2016 IL App (1st) 143154-U

FIFTH DIVISION
November 4, 2016

No. 1-14-3154

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. 13 MC1 250593
	)	
TIWON SIMS,	)	Honorable
	)	Clarence Burch,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's battery conviction affirmed where defendant failed to establish plain error and thus forfeited his claim that he was denied his right to present his defense when the trial court excluded his witness from testifying.

¶ 2 Following a bench trial, defendant Tiwon Sims was found guilty of battery (720 ILCS 6/12-3(a)(2) (West 2012)) and sentenced to 43 days' imprisonment, time considered served. On appeal, defendant does not contest the sufficiency of the evidence to sustain his conviction. Rather, he solely contends that he was denied a fair trial by the trial court's exclusion of witness

testimony on the complainant's motive to lie, which prevented him from demonstrating the complainant's bias and presenting his theory of defense. Thus, he requests that we reverse his conviction and remand his cause for a new trial. For the following reasons, we affirm the judgment of the trial court.

¶ 3 Defendant was charged by complaint with battery. At trial, Steven De La Torre, the complainant, was the State's sole witness. De La Torre testified that in November 2013, he and defendant were both sales counselors for LA Fitness in Chicago. As sales counselors, they signed up potential members for gym memberships with LA Fitness. On November 12, 2013, De La Torre was acting as general manager and arrived at work around 9 a.m. Defendant opened the sales office and arrived prior to De La Torre. As the opening sales counselor, defendant was entitled to commissions from any "walk-ins."

¶ 4 Around 9:15 a.m., a woman, who had an appointment with a sales counselor identified only as Bruno, entered the sales office to sign up for a gym membership. Because Bruno was not at work at that time, De La Torre assisted the woman and assigned the commission in the computer system to Bruno. Around 1 p.m., defendant entered De La Torre's office, grabbed the phone from his hand, "slammed the phone down onto the desktop," and with a sweeping motion pushed the phone to the floor. Defendant cursed at De La Torre, accused him of stealing, and called him a weasel. Defendant claimed that as the opening employee, he was entitled to the commission from the walk-in that morning and that De La Torre stole from him when he assigned the commission to Bruno. De La Torre explained that the woman was an appointment, not a walk-in, and asked defendant to return to his office. Defendant complied.

¶ 5 At approximately 5 p.m., defendant returned to De La Torre's office, still enraged. De La Torre's hand was on his computer mouse, and defendant grabbed his wrist and "whipped it up in the air." With his other hand, defendant grabbed the mouse and slammed De La Torre's hand down on the desk. Consequently, De La Torre was insulted and felt pain in his wrist. Defendant sat across from De La Torre, placed his cell phone on the desk, and informed De La Torre that he was recording their conversation. Defendant said, "This is going to prove that you are a thief. That you take money out of people's pockets, that you're an F'ing thief. And the powers that be are going to know that you are an F'ing thief and you are Willie the weasel." As a result, De La Torre sent defendant home immediately, although he was scheduled to work until 6 p.m. that day.

¶ 6 De La Torre called the police to report the incident with defendant when he returned home from work around 9 p.m. He did not want to call attention to the LA Fitness sales office by calling police during the workday. The following day, De La Torre returned to work. For three weeks, De La Torre and defendant worked together without incident. On December 3, 2013, a police detective followed up with De La Torre about his complaint against defendant. De La Torre indicated that he wanted to pursue charges against defendant, so the detective told him to call police the following day when he was at work with defendant and they would arrest defendant.

¶ 7 Between the date of the incident and December 4, 2013, De La Torre had phone conversations with LA Fitness's human resources department and meetings with Daniel Velasquez, the new general manager. Velasquez had recently started at LA Fitness and was not the general manager at the time of the incident between De La Torre and defendant. On the

morning of December 4, 2013, De La Torre called 911 and defendant was subsequently arrested. De La Torre did not inform Velasquez that defendant would be arrested that day because the police detectives told him to "keep things quiet." However, because Velasquez took over as general manager, De La Torre told him prior to December 4, 2013 that there was an incident between himself and defendant and that the police were involved. Later in the day, De La Torre, Bruno, and Velasquez had a team building meeting, but they did not discuss defendant's arrest.

¶ 8 De La Torre signed a complaint dated December 4, 2013. He did not sign one on November 12, 2013 when the incident occurred because police officers instructed him to wait until Area North detectives contacted him. Those detectives did not contact him for three weeks.

¶ 9 After De La Torre testified, the State rested and defense counsel attempted to call Daniel Velasquez as a witness. The State requested an offer of proof regarding what Velasquez would testify to because he was not a witness to the incident. The following colloquy ensued:

> "THE COURT: Make an offer of proof.
>
> [DEFENSE COUNSEL]: Mr. Velasquez is here –
>
> THE COURT: If this witness were called to testify he would testify –
>
> [DEFENSE COUNSEL]: If this witness were called to testify – I apologize, Judge – if this witness was called to testify, he would impeach a great deal of the testimony of the complaining witness in this matter.
>
> THE COURT: Tell me exactly what he will say.

[DEFENSE COUNSEL]: He will tell you that he did not hear about this incident, this alleged incident until, December 4th after my client got arrested.

THE COURT: So what's that got to do with anything, when he heard about it?

[DEFENSE COUNSEL]: It goes towards the bias and the motivation of the complaining witness.

THE COURT: The bias to do what?

[DEFENSE COUNSEL]: To lie, Judge. He wanted my client out of the way. He got him out of the way.

[STATE'S ATTORNEY]: Judge, this doesn't go to any sort of bias –

THE COURT: The only thing I'm concerned with at this point – you can call him later, but right now it's not relevant.

[DEFENSE COUNSEL]: Okay, Judge.

THE COURT: For now, no.

[DEFENSE COUNSEL]: At this time the defense rests."

¶ 10 Following arguments, the trial court found defendant guilty of battery and sentenced defendant to 43 days' imprisonment, time considered served. In his posttrial motion, defendant challenged the sufficiency of the evidence. The trial court denied defendant's motion and this appeal followed.

¶ 11 On appeal, defendant contends that the trial court violated his due process right to present a defense when it excluded a defense witness, Velasquez, who would have testified regarding De La Torre's motive to lie. Defendant concedes he failed to raise this issue in his posttrial motion, and asks that this court review it for plain error.

¶ 12 The plain-error rule permits a reviewing court to consider unpreserved errors when " '(1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). Defendant argues both plain error prongs apply because 1) witness bias is always relevant, 2) the evidence was closely balanced where the only evidence was De La Torre's testimony, and 3) defendant was deprived the right to a fair trial because the exclusion of Velasquez's testimony made it impossible to defend against the State's allegations. Prior to addressing plain error, however, we must first determine whether any error occurred. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 13 Before turning to the merits of defendant's contention of error, we must first ask whether the record is adequate to review the alleged error. "When a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he 'must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been.' " *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010) (quoting *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 773 (2002)). An offer of proof permits the reviewing court to determine whether the evidence was properly excluded. *People v. Wood*, 341 Ill. App. 3d 599, 604 (2003). An adequate offer of proof requires that the proponent of the evidence assert, with particularity, the substance of the witness's anticipated testimony. *People v.*

Andrews, 146 Ill. 2d 413, 421 (1992). An offer of proof is insufficient if the proponent speculates as to the witness's testimony or merely summarizes the testimony in a conclusory fashion. *Pelo*, 404 Ill. App. 3d at 875-76. The failure to make an adequate offer of proof deprives the reviewing court of the record necessary to determine whether the trial court abused its discretion. *Id.*at 877. An offer of proof "serves no purpose if it does not demonstrate, both to the trial court and to reviewing courts, the admissibility of the testimony" which the trial court excluded. *Andrews*, 146 Ill. 2d at 421. Thus, "the failure to make an adequate offer of proof results in a waiver of the issue on appeal." *Id.* at 421.

¶ 14 Here, we find defendant's offer of proof inadequate because it was conclusory and unspecific. Defense counsel proffered that Velasquez's testimony "would impeach a great deal of the testimony of the complaining witness," and reveal that he did not learn of the incident until after defendant's arrest on December 4th, 2013. When the trial court inquired how the timing of Velasquez's knowledge of the incident was relevant, defense counsel merely stated that Velasquez's testimony would "go towards the bias and the motivation of the complaining witness *** to lie," because "[De La Torre] wanted [defendant] out of the way." To begin, the offer of proof provided no specifics beyond that Velasquez was unaware of the incident prior to December 4th. Further, it failed to explicitly reveal how the date Velasquez learned of the incident would demonstrate De La Torre's bias or motive to lie about defendant or the incident. See *Andrews*, 146 Ill. 2d at 421 ("[I]n making the offer of proof, counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony."); see also *People v. Howard*, 113 Ill. App. 3d 380, 385 (1983) (noting the evidence of bias "must be direct and positive"). Thus, defense counsel's statement amounted to

unsupported speculation as to what the testimony would reveal. See *Pelo*, 505 Ill. App. 3d at 876 (noting an offer of proof is inadequate if it "offers unsupported speculation as to what the witness would say"). Merely stating that Velasquez would reveal De La Torre's bias or motive to lie, without more, is insufficient to demonstrate the admissibility of his testimony or preserve the issue for review. *Andrews*, 146 Ill. 2d at 421. Accordingly, we conclude that the offer of proof was inadequate, and therefore, defendant waived this issue.

¶ 15 Moreover, even if the offer of proof could be construed as adequate, the evidence offered was not relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action either more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan 1, 2011); *People v. Pike*, 2016 IL App (1st) 122626, ¶ 33. "While a defendant has the right to present a defense, a trial court has broad discretion in ruling on evidence sought to be excluded as irrelevant." *People v. Bohn*, 362 Ill. App. 3d 485, 490 (2005). The admissibility of evidence is within the trial court's sound discretion, and we will not overturn a trial court's decision to admit or exclude evidence absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 16 Here, the trial court determined that the timing of when Velasquez learned of the incident was irrelevant, and that determination is supported by the record. Velasquez was not a witness to the incident, was not the general manager when the incident occurred, and when he learned of the incident did not tend to make the existence of any material fact more or less probable. While defendant argues criminal defendants should be given wide latitude to establish bias or a motive to testify falsely, particularly where the State's case relies entirely on witness credibility (*People v. Cookson*, 215 Ill. 2d. 194, 215 (2005)), this latitude does not extend to irrelevant evidence (see

Bohn, 362 Ill. App. at 490). Moreover, the proposed testimony would not have established De La Torre's alleged bias. Further, defendant was not denied an opportunity to present his defense regarding De La Torre's motive to lie because he was able to cross-examine De La Torre on any potential bias or motive to lie (see, *e.g.*, *People v. Collins*, 106 Ill. 2d 237, 269 (1985) (stating "any permissible kind of impeaching matter may be developed on cross-examination, since one of the purposes of cross-examination is to test the credibility of the witnesses")) and argued his lack of credibility to the trial court. We therefore conclude that the trial court's decision to exclude Velasquez's testimony was not an abuse of discretion. Because we find no error, plain error does not exist.

¶ 17 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.