2017 IL App (1st) 150092-U

SIXTH DIVISION
JUNE 9, 2017

No. 1-15-0092

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 CR 23672
	)	
CHRISTOPHER KIZART,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the defendant's conviction and sentence as there was no discovery violation by the State, and the defendant's sentence of 20 years was not an abuse of discretion.

¶ 2 The defendant, Christopher Kizart, was convicted of aggravated battery with a firearm and sentenced to 20 years' imprisonment. On appeal, the defendant argues (1) that his conviction should be reversed and the case should be remanded for a new trial because the State failed to comply with Illinois Supreme Court Rule 412(c) (eff. March 1, 2001) and *Brady v. Maryland*, 373 U.S. 83 (1963), or in the alternative, (2) that this court should reduce his sentence or remand

for resentencing because his 20-year sentence was excessive and an abuse of discretion. For the reasons stated below, we affirm the order of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On November 15, 2013, around 9:00 a.m., the victim, Richard Griffin, was walking to his grandmother's house in Chicago, Illinois. The victim testified that as he was walking, he saw a man he knew as "Little Chris" standing at the crosswalk. At trial, the victim identified the defendant as "Little Chris." The victim and the defendant walked past each other in different directions and nodded at the other one. The victim then heard a gunshot and felt a "hot pinch" in his right lower back. The victim turned around and saw the defendant holding a gun, with the barrel pointed in his direction. The victim then turned around and ran. He heard more gunshots and was shot again in his left lower back. In total, the victim was shot three times, twice in the back and once in the hand. The victim was taken to a hospital and remained hospitalized for three weeks. On December 20, 2013, the defendant was charged with attempted first degree murder, aggravated battery with a firearm, and aggravated unlawful restraint.

¶ 5 A bench trial commenced on October 14, 2014. Detective Christopher Tenton testified that he and Detective Neil Evans interviewed the victim in the hospital the same day he was shot. During the interview, the victim told the detectives that a man named "Little Chris" shot him. The victim said he had known "Little Chris" from his neighborhood for about five years. The victim further told Detective Tenton that "Little Chris" lived near the site of the shooting. At trial, the victim clarified that he meant that "Little Chris" "hung out" near the site of the shooting, and not that he lived there.

¶ 6 After meeting with the victim, Detective Tenton went back to the police station and investigated the nickname "Little Chris." After his investigation, Detective Tenton generated two

photo arrays, each with a picture of a different individual known as "Chris." The first photo array included a picture of the defendant, and the second photo array included a picture of Christopher Williams, who lived near the site of the shooting and had been arrested near that location twice in 2010.

¶ 7 Detectives Tenton and Evans returned to the hospital and showed the victim the first photo array, informing him that the suspect may or may not be included in the pictures. The victim identified the defendant's picture as "Little Chris" and signed his initials under the picture. The detectives did not show the second photo array containing William's photograph to the victim. The State, however, did show Williams' picture to the victim on September 16, 2014, in preparation for trial. And when the victim was testifying at trial, the State again showed the victim a picture of Williams and asked him if that was the "Little Chris" who shot him. The victim stated that he recognized the man's face in the picture, but that he did not know his name and that he was not the man who shot him.

¶ 8 When Detective Tenton mentioned the second photo array during his testimony at trial, the defendant objected, arguing that in response to the defendant's discovery request, the State had tendered only one photo array. The State responded that it was aware there were two photo arrays, but that it did not have the second one in its possession, and claimed that it was not evidence as it was never shown to the victim. When the trial court asked the State why it asked the victim about Williams' picture, the Assistant State's Attorney claimed it was because the defendant had subpoenaed the police officers who had arrested Williams in 2010 to testify at the trial, and "I anticipated this was going to be an issue, and because I don't want to keep [the victim] here all day long just to call him in rebuttal, I showed him the pictures of Christopher Williams."

¶ 9 The defendant argued that information about Williams was in the police reports, which had been requested during discovery, and the State was aware of the second photo array which included Williams. The defendant moved for a mistrial, arguing that the State's failure to disclose the second photo array containing Williams' picture was a discovery violation pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court denied the defendant's motion for a mistrial, stating "I do not find this to be a *Brady* violation because the victim, who just testified, *** was never shown the second [photo] array, so it is not like he viewed another array and made an identification. *** I don't think [the State] is trying to pull anything."

¶ 10 Following the bench trial, the defendant was convicted of aggravated battery with a firearm.

¶ 11 At the sentencing hearing, the State requested the trial court to sentence the defendant above the minimum sentence of six years due to the violent and senseless nature of the offense. In mitigation, the defendant argued that he had great potential for rehabilitation, especially because he was only 22 years old at the time of the offense. He explained that he had remained employed at a series of jobs since leaving high school, that he had a supportive family in court with him, and that his mother offered to let him live with her in Georgia upon his release. He noted that he had only one prior felony conviction, a burglary, and that he was not a gang member. He apologized and requested the minimum sentence.

¶ 12 At the conclusion of the sentencing hearing, the trial court sentenced the defendant to 20 years in prison. In sentencing, the trial court stated:

> "I have had the opportunity to review the presentence investigation and the defendant's background, his social history, his education background. *[sic]* Considered the facts of the case, all the factors

> in aggravation and mitigation. I have considered his rehabilitative potential. *** [T]his is not a case where there was a single shot fired from a distance which hit somebody. This was several shots fired at close range. If the defendant was a better aim, we would be talking about first degree murder here and not an aggravated battery with a firearm. *** Considering the number of shots fired, the court does not believe the minimum sentence is appropriate. The court feels a lengthier sentence is necessary in light of the fact *[sic]* of the case as well as to deter others."

¶ 13 On the same day, the defendant filed a written motion for reconsideration, arguing that his 20-year sentence was excessive in view of his background and nature of the offense; the motion was denied and this appeal followed.

¶ 14 In his initial appellate brief, the defendant argued that a 20-year sentence was excessive and an abuse of discretion considering the mitigating factors he presented at the sentencing hearing. With this court's permission, the defendant filed a supplemental brief which argues that his conviction should be reversed and remanded for a new trial because the State failed to comply with *Brady* and Rule 412(c) when it failed to disclose the second photo array and therefore the trial court should have granted his motion for a mistrial. We now review both issues.

¶ 15 ANALYSIS

¶ 16 We note that we have jurisdiction to review this matter, as the defendant filed a timely notice of appeal. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); Ill. S. Ct. R. 606 (eff. Dec. 11, 2014).

¶ 17 The defendant argues the trial court erred in denying his motion for a mistrial because the

State committed a discovery violation pursuant to Rule 412(c) and *Brady* when it failed to disclose the second photo array. He argues that his guilt turned on the victim's identification of him from the first photo array and that there was no other evidence tying him to the offense. Specifically, he argues that this case "boiled down to the reliability of [the victim's] identification of [the defendant] as the shooter" from the first photo array.

¶ 18 According to the defendant, the second photo array is material evidence because it contained a picture of Williams, who is another "Chris" who "looks remarkably like" him, lived near the scene of the offense (unlike the defendant who lived over 20 miles away), and had been arrested near the same location twice in 2010. The second photo array containing Williams' picture, he argues, is therefore favorable to him because his entire defense was that he was misidentified by the victim as his shooter. The defendant urges that although the victim was never shown the second photo array during the investigation, it demonstrates that the detectives considered Williams a suspect, which supports the his defense of misidentification. He claims that by the time the victim first saw Williams' picture in September 2014, the police had cemented in his mind that the defendant was the man who shot him. The defendant concludes that the State's failure to comply with Rule 412(c) and *Brady* deprived him of the opportunity to see possibly exculpatory evidence when preparing the case, and thus, requests us to reverse his conviction and remand the matter for a new trial.

¶ 19 The State argues there was no discovery violation pursuant to *Brady* or Rule 412(c) because at the time of discovery, the State did not have the second photo array in its possession and thus could not disclose it. The State further argues that the second photo array is not material in light of the identification evidence at trial. The State points out that the victim recognized the defendant from his neighborhood shortly before he shot him, that he identified the defendant

immediately without hesitation from the first photo array, and that the second photo array is not enough to negate all that evidence. Thus, the State argues that the second photo array is neither favorable to defendant nor material to his guilt.

¶ 20 A mistrial should be granted where an error of such gravity has occurred that it has infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice. *People v. Bishop*, 218 Ill. 2d 232, 251 (2006). The trial court's denial of a defendant's motion for a mistrial will not be disturbed unless the denial was a clear abuse of discretion. *Id*. If the defendant has been prejudiced by a discovery violation and the trial court fails to eliminate the prejudice, a reviewing court will find an abuse of discretion. *People v. Weaver*, 92 Ill. 2d 545, 559 (1982).

¶ 21 Supreme Court Rule 412(c) provides, in part, that "the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor." Ill. S. Ct. R. 412(c) (eff. March 1, 2001). Additionally, in *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held the State is required to disclose evidence that is favorable to the accused and material to guilt. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *People v. Burt*, 205 Ill. 2d 28, 47 (2001) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985). A claim of a *Brady* violation requires a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching, (2) the evidence was either willfully or inadvertently suppressed by the State; and (3) prejudice ensued to the defendant. *Id*.

¶ 22 The State argues that the defendant has forfeited this issue because while he did move for a mistrial, he did not file a post-trial motion on the issue. The defendant responds that we should consider this forfeited issue as plain error.

¶ 23 In order to properly preserve an issue for appellate review, a defendant must both contemporaneously object at trial and raise the issue in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, the plain error rule permits this court to consider unpreserved issues when a clear and obvious error occurred, and (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant's trial, or (2) the error is so serious that it affected the fairness of the defendant's trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005); Ill. S. Ct. R. 615(a) (eff. March 15, 2017). Without reversible error, there can be no plain error. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 24 In arguing that the second photo array is material, the defendant directs us to *People v. Nichols*, 63 Ill. 2d 443 (1976). In *Nichols*, the defendants were convicted of burglary, armed robbery, and attempted rape based on the victim's identification from photographs of the defendants. *Id*. at 444. At trial, the State failed to produce a shoe that was left below the window used by the perpetrators to enter the victim's apartment, and instead only disclosed a copy of a crime laboratory report prepared following an examination of the shoe. *Id*. at 445-46. Our supreme court held the failure to disclose the shoe was a discovery violation pursuant to Rule 412(c) and *Brady*. *Id*. at 448. The shoe in *Nichols* was material because it was left behind under the apartment window by the perpetrators, and there was a palm print near the same window that did not match any of the defendants. *Id*. The shoe, therefore, could have led to a different verdict at trial. *Id*.

¶ 25 We disagree with defendant that *Nichols* is instructive here. We find *People v. Uselding*,

217 Ill. App. 3d 1063, 1074 (1991) to be more analogous. In *Uselding*, the defendant was convicted of aggravated criminal sexual abuse of his granddaughter. *Id*. at 1066. On appeal, the defendant argued that the State violated *Brady* by failing to disclose that prior to trial, the State had interviewed the defendant's friend. *Id.* at 1069. He argued that the friend's interview corroborated other defense witnesses' testimony that was favorable to him at trial, and impeached the complaining witness's testimony. *Id*. at 1073. He urged that the State's interview with his friend would tend to negate his guilt, and therefore, the State should have disclosed the information from that interview. *Id*. This court rejected his argument, finding that the defense counsel knew from the beginning about the friend and what she could testify to at trial. *Id.* We held that the friend's testimony would have had no effect on the outcome of the case, finding that her affidavit was "at best cumulative of other testimony by defense witnesses" and that it did not truly discredit the complaining witness's testimony. *Id.* at 1074.

¶ 26 Here, we conclude that in light of the other evidence implicating the defendant, the second photo array was not material exculpatory evidence. The victim recognized the defendant as he walked past him right before he was shot. The victim immediately identified the defendant's nickname and photograph on the same day that he was shot. The second photo array containing Williams' picture does not negate the other evidence against the defendant. There is nothing about the second photo array to lead us to believe that, had it been disclosed prior to trial, the trial court would have reached a different verdict. The trial court, which was the finder of fact, explicitly noted how the victim never saw the second photo array and never identified Williams as his shooter. Recognizing that the second photo array would have little impact on the rest of the evidence, the court stated, "The court does not view this to be an identification issue. It is more one of recognition. This is not who done it. [The victim] knows [the defendant], and he

has known him from the neighborhood. *** The court found [the victim] to be a credible witness *** He has no motive to say it was [the defendant] when it was some other Chris who may have lived at [the site of the shooting]." Additionally, similar to *Uselding*, defense counsel was aware of Williams from the very beginning. In fact, it was the defendant who subpoenaed the police officers who had arrested Williams in 2010 and brought Williams to the attention of the State. Thus, it cannot be said that the defendant was prejudiced by the lack of the second photo array when preparing the case.

¶ 27 Because we find that the second photo array was neither favorable to the defendant nor material to his guilt, we need not address the other elements of a *Brady* violation. Thus, we conclude that there was no discovery violation and we need not further analyze whether the defendant forfeited his argument that the trial court abused its discretion in denying his motion for a mistrial.

¶ 28 We next address the defendant's claim that his sentence of 20 years was excessive considering the mitigating factors he presented at the sentencing hearing, including that: he was only 22 years old at time of the offense, he had been steadily employed since leaving high school, he has a supportive family, he has a negligible criminal background, and he has strong rehabilitative potential. He claims that the only factor in aggravation is the nature of the offense, which is not enough to justify a 20-year sentence.

¶ 29 A trial court's sentence will not be disturbed on review absent an abuse of discretion. *People v. Johnson*, 347 Ill. App. 3d 570, 573-74 (1st Dist. 2004). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court. *Id*.

¶ 30 The Illinois Constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. In sentencing, the trial court must consider "all factors in aggravation and mitigation, including, *inter alia*, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). The trial court, however, is given great discretion in determining a sentence within the limits set by the legislature by statute. *People v. Haley*, 2011 IL App (1st) 093585, ¶ 63. This court will not substitute its judgment for that of the circuit court merely because it may have balanced the appropriate factors differently. *People v. Benford*, 349 Ill. App. 3d 721, 737 (2004). And where a sentence falls within the statutorily mandated guidelines, it is presumed to be proper and will be overturned only where there is an affirmative showing that the sentence departs significantly from the intent behind the law, or is manifestly violative of constitutional guidelines. *Id*.

¶ 31 We agree with the State that the court did not abuse its discretion. Aggravated battery with a firearm is punishable by 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2014). The defendant's sentence of 20 years' imprisonment is 10 years below the maximum and well within the statutory range. Furthermore, the trial court explicitly stated that it considered the mitigating factors, including the defendant's rehabilitative potential. The trial court properly focused on the seriousness of the offense, noting that the defendant fired several shots at the victim in close range, and could easily have killed the victim. Thus, we find that the defendant's 20-year sentence was not abuse of discretion.

¶ 32 CONCLUSION

¶ 33 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.