2017 IL App (1st) 142318-U

SECOND DIVISION
February 14, 2017

No. 1-14-2318

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. 08 CR 5378
	)	
MAURICE MCGEE,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justice Neville concurred in the judgment.
Justice Mason specially concurred.

O R D E R

¶ 1 *Held*: Court did not abuse discretion in denying defense motion to bar an alleged victim from making identification at trial, and any error in admitting the identification was harmless. Erroneous fee vacated.

¶ 2 Following a jury trial, defendant Maurice McGee was convicted of involuntary manslaughter and sentenced to three years' probation with fines and fees. Defendant contends on appeal that the trial court erred in denying his motion to bar one of the alleged victims from

making an identification at trial. Defendant also contends that one of his fees was erroneously assessed. We affirm except for vacating the erroneous fee.

¶ 3 Defendant was charged with involuntary manslaughter for recklessly causing the death of John Gavin on or about February 13, 2008, by striking a person on the head with a firearm that then discharged and killed Gavin. He was also charged with aggravated discharge of a firearm for knowingly or intentionally firing a gun in the direction of Robert Marzettee on the same date.

¶ 4 Defendant filed a pre-trial motion to bar Marzettee from making an identification at trial. He argued that Marzettee gave the police an account that he did not know "exactly" what happened during the incident because of his beating by the perpetrators, and gave only a vague description of the perpetrators. Defendant noted that Marzettee had never viewed a photographic array or lineup after the incident, according to the State's discovery disclosures. Defendant argued that Marzettee making an identification at trial for the first time, when defendant would be seated at the defense table, would be unnecessarily suggestive.

¶ 5 At the motion hearing, the State argued that photographic arrays, showups, and lineups may be found unnecessarily suggestive but in-court identifications are barred only if a pre-trial identification was unduly suggestive and an in-court identification is insufficiently attenuated. The State also argued that the credibility of a trial identification by Marzettee would be an issue for the trier of fact, and cross-examination would be an adequate countermeasure against the issues noted by defendant. The defense argued the suggestiveness of defendant being at the defense table for Marzettee's testimony, citing a case where counsel had a defendant sit in the gallery while another person sat at the defense table, and a witness identified the person at the table rather than the defendant. The court noted that, conversely, it "had cases" where a witness identified a person in the gallery rather than the defendant seated at the defense table. Finding

that cross-examination of Marzettee was the proper method for addressing defendant's concerns, the court denied the motion.

¶ 6 Just before trial, the defense asked the court again to bar Marzettee from making an identification at trial, arguing unduly suggestive circumstances. Counsel added that Marzettee had pled guilty to extortion for seeking a bribe from defense counsel, and that Marzettee had earlier said that he could not identify defendant but was now saying that he could. The court denied the motion, noting that Marzettee would be subject to cross-examination.

¶ 7 At trial, Charles Ellis testified that Mary Ellis was his wife and John Gavin was their son. At about 6 a.m. on the day in question, Charles heard multiple gunshots. A short time later, Charles was leaving his home by the side door when he encountered a man he did not know pulling on the doorknob and claiming that someone was trying to harm him. At trial, Charles identified a photograph of Marzettee as that man. Marzettee startled Charles, who went back inside and did not let him into his home. Marzettee ran onward before Charles closed the door. Charles heard voices, and when he looked out a window, he saw four men "tussling" and forcefully leading "the guy" away. As it was still dark, Charles could not tell who the men were. Charles went to his kitchen, where he heard voices – including defendant's voice – coming from defendant's home next door. Charles went outside and saw defendant, Gavin, and defendant's cousin Marquis beating and kicking a man on defendant's doorstep. When Charles went back inside to call the police "because they're going to kill someone," he heard a single gunshot. He looked outside again and everyone was gone. Charles and Mary started calling for Gavin but received no response. When defendant and Marquis came out of defendant's home, Charles saw Gavin's apparently dead body on the doorstep. As defendant was walking towards his parked car, the police and ambulance arrived.

¶ 8 Mary Ellis testified that, at about 6 a.m., she heard several gunshots that seemed to be about a block away. A short time later, she heard Charles telling someone "No, you can't come in here." A short time after that, she heard a commotion of multiple people in defendant's driveway, and looked out her window. She saw defendant, Gavin, and defendant's cousin dragging another man she did not know towards defendant's home. While Mary stepped away from the window to put on shoes, she heard two gunshots. She ran outside and saw Gavin, lying apparently dead; except for Charles, nobody else was there. She called 911. She did not see defendant, but noticed Marquis inside defendant's home. When the police arrived, she heard them tell someone to "back up" so she turned around and saw defendant in his car; he exited the car as ordered by police. An ambulance came and took Gavin to a hospital, where a physician told her that he was dead.

¶ 9 About two or three days after the incident, Mary invited defendant to her home to explain what had happened. When he came, Mary and her daughter Charday were there. Defendant told them that Marquis saw a man inside defendant's car on the morning in question so he, defendant, and Gavin ran out of defendant's home to pursue the man. As they chased him, defendant fired shots into the air. They caught the man and brought them back to defendant's home, where they were "fighting" him. Defendant struck the man on the head with the handle or butt of his gun, the gun discharged, and Gavin fell to the ground. Defendant told Mary and Charday that he "got rid of" the gun and that he was in the car to take Gavin to a hospital. Mary was a long-time friend of defendant's mother Virnita Martin and, in discussing the incident with Virnita, told Virnita that defendant confessed to her. Mary denied asking Virnita "who did it" in 2011 outside a courtroom, explaining that Virnita was not there and thus would not know. She admitted posting online in February 2014 that Gavin died "due to so-called friends who as of this day none of

them take responsibility for his death." She explained that she considered defendant's not-guilty plea a denial of responsibility, and she blamed the group for not providing aid to Gavin.

¶ 10 Robert Marzettee testified that he had three prior convictions for burglary. He also was convicted of bribery, for offering to defense counsel in this case that he would testify that he could not identify defendant in exchange for $7,000, and was in prison on a six-year sentence therefor as of trial. On the morning in question, Marzettee was walking down the street, not intending particularly to commit theft but open to doing so if the opportunity arose. He always carried a screwdriver and flashlight, and was doing so that day. He stopped to urinate between a hedge and a car parked in a home's driveway. He denied that he tried opening the car door as the car was "junk." As he walked away, he heard people rushing towards him from the home. He fled without looking back, and heard gunshots as he fled. In his flight, he saw a man leaving a home and asked to go inside, but the man refused and did not open the door. The chase ended when Marzettee met a man who pointed a gun at him and led him at gunpoint back to the home where the chase began. There, Marzettee saw three other men, including another holding a gun.

¶ 11 Though Marzettee could not be certain, in court he identified defendant as the second armed man. When asked if he could identify any of his assailants, he answered "I believe I can, but I wouldn't want to be wrong." Asked if he recognized any of his assailants in court, he replied "We all know where he is." Upon the court directing him to answer without "playing games," Marzettee answered "I think it's the defendant" but "I can't be a thousand percent sure." When asked if he saw someone he believed to be one of his assailants, he answered "Possibly the defendant." When asked if the man who "possibly might be the defendant" was the second armed man, Marzettee agreed.

¶ 12 The second armed man struck Marzettee in the face with his gun, a heavy metal object, breaking several teeth. Then, all four men struck, beat, and kicked Marzettee repeatedly. The attack ended when the second armed man struck Marzettee on the head with his gun, which discharged. As one of his attackers fell to the ground, Marzettee fled but then passed out after running only about a block. He briefly awoke and noticed that the police had arrived at the scene but did not recall being taken to the hospital. In addition to losing several teeth, he had a broken finger and broken rib, and repeated blows to his head from the gun required multiple staples and several stitches.

¶ 13 On cross-examination, Marzettee admitted that he had called defense counsel and they negotiated, or purported to negotiate, his favorable testimony in exchange for money. He was unaware that counsel had recorded the call. He pled guilty to doing so but admitted that he would do so again as "I'm an opportunist." He acknowledged that his minimum six-year sentence was negotiated by the assistant State's Attorneys (ASAs) who were prosecuting the instant case. He acknowledged that, during his beating, someone other than the two men he saw holding guns may also have had a gun. He told the police that he could not name his attackers. While he was taken to the police station after his treatment, he never viewed a lineup, and he did not recall viewing a photographic array. He denied telling ASAs on the day before trial that he could not make an identification, but admitted saying that he did not want to.

¶ 14 On redirect examination, Marzettee testified that he was never charged with a crime in this case and was released after being interviewed at the police station. To the best of his recollection, he had not seen defendant or a photograph of him between the incident and this trial. He had been avoiding the police and was not eager to go the police station to view an array or lineup. He acknowledged that the bribery charges, and his earlier burglary charges, had been

brought by the ASAs in the instant case, and that his plea to bribery was not given in exchange for his instant testimony. He had not been paid or made any promises for his testimony.

¶ 15 The parties stipulated that Dr. Adrienne Segovia would testify to conducting Gavin's autopsy and finding that he died of a single gunshot wound to the chest.

¶ 16 Crime scene investigator Heather Hansen testified to processing the crime scene. She found a shell casing on the front porch of defendant's home, and near the scene found a screwdriver and pair of gloves. She took samples of apparent bloodstains. No gun was recovered upon a search of defendant's home.

¶ 17 Police sergeant Jesse Jones testified to interviewing Marzettee at the hospital. Marzettee said that he was unable to ascertain exactly what happened due to his beating. A "couple of hours" after the incident, Sergeant Jones collected samples from defendant's hands for a gunshot residue test. Neither defendant nor anybody taken to the police station in this case was placed in a lineup, nor was a photographic array conducted.

¶ 18 Forensic scientist Mary Wong testified to performing gunshot residue testing. A sample from defendant's right hand tested positive for gunshot residue, indicating that he either fired a gun, was near the discharge of a firearm, or touched a surface with gunshot residue on it.

¶ 19 Defendant made a motion for a directed verdict, which the court denied.

¶ 20 Detective Michael Wilson testified that he was a patrolman in 2008 and responded on the morning in question to a report that a man was shot. After finding Marzettee on the street, lying on the ground bleeding, he proceeded to defendant's home. There, he saw four men and an apparently unconscious fifth man nearby. Two of the men, who Detective Wilson knew, were defendant and Marquis (or Marques) Martin. Immediately upon arriving, Detective Wilson saw

defendant walking towards a car until another officer told him to "step back" or the like, while the other three men were near the doorway of the home.

¶ 21 Virnita Martin, defendant's mother, testified that Mary Ellis had been her long-time friend until recently. While Virnita and Mary had discussed the incident at issue several times, Mary never told her that defendant confessed to the shooting. As they were waiting to enter court some time in 2011, Mary asked Virnita if defendant shot Gavin, and Virnita replied that he did not. Virnita did not believe that anyone overheard this conversation.

¶ 22 Defendant presented the parties' stipulation that Mary Ellis told an ASA that Charday "might have been present for a conversation with" defendant.

¶ 23 Following closing arguments, instructions, and deliberations, the jury found defendant guilty of involuntary manslaughter and not guilty of aggravated discharge of a firearm.

¶ 24 In his post-trial motion, defendant argued in relevant part that the court erred in denying his motion to bar identification. The court denied the post-trial motion and proceeded to the sentencing hearing, where defendant received three years' probation, 60 days of community service, and fines and fees. This appeal followed.

¶ 25 On appeal, defendant primarily contends that the trial court erred in denying his motion to bar Marzettee from making an identification at trial because the circumstances were unduly suggestive and Marzettee had not made a pre-trial identification.

¶ 26 The United States Supreme Court has addressed such a contention. *Perry v. New Hampshire*, 565 U.S. 228 (2012).

> "An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is 'a very substantial likelihood of irreparable misidentification,'

> [citation], the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth."
>
> "We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.* at 720-21.

In so stating, the Supreme Court acknowledged that "[m]ost eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do," nor did the Court "doubt either the importance or the fallibility of eyewitness identifications." *Id.* at 727-28. Noting that the Court had previously held that the potential unreliability of a type of evidence does not by itself render its admission fundamentally unfair, "[w]e reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Id.* at 728.

¶ 27 Our supreme court has considered a "contention that the in-court identification of defendant by [a State witness] was highly suggestive, thereby depriving defendant of due process." *People v. Lego*, 116 Ill. 2d 323, 339 (1987). Our supreme court held that the "authorities cited by defendant for the proposition that unnecessarily suggestive and conducive identification procedures lead to irreparable mistaken identification and denial of due process are inapplicable because they involve allegedly suggestive pretrial identification procedures and their possible taint upon later in-court identification." *Id.* at 340.

> " 'The identification by the witness *** was indeed the result of suggestive questioning, but the entire process, suggestive questions and all, took place in the presence of the jurors, who were in a position to determine the weight to be given to the fact that the defendant was wearing glasses in the courtroom, the difficulty of the witness with the English language, and all other attendant circumstances. We do not agree that the identification was inadmissible.' " *Id.* at 340-41, quoting *People v. King*, 54 Ill. 2d 291, 299 (1973).

¶ 28 We review the trial court's evidentiary ruling on whether to admit particular testimony for an abuse of discretion. *People v. Evans*, 2016 IL App (3d) 140120, ¶ 28. Even where evidence was improperly admitted, the error is harmless if there is no reasonable probability that the outcome would have been different had the evidence been excluded. *Id.*, ¶ 54.

¶ 29 Here, we conclude that the court did not abuse its discretion in denying defendant's motion. Defendant argues that an at-trial identification not preceded by a pre-trial identification is made under inherently suggestive circumstances and is an "archaic practice" "indistinguishable from the archaic single-suspect identifications that have been condemned as unnecessarily suggestive." However, trial testimony is readily distinguishable from an improper investigatory

procedure. As the trial court here noted repeatedly, a witness making a testimonial identification is subject virtually immediately to cross-examination regarding his identification. That adversarial testing makes at-trial identifications fundamentally different from suggestive identification procedures used during a police investigation months or years before trial. Marzettee was subjected to vigorous cross-examination, and the jury heard considerable evidence in impeachment of his testimony. Pursuant to *Perry* and *Lego*, the last relevant opinion from our supreme court, we must conclude that the trial court did not abuse its discretion in denying defendant's motion to bar Marzettee's in-court identification testimony.

¶ 30 Moreover, any error in admitting Marzettee's identification of defendant was harmless beyond a reasonable doubt. Marzettee's clear credibility issues notwithstanding, Charles and Mary Ellis corroborated his account that shots were fired during his flight, he was caught and dragged back to defendant's home, he was attacked there by a group of men, and a gunshot abruptly ended the attack. The Ellises established independently of Marzettee that the attackers included defendant and Gavin and that Gavin lay dead or dying almost immediately after the last gunshot. Defendant's statement to Mary corroborated Marzettee's account that one of his attackers was striking him on the head with a gun when it discharged and one of his attackers fell. In particular, that statement, with corroboration from the gunshot residue on defendant's hand, establishes independently of Marzettee that defendant struck the blow to Marzettee's head that resulted in the fatal gunshot. We find sufficient evidence other than Marzettee's testimonial identification of defendant for a jury to conclude that defendant caused Gavin's death.

¶ 31 The parties correctly agree that the $250 DNA analysis fee should not have been assessed here because defendant's DNA was collected upon an earlier felony conviction. 730 ILCS 5/5-4-3(j) (West 2014); *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 32 Accordingly, we vacate defendant's $250 DNA analysis fee and, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), direct the clerk of the circuit court to correct the fines and fees order to reflect the vacatur. The judgment of the circuit court is otherwise affirmed.

¶ 33 Affirmed in part, vacated in part, and order corrected.

¶ 34 JUSTICE MASON, specially concurring:

¶ 35 I agree with the result in this case, including the vacation of the improperly assessed DNA fee. I write specially because I disagree with the majority's invocation of Illinois Supreme Court Rule 615(b) as freestanding authority to "modify the judgment or order from which the appeal is taken." Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999). Without a vehicle, such as plain error, permitting us to review a forfeited error, I do not agree that Rule 615(b), standing alone, permits the result the majority reaches.

¶ 36 McGee did not raise the improperly assessed DNA fee in the trial court. In his brief, McGee invoked the void judgment rule, since overruled in *People v. Castleberry*, 2015 IL 116916, ¶ 19, and Rule 615(b) as a means to review this unpreserved error. The State has not raised McGee's failure to preserve the error and so has forfeited that argument. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000); Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("points not argued are waived."). Therefore, under the circumstances of this case, I agree with the decision to address this issue on the merits.

¶ 37 But given the admonition in Rule 615(a) that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights *shall be disregarded*," I am unwilling to state categorically that under all circumstances, Rule 615(b) provides an avenue of review for all unpreserved issues relating to erroneously assessed fines and fees. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999) (emphasis added).