendant as the shooter in this case. Further, defendant argues, the statement was inadmissible propensity evidence of a prior bad act that would tend to convince the jury that defendant was a violent, dangerous person who carries a shotgun.

¶ 9 Before we reach the merits of defendant’s appeal, we must first determine whether defendant forfeited this issue for appeal. It is well established that to preserve an alleged error for review, a party must object at trial and include the issue in a written posttrial motion. *People v. Nelson*, 235 Ill. 2d 386, 436; see also *People v. Phelps*, 211 Ill. 2d 1, 10-11 (2004).

¶ 10 Here, during the State’s direct examination of Porter, Porter stated that when defendant punched him in the chin, defendant also stated that he was going to get his gun. Porter testified that he ran because he had seen the gun before and he knew that defendant had it. Defense counsel did not object at the time that Porter made this statement. During Porter’s cross-

examination, defense counsel requested a side-bar wherein he inquired of the trial court whether he would be allowed to question Porter on his alleged involvement in selling drugs outside of defendant's apartment. The trial court denied this request. We note that counsel did not bring to the court's attention during the sidebar the issue of Porter's allegedly improper testimony. After the court denied counsel's request, he continued cross-examining Porter on his testimony.

¶ 11 Porter's testimony never returned to the mention of him seeing defendant with a gun on a prior occasion. It was not until the morning after Porter's testimony concluded that defendant addressed the issue of Porter's allegedly improper statement, which the trial court previously ruled was inadmissible as a result of defendant's motion *in limine*. Based on the foregoing, we conclude that defendant failed to make a timely objection to Porter's improper testimony. See *Nelson*, 235 Ill. 2d at 436-37 (concluding that defendant forfeited an issue for appeal where the defendant waited until after the third witness testified before moving for a mistrial based on a statement the State made during opening statements).

¶ 12 Further, in waiting until the next day of trial, after Porter concluded his testimony, to object to the alleged improper testimony, defendant "deprived the trial court of the ability to mitigate any error stemming from the prosecutor's remarks." *Nelson*, 235 Ill. 2d at 436-37 ("Timely and specific objections at trial afford the trial court an opportunity to prevent most errors by sustaining the objection or instructing the jury to disregard a remark.") See also *People v. Jackson*, 84 Ill. 2d 350, 359 (1981).

¶ 13 Defendant also did not make a plain error argument in response to the State's argument that he forfeited this claim, and consequently, defendant has also forfeited any plain error argument. See *Phelps*, 211 Ill. 2d at 10-11 (defendant waived contention that alleged

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misstatements during closing argument rose to the level of plain error where he did not make the plain error argument); *People v. Nieves*, 192 Ill. 2d 487, 503 (2001).

¶ 14 Finally, we find that the testimony in question was limited in nature, had a minimal impact on the trial, and would not have changed the outcome where the evidence against defendant was overwhelming. Defendant was identified by several witnesses as the shooter. Two of the witnesses were defendant's next door neighbors and they identified defendant in court, in photo-arrays, and in line-ups.

¶ 15 Accordingly, where defendant has forfeited review of this issue, we affirm the judgment of the trial court denying defendant's motion for a mistrial.

¶ 16 Affirmed.