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2014 IL App (3d) 120880-U

Order filed July 14, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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. 3-12-0880
KENDRICK RILEY,)	Circuit No. 11-CF-435
Defendant-Appellant.)	Honorable Timothy M. Lucas, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* State's extrinsic evidence rebutting defense witness's testimony that he used a particular cellular telephone to photograph defendant on the day of the shooting was not collateral evidence.
- ¶ 2 Defendant, Kendrick Riley, was charged with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)). At a bench trial, defendant raised an alibi defense, claiming that he was at a party in a park on the day of the shooting. The defense introduced two photographs showing

defendant in a park. Defense witness Richard Gray testified that he took the pictures with his cellular telephone on the day of the shooting. Gray further testified that the phone was taken from him in a police raid on his cousin's house. The State introduced testimony that police executed a search warrant on Gray's cousin's house and seized Gray's cellular telephone approximately six months prior to the date of the shooting, and that the phone remained locked in an evidence locker ever since. The court found defendant guilty and sentenced him to 45 years' incarceration. On appeal, defendant argues that the court abused its discretion by admitting extrinsic evidence about the seizure of the phone, which defendant argues was collateral. We affirm in part and vacate in part.

¶ 3

FACTS

¶ 4

Defendant was arrested and charged with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)). The court appointed counsel, and the cause proceeded to a bench trial.

¶ 5

Tyrone Nichols testified that he was at the Lexington Hills apartment complex (Lexington Hills) in Peoria around 2 p.m. on April 21, 2011, when he heard gunshots. He went outside and saw a man jogging away and another man lying on the ground. Dennis Zimmerman testified that he was working as a contractor at Lexington Hills on the afternoon of April 21, 2011, when he also heard gunshots. He looked toward the sound of the shots and saw one man chasing another approximately 100 yards from Zimmerman's location. The man doing the chasing had "[f]airly long hair."

¶ 6

The victim, Patrick Holmes, testified that he lived at Lexington Hills on April 21, 2011. Holmes was walking through the parking lot to his apartment when a silver Ford Taurus "rolled up" 10 to 20 feet away from him. Defendant exited the passenger side of the Taurus and pointed

a handgun at Holmes. Holmes was shot in the leg as he ran from defendant. He kept running for 15 or 20 feet until his leg gave out and he fell to the ground. He looked over his shoulder and saw defendant coming toward him. Holmes put his head down and was shot in the back. He was taken to the hospital, where he stayed for approximately two months. His left leg was amputated as a result of the gunshot wound, and his right leg was later amputated as well.

¶ 7 Holmes testified that he had a run-in with defendant approximately one week prior to the shooting. Holmes was on his way to visit a friend in Lexington Hills, when he saw defendant and others standing in the hallway leading to the friend's apartment. As Holmes walked past, defendant pointed a handgun at Holmes and attempted to rob him. Holmes ignored defendant and kept walking to his friend's apartment, where he stayed for the remainder of the night.

¶ 8 Holmes testified that when police interviewed him about the shooting, he initially refused to tell them who had shot him because he did not want to involve the police. However, three days after the shooting, Holmes met with Detective Matt Ray at the hospital, who showed him a photographic lineup. Holmes recognized defendant's picture and identified him as the shooter. Holmes testified that he could not remember whether defendant's hair was in braids at the time of the shooting but remembered that defendant wore a "wife beater" and blue jeans. Holmes admitted that he lied to the police by initially telling them he did not know who shot him.

¶ 9 Gray testified for the defense. Gray testified that he was hospitalized on April 20, 2011. When he awoke in the hospital on April 21, defendant was present in his room. Gray was discharged from the hospital around noon or 1 p.m. that day. He left the hospital with defendant, and they drove straight to Glen Oak park for a birthday party. Gray and defendant stayed at the party until dark, when they traveled together to a residence on Indiana Street and went to sleep. Defendant was in Gray's presence from 1 p.m. until the two went to sleep that night.

¶ 10 Through Gray's testimony, the defense introduced two photographs that Gray testified he took at the party in the park on April 21. Both photographs showed defendant sitting at a picnic table in a grassy area while holding a shirtless infant. Defendant had short hair in both photographs and wore shorts and no shirt. The trees in the background appeared to be full of green leaves. Gray testified that it was a "nice day" and denied that the weather was "pretty cold." In the lower-left-hand corner of both photographs appears a superimposed date reading "4/21/11."

¶ 11 On cross-examination Gray testified that he took the pictures with his cellular telephone and that the pictures were printed "probably like a week after" April 21. Gray testified that his girlfriend manually put the "4/21/11" date on the photographs with a computer while printing the photographs at Walgreens. The State questioned Gray about what kind of phone he used to take the pictures. Gray stated that he did not remember. The State asked whether Gray still had the phone he used to take the pictures. Gray testified that police took the phone during a raid on the residence of his cousin, Byron Brock, on Garden Street in Peoria. Gray was present during the raid but could not remember exactly when it had occurred, remembering only that it happened after April 21, 2011. Gray testified that the pictures he took from April 21 would probably still be saved on the phone, because he didn't think he had deleted them, but he could not be certain. Gray testified that the pictures were taken and printed before his phone was taken in the raid but still could not remember when the raid had occurred.

¶ 12 On redirect examination, defense counsel pointed out that the back of each photograph was marked "Walgreens 03181 <> 10/03/11" and asked Gray whether the pictures were printed on October 3, 2011. Gray testified that he thought the October 3 date might be wrong, but he could not remember the date on which the pictures were printed.

¶ 13 In rebuttal, the State called Officer Richard Linthicum, who testified that he executed a search warrant at 2401 West Garden Street in Peoria on October 26, 2010. Brock and Gray were present at the residence at the time of the search. During the search, Linthicum collected two cellular telephones, one of which belonged to Gray.

¶ 14 James Feehan, a digital forensic examiner for the Peoria police department, testified for the State. The State used Feehan to introduce the two cellular telephones taken by Linthicum during the search. Feehan testified that the phones' digital storage did not contain either of the photographs introduced by the defense. Defense counsel objected to the introduction of the phones on the ground that they constituted evidence of a collateral matter. The court stated:

"So, what happened here is Mr. Gray said, I took these photographs on a phone that was taken in a search warrant raid at a certain address with a certain other person present on a certain street, and they searched those informations out and now have demonstrated that the date in question predated the alleged taking of the photograph.

*** He was pretty specific about the circumstances of the phone being taken when he was with his cousin who he named at a certain address."

¶ 15 In response to defense counsel's objection, the State explained the relevance of the evidence:

"And the witness says, well, I don't have [the phone] because my phone was taken on Garden Street. I don't know when. I can't tell you when, but I did take those pictures in April of 2011, but then sorry, the phone is gone because the police took it when I was on Garden Street with Byron Brock.

Well, as it turns out, the police did take a phone on Garden Street on a date when Richard Gray was in a home with Byron Brock, but it was in 2010. And so, what—it's rebuttal to the defense case, and the defense claiming that the defendant was at that park on 2011."

The court admitted the phones, finding "I believe that it does bring into question the credibility of [Mr. Gray's] recollection and/or perhaps candor, but at least his recollection of events[.]"

¶ 16 The State introduced a certified report from the Midwestern Regional Climate Center showing that the high temperature in Peoria on April 21, 2011, was 54 degrees, after which the State rested. The State had previously introduced a photograph of the crime scene taken on April 21, 2011. The trees in the background of that photograph did not have all of their leaves.

¶ 17 The court found defendant guilty on both counts. It stated that it found Holmes's testimony and identification of defendant credible, despite Holmes's initial abstention from identifying defendant as the shooter. The court found Gray's and defendant's testimony about the alibi incredible.

¶ 18 Defendant filed a motion for a new trial, arguing, *inter alia*, that the evidence was insufficient to prove him guilty beyond a reasonable doubt. The motion did not raise the claim that the cellular telephones were collateral evidence. The court denied the motion.

¶ 19 The court merged the aggravated battery count with the attempted murder count and sentenced defendant to 20 years' incarceration, plus a 25-year add-on for discharging a firearm that caused great bodily harm. The court also ordered a deoxyribonucleic acid (DNA) fee, if defendant had not previously given a DNA sample. The DNA fee was imposed. Defendant appeals.

¶ 20 ANALYSIS

¶ 21 Defendant raises two issues on appeal: (1) the cellular telephones admitted into evidence constituted improper collateral evidence; and (2) defendant's DNA analysis fee must be vacated because defendant had previously provided a DNA sample.

¶ 22 I. Collateral Evidence

¶ 23 Defendant first argues that the court erred by admitting the cellular telephones, because the phones were collateral evidence introduced solely for the purpose of impeaching Gray. See, e.g., *People v. Collins*, 106 Ill. 2d 237 (1985).

¶ 24 Defendant objected at trial but failed to raise the issue in his posttrial motion. Therefore the issue is forfeited and plain error review applies. *People v. Enoch*, 122 Ill. 2d 176 (1988). Plain error allows a reviewing court to address forfeited errors when either (1) the evidence was so closely balanced that the verdict may have been the result of the error and not the evidence; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005). In the present case, defendant argues that the closely balanced prong applies. We must first determine whether error occurred at all. *People v. Naylor*, 229 Ill. 2d 584 (2008).

¶ 25 A. Was There Error?

¶ 26 Generally, any kind of impeaching matter may be developed on cross-examination of a witness. *Collins*, 106 Ill. 2d 237. However, the use of extrinsic evidence for impeachment purposes is limited. Extrinsic evidence may not be introduced to impeach a witness's testimony about a collateral issue, and the examiner must accept the witness's answer. *People v. Terrell*, 185 Ill. 2d 467 (1998). An issue is considered collateral if the subject matter is not relevant for any purpose other than to contradict the testimony of the witness. *People v. Santos*, 211 Ill. 2d 395 (2004). On the contrary, a matter is noncollateral if the subject matter is relevant in the

litigation to establish a fact of consequence. *People v. Hayes*, 353 Ill. App. 3d 578 (2004). The limitation on using collateral evidence for the purpose of impeachment is grounded in principles of relevancy. See Ill. Rs. Evid. 401, 402, 403 (eff. Jan. 1, 2011). The collateral impeachment rule is intended to avoid confusion of the issues, undue consumption of time, and unfair prejudice. *People v. Persinger*, 49 Ill. App. 3d 116, 124-25 (1977); see also Ill. R. Evid. 607 (eff. Jan. 1, 2011); Michael H. Graham, *Graham's Handbook of Illinois Evidence* § 607.2 (10th ed. 2010). The latitude to be allowed on cross-examination and rebuttal—and, specifically, the determination whether an issue is collateral—lies within the sound discretion of the trial court. *Collins*, 106 Ill. 2d 237.

¶ 27 In the present case, the issue of whether Gray's cellular telephone was in an evidence locker on the day of the shooting was a fact of consequence and not collateral. Gray claimed that the particular phone he used to take the photographs of defendant on April 21, 2011, was seized during a raid on his cousin's house. The State's rebuttal evidence showed that the particular phone Gray claimed to have used to take pictures of defendant on April 21, 2011, was actually in an evidence storage locker on that date and had been since October 2010. One possible conclusion to draw from that rebuttal evidence was that the photographs introduced into evidence were not taken on April 21, 2011—a conclusion which rebuts defendant's alibi. As a result, the photographs were not used solely to contradict the testimony of Gray, but rather to establish that the pictures taken by Gray were not taken on the date of the shooting. The court did not abuse its discretion by admitting the extrinsic evidence.

¶ 28 II. DNA Analysis Fee

¶ 29 Section 5-4-3 of the Unified Code of Corrections requires that a defendant convicted of a felony submit a DNA specimen and pay a \$250 DNA analysis fee. 730 ILCS 5/5-4-3(a), (j)

(West 2012). However, a defendant is required to submit to and pay for the DNA assessment only when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Defendant's presentence investigation revealed that his DNA was already on file with the Illinois State Police. Because defendant's DNA was previously registered, we vacate that portion of the sentencing order requiring defendant to submit a DNA sample and pay a \$250 DNA analysis fee.

¶ 30

CONCLUSION

¶ 31

The judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

¶ 32

Affirmed in part and vacated in part.