2016 IL App (2d) 140431-U
No. 2-14-0431
Order filed September 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TONY ROSALEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 09-CF-361 Honorable Susan Clancy Boles, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no plain error in the trial court's restriction of cross-examination as to a witness's motives to testify falsely: defendant was permitted to explore the witness's key motive, a plea agreement under which he received a very lenient sentence in exchange for his testimony, whereas the further motives that defendant sought to explore were speculative.

¶ 2 Following a jury trial, defendant, Tony Rosalez, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to 35 years' imprisonment. He appeals, contending that the trial court erred by prohibiting him from cross-examining a State witness about whether, before the witness entered into a plea agreement with the State, the State had

openly contemplated seeking the death penalty against him, and whether, two days before making the agreement, he learned that the psychiatrist retained to help develop his defense had concluded that he was a malingerer. We affirm.

¶ 3 Defendant was charged with two counts of first-degree murder in the death of Paola Rodriguez, who was shot in the head on January 30, 2009. Manith Vilayhong was also charged with Rodriguez's murder. At a joint preliminary hearing, Jose Gonzalez, who claimed to be with defendant and Vilayhong when the shooting occurred, testified to his recollection of events. At the end of the hearing, the attorneys discussed scheduling future court dates for, *inter alia*, arraignment. The prosecutor stated that "we will have 120 days from the date of arraignment to make a determination as to whether we would be seeking the death penalty on either of these defendants."

¶ 4 Subsequently, Vilayhong pleaded guilty and agreed to testify against defendant. Defendant's case proceeded to a jury trial. Briefly summarized, the evidence at trial showed the following.

¶ 5 On January 30, 2009, Rodriguez, who lived in Rochelle, was visiting her cousin, Sara Almanza, and Almanza's boyfriend, Omar Zavala, in Elgin. Almanza knew that Zavala was a member of the Insane Deuces street gang.

¶ 6 At about 9:30 p.m., Almanza, Rodriguez, Zavala, and another man were in the parking lot of a BP gas station on Bluff City Boulevard. A white Ford Expedition drove by and Zavala exchanged gang slogans with the people in the Expedition. The Expedition continued east on Bluff City Boulevard. Almanza and the others left the parking lot, heading in the same direction. Rodriguez was driving a Pontiac Grand Prix with Almanza in the passenger seat, following Zavala and his friend, who were in a Dodge Durango. The Expedition circled back to get behind

the Grand Prix. All three cars turned north onto Raymond Street, where the Expedition pulled up alongside the Grand Prix. Almanza heard a gunshot and the driver's side window shattered. As Rodriguez slumped forward, Almanza reached her leg over to stop the car. The Expedition sped away.

¶ 7 Gonzalez was riding in the Expedition. Defendant sat in the front passenger seat, with Vilayhong in the second row of seats on the passenger side. Gonzalez knew that defendant and Vilayhong were members of the Maniac Latin Disciples.

¶ 8 Gonzalez recounted seeing the other group at the gas station. Those in the Expedition believed that the others were members of a gang that was enemies of the Maniac Latin Disciples. Vilayhong insisted that the driver follow the vehicles leaving the gas station. Gonzalez testified that, as the Expedition pulled alongside the Grand Prix, Vilayhong told defendant that he had better "do it," or Vilayhong would do so himself. Defendant then rolled down his window. Gonzalez heard a "pop" and saw a flash outside the window. The flash was closer to defendant than it was to Vilayhong. The car's driver's side window shattered and the car began to slow down.

¶ 9 Vilayhong testified that he held the rank of governor in the Maniac Latin Disciples. He said that, as the Durango turned onto Raymond Street, he told the driver to follow it. There was a car in between the Durango and the Expedition at that point. Vilayhong had noticed only the men in the Durango and considered it to be his only target. Vilayhong told the driver to pass the car and catch up to the Durango. He repeatedly told defendant to shoot at the Durango, threatening to "violate" defendant if he did not.

¶ 10 As the Expedition pulled alongside the car, Vilayhong leaned out his window and screamed "Maniac" and "Deuce killer" to see if the occupants reacted. When they did not, he

assumed that they were not gang members. At that point, he heard a gunshot and saw a flash. He did not see whether the shot hit anything. He later gave the gun to a man named "Tough Tony" for disposal.

¶ 11 Vilayhong admitted that he had been charged with first-degree murder in connection with Rodriguez's death. He knew that he faced a sentence of up to 75 years' imprisonment. He was testifying pursuant to a negotiated plea agreement. Per that agreement, he was initially sentenced to 35 years' imprisonment. However, if the State deemed his testimony truthful, his prison term would be reduced to 20 years. Whether his testimony was deemed truthful was entirely within the State's discretion.

¶ 12 On cross-examination, Vilayhong testified that he was extremely worried about the penalties he would be facing if convicted of murder. However, he knew that he was not facing "the shooter spot."

¶ 13 On cross-examination, defense counsel asked Vilayhong whether he was familiar with a court hearing on February 27, 2009. The State objected on the ground of relevance. Defense counsel explained that the testimony would be relevant for two reasons. First, it was relevant because Vilayhong had heard Gonzalez testify at the hearing and thus might have been tempted to conform his testimony to Gonzalez's. Counsel asserted that the evidence was also relevant because:

> "They [the prosecution] made the declaration they were going to decide whether they were going to ask for the death penalty. It goes to his desire to make a deal."

The prosecutor asserted that the evidence was not relevant on that ground because the decision not to seek the death penalty had been made long before Vilayhong entered the plea agreement.

¶ 14 The trial court overruled the objection as to whether Vilayhong heard Gonzalez testify, but sustained the objection as to the death penalty. Vilayhong then testified that he had been in court when Gonzalez testified.

¶ 15 On further cross-examination, Vilayhong testified that he had been hospitalized in 2002 with a diagnosis of manic-depressive disorder. After he was charged in this case, he was given a psychological examination at the request of defense counsel. Vilayhong denied that he asked the evaluator whether she had an "in" with the jail's psychiatrists, but the parties later stipulated that the evaluator would testify that he did. Vilayhong testified that he discussed the results of the evaluation with his lawyer. Counsel then began to ask whether "one of the results of this is that they believed." The State objected on the ground of hearsay.

¶ 16 Defense counsel asserted that the evidence was not being offered for its truth. Rather, it was relevant to Vilayhong's state of mind in deciding to make the plea agreement. The trial court sustained the objection, stating that defendant could bring in that evidence in his case-in-chief. Defendant did not do so.

¶ 17 The jury found defendant guilty. The trial court sentenced him to 35 years' imprisonment and defendant timely appeals.

¶ 18 Defendant argues that the trial court erred by restricting his cross-examination of Vilayhong. He contends that he should have been able to question him about whether the prospect of receiving the death penalty influenced his decision to plead guilty and testify against defendant. He further contends that he should have been allowed to inquire about whether the psychologist's diagnosis that Vilayhong was a malingerer influenced his decision.

¶ 19 We note that defendant failed to include this issue in a posttrial motion, thus forfeiting it. " '*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged

errors that could have been raised during trial.' " (Emphases in original.) *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (quoting *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Defendant recognizes this, but asks us to consider the issue as plain error.

¶ 20 The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). We apply the plain-error doctrine when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step of plain-error review is to decide whether any error occurred. *Id.* Defendant here invokes only the first prong of plain-error analysis, contending that the evidence was closely balanced and that the error was serious enough to have affected the result.

¶ 21 "A criminal defendant has a fundamental constitutional right to confront the witnesses against him and this includes the right to conduct a reasonable cross-examination." *People v. Davis*, 185 Ill. 2d 317, 337 (1998). Accordingly, a defendant has the right to inquire into a witness's bias, interest, or motive to testify falsely. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). However, "[a] defendant's rights under the confrontation clause are not absolute. Rather, 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis in original.) *People v. Jones*, 156 Ill. 2d 225, 243-44 (1993) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). The latitude allowed on cross-examination is within the trial court's sound discretion, and a reviewing court will not interfere unless there has

been a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000).

¶ 22 Here, Vilayhong testified on direct examination about his favorable plea agreement: although facing a maximum sentence of 75 years' imprisonment, he was sentenced to only 35 years in exchange for his testimony against defendant, and that sentence could be further reduced to 20 years if the prosecution, in its sole discretion, deemed his testimony truthful. Thus, Vilayhong had every reason to tailor his testimony to the prosecution's liking. Defendant was able to cross-examine him about this arrangement. In light of Vilayhong's testimony that he was not facing "the shooter spot" and that the maximum sentence he faced was 75 years, we fail to see how additional questioning about whether at some earlier time he believed he was facing the death penalty would have further called into question the veracity of his testimony. Indeed, by the time defendant's trial began in February 2012, the death penalty had been legally abolished in Illinois. See 725 ILCS 5/119-1(a) (West 2012).

¶ 23 On appeal, defendant speculates that Vilayhong might have been further motivated to please the prosecution because he believed that he owed the prosecutor his life because the prosecutor decided not to seek the death penalty. This appears to be different from the reasons advanced in the trial court for the admission of this evidence. In any event, in light of Vilayhong's testimony about the possible penalties he faced, such an inference is simply too speculative. See *People v. James*, 2013 IL App (1st) 112110, ¶ 54 (trial court did not err in prohibiting inquiry on cross-examination of witness into plea deal that was not pending at the time of the defendant's trial as the witness had already decided not to take the offer).

¶ 24 Defendant also contends that he should have been allowed to question Vilayhong about the psychological evaluation finding that he was a malingerer. Like the State, we fail to see the

relevance of this line of questioning. Defendant argues that Vilayhong, with a possible insanity defense foreclosed, was further motivated to seek a plea deal. Such an inference is speculative at best. Defendant never made an offer of proof that he expected Vilayhong to so testify. In any event, the trial court allowed defendant to introduce such evidence during his case-in-chief and defendant never availed himself of that opportunity.

¶ 25 Defendant relies on *People v. Perez*, 209 Ill. App. 3d 457 (1991), but that case is distinguishable. There, an informant testified about his drug transactions with the defendant. The defense cross-examined him about the fact that he was paid for his work on the case, but was not allowed to cross-examine him about the informant's prior arrest and the fact that those charges were dismissed. *Id.* at 470. Consistent with longstanding precedent, the court held that the fact that a witness has been arrested or charged with an offense is always admissible to show that the witness might have a motive to testify falsely. *Id.* Further, the defense need not establish that the State had a specific deal with the witness. *Id.* at 470-71.

¶ 26 Here, defendant cannot show that Vilayhong had any charges dropped. The defense was able to explore the extremely lenient sentence Vilayhong received in exchange for his testimony. The further questions that were barred related to other, highly speculative motives for Vilayhong to falsely accuse defendant.

¶ 27 Finally, in light of Vilayhong's clear testimony about his favorable agreement with the prosecution and the tenuous nature of the excluded evidence, any error did not rise to the level of clear or obvious error. See *People v. Kliner*, 185 Ill. 2d 81, 134 (1998) ("the improper denial of a defendant's constitutional right to cross-examine a witness regarding bias does not always mandate reversal").

¶ 28 The judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 29 Affirmed.