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2017 IL App (3d) 140407-U

Order filed January 31, 2017
Modified upon denial of rehearing filed March 21, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

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. 3-14-0407 Circuit No. 13-CF-915
DEANGELO L. GULLEY,)	Honorable
Defendant-Appellant.)	Kevin Lyons, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Trial court's denial of defendant's request for a continuance to secure the presence of a witness did not rise to the level of plain error where the evidence was not closely balanced.
(2) Defense counsel was not ineffective for failing to request the appointment of an expert witness to testify about the unreliability of eyewitness testimony.
(3) Defendant was not improperly sentenced.
- ¶ 2 Defendant, Deangelo L. Gulley, was found guilty of armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)) and home invasion (720 ILCS 5/19-6(a) (West 2012)) based on allegations

that, while armed with a hand gun, he took currency from Jeremy Miles by the use of force. The trial court sentenced him to 36 years' imprisonment for armed robbery and 24 years' imprisonment for home invasion. Defendant appeals, arguing that (1) the trial court erred in denying his request for a continuance to secure the presence of a witness, (2) defense counsel provided ineffective assistance in failing to request the appointment of an expert witness regarding the unreliability of eyewitness identification testimony, and (3) his sentence was excessive because the trial court considered several improper factors. We affirm.

¶ 3

FACTS

¶ 4

At trial, Jeremy Miles testified that in September of 2013 he lived on Northeast Roanoke Avenue in Peoria. He shared an apartment with Dominique Gulley and Jimeka Mills, and his mother lived in the apartment next door. On September 4, 2013, Miles and Jimeka left the apartment to buy some cannabis. He testified that he had approximately \$110 in his pocket because he had just been paid by his employer. When Miles and Jimeka returned, Dominique was sitting on the couch. Jimeka joined her. As soon as Miles entered the apartment, a man approached him from behind the front door and pointed a gun at him. Miles testified that the man had a shirt tied around his neck that covered the lower part of his face. He wore white shorts and a black t-shirt, and he had a tattoo on his right arm. Miles thought the tattoo read "MOB or some others [letters] or something else." He recognized the man as defendant. Miles knew defendant from school and had purchased drugs from him "from time to time." At the time he was attacked, he owed defendant \$100 for a previous drug purchase.

¶ 5

As Miles tried to push the gun away, another man jumped toward him from behind a curtain and knocked Miles to the floor. Miles landed face down. The two men struck him repeatedly with their handguns and demanded money. Miles gave them the money he had in his

pocket and some cannabis. While he was lying on the floor, he saw his mother enter the apartment. He eventually lost consciousness. When he woke, police officers were standing over him. He was later transported to the hospital.

¶ 6 Miles remembered seeing a black Cadillac driving around the neighborhood both before and after the attack. A few days after the incident, he recognized defendant in a black Cadillac at the gas station. Defendant asked Miles why he was accusing defendant of beating him. Miles refused to answer him, and he left. On cross-examination, Miles admitted that he ingested Xanax and smoked four blunts of cannabis on the day he was attacked.

¶ 7 Janice Miles is Jeremy Miles' mother. In 2013, she lived in the apartment next to Miles. On the evening of September 4, 2013, she heard sounds and voices coming from her son's apartment saying to take the phone and money but not to kill him. Janice and her daughter ran to Miles' apartment. As she entered, she saw blood and Miles lying on the floor. A man was standing over him with a gun. The man in the apartment was dressed in black and had something tied around his face that went up to his nose. As she stepped into the apartment, a man from behind the door put a gun to her head. She pushed her daughter out of the apartment and yelled at her to call the police. She grabbed the man's hand with the gun and attempted to pull him out of the apartment. She hid behind the door in the hallway and the two men with guns ran out of the building.

¶ 8 Janice identified defendant in court as one of the men who attacked her son. She testified that she knew nothing about defendant before the incident on September 4. After the attack, Miles showed Janice a picture of defendant in his school yearbook. She covered his face slightly and determined that the young man in the picture was the person who attacked Miles. She later selected defendant's picture from a photo array of six people at the police station. She testified

that when she viewed the photo lineup, she covered the faces on the photographs from the tip of the nose down to simulate the shirt that covered the intruder's face. She identified the photograph of the man in the lineup as the man she struggled with in the apartment.

¶ 9 Following a brief recess, defense counsel informed the court that she intended to call Jimeka Mills as a witness. Counsel stated that she had subpoenaed Mills but received a voicemail from her during the recess in which Mills stated that she "won't be at court today, has to work and wants nothing to do with the case." Counsel attempted to contact Mills, and she did not answer her phone. As a result, counsel requested that she be allowed to present her case-in-chief, except for Mills, and asked for a continuance to the next day to give her the opportunity to "track [Mills] down without having to have her arrested to get her here." The court then asked about the possible content of her testimony. Counsel referred to an affidavit that she gave the State's Attorney's office, which provided the following:

"I have seen in the paper that someone gave a statement with false involvement in this case, but I was the one there. And the night of September 4, 2013, two men came into the house, one light skinned, skinny and short; the other one dark skinned [sic] and tall. I looked up the guy, Deangelo Gulley, and he doesn't fit the description of the man I seen come into the house. I believe you guys have the wrong guy in custody. I just hate to see someone go down for something they didn't do."

¶ 10 As discussions continued, the prosecutor informed the court that Mills was on defendant's Facebook page. Given that information, the trial court stated that Mills' testimony would present credibility issues and expressed reluctance to postpone the case to the next day.

The court deferred its ruling until all witnesses had been presented, and the State resumed its case.

¶ 11 Officer Andrew Smith and Michael Bishoff were separately dispatched to Miles' apartment around 11:30 p.m. on September 4, 2013. Smith took photographs at the scene, and Bishoff took pictures of Miles at the hospital. Both officers remembered Mills and Gulley sitting on the couch inside the apartment when they arrived.

¶ 12 Detective Shawn Curry met Miles and his mother, Janice, at the police station on September 24, 2013. He discussed the events that occurred two weeks earlier and showed each of them a six-person photographic array. Prior to viewing the photographs, he informed them that the subject may not be in the lineup and that they were not required to make an identification. Both positively identified defendant's photograph as one of the men who attacked Miles on September 4.

¶ 13 Detective Curry also interviewed defendant. Defendant denied any involvement in the incident at the apartment. He told Curry that he knew Miles because he sold cannabis to him. Defendant did not provide an alibi during the interview.

¶ 14 At the conclusion of the State's case, the trial court informed the parties that the case would proceed without waiting for Jimeka Mills to appear. Defense counsel renewed her objection, and then presented defendant's case-in-chief.

¶ 15 Brianna Johnson and Tiamber Forrest testified that they attended a baby shower for Johnson on September 4, 2013. Defendant is the father of Johnson's baby and Forrest's brother. The shower started around 7 p.m. and ended between 10:30 p.m. and 11:30 p.m. Both witnesses testified that defendant was at the party. Johnson testified that defendant was there all evening

and that he spent the night with her. Forrest stated that she left the party around 10 p.m. and defendant was still there.

¶ 16 Defendant testified that he was at Johnson's baby shower on the evening of September 4, 2013. He denied attacking Miles. He said that he did not tell Detective Curry about the baby shower during his interview because he forgot about it. He admitted knowing Miles and selling cannabis to him. He said he was not a violent person and that he did not have any felony convictions. He acknowledged that he drove a black Cadillac and admitted that he asked Miles about the incident at the gas station a few days after it happened.

¶ 17 Defense counsel then asked defendant to stand up and display his tattoos to the jury. Counsel noted for the record that defendant had a tattoo on his right arm that said, "Fear no man, trust no woman," and another one that read, "RIP Toot." He did not have a tattoo that said, "MOB."

¶ 18 At the end of trial, defense counsel renewed her request for a continuance to allow Mills to testify. The trial court stated that it did not believe that the witness's testimony would aid defendant's case based on her "blurry" affidavit. The court noted that Mills "may or may not show up tomorrow and say something that is consistent or inconsistent with *** her general remarks." According to the court, "it [did] not seem prudent to pause the trial for her nonappearance."

¶ 19 Jury instructions were then given to the jury, which included an instruction on evaluating eyewitness identifications. The jury returned verdicts of guilty of armed robbery and home invasion.

¶ 20 At sentencing, the presentencing investigation report showed that defendant was 24 years old and had several prior convictions, including convictions for theft, resisting a peace officer,

obstructing identification and disorderly conduct. He had served community service hours and probation. In school, he had served several suspensions for fighting and insubordination. He did not graduate. The report also indicated that defendant had two children and a limited employment history. In closing arguments, the prosecutor noted that consecutive sentences were discretionary and that the sentence for armed robbery included a mandatory 15-year firearm enhancement.

¶ 21 The trial court sentenced defendant to concurrent terms of 36 years' imprisonment for armed robbery and 24 years' imprisonment for home invasion, with credit for time spent in presentence custody. Defendant moved to reconsider his sentence. In denying the motion, the trial court stated that "what could have unfolded could have been a real tragedy," and that "it had all the ingredients that were there for something that would involve great bodily harm or death, but for the intrusion of the mother."

¶ 22 ANALYSIS

¶ 23 I

¶ 24 Defendant first argues that the trial court erred in denying his request for a continuance to secure the presence of Jimeka Mills. He admits that he forfeited the issue by failing to raise it in his posttrial motion and asks us to review it as plain error. Alternatively, defendant argues that counsel was ineffective for failing to include the issue in his posttrial motion.

¶ 25 A. Plain Error

¶ 26 A valid basis for a continuance lies where a material witness is not available and the defense would be prejudiced without the witness's testimony, and the prosecution is otherwise unwilling to stipulate to the witness's testimony. 725 ILCS 5/114-4(b)(3) (West 2012). Once trial has commenced, a reasonably brief continuance may be granted to either party in the interest

of justice. 725 ILCS 5/114-4(f) (West 2012). In deciding whether to grant a continuance, the trial court may consider the movant's diligence, the defendant's right to a fair and impartial trial, the interest of justice, the seriousness of the charges, judicial economy, and inconvenience to the parties and witnesses. *People v. Walker*, 232 Ill. 2d 113, 125-26 (2009). A motion to continue is addressed to the discretion of the trial court. *Id.* at 125. A decision to deny a request to continue will be reversed only when shown that the trial court abused its discretion and the refusal prejudiced defendant. *People v. Ward*, 154 Ill. 2d 272, 304 (1992).

¶ 27 Under a plain error analysis, we must first determine whether an error occurred. Here, defense counsel subpoenaed Jimeka Mills prior to trial. After trial began, counsel learned that Mills had no desire to appear or testify, at which time she tried to contact Mills without success. These facts show that counsel was diligent in attempting to secure the witness. In addition, defendant was facing serious charges that carried with them significant sentencing ranges. Further, judicial economy would not have been forfeited by allowing the defense less than 24 hours to secure Mills as a witness and conclude defendant's case. Given the jury's decision to continue deliberations into the second day, a one-day continuance would not have impinged on the fairness of the trial proceedings. Thus, we find that the trial court abused its discretion in refusing to delay closing arguments until the second day of trial to allow defense counsel the opportunity to secure the presence of a witness.

¶ 28 Although the trial court's decision to deny defendant's request was error, defendant has not demonstrated that reversal is required under the plain error doctrine. Plain error is a narrow and limited exception to examine procedurally defaulted claims on appeal. It allows for reversal only where the evidence is so closely balanced that it might be said that the jury's verdict may

have resulted from the error, or the error is so substantial that it deprived the defendant of a fair trial. *People v. Caffey*, 205 Ill. 2d 52, 103 (2001).

¶ 29 In this case, the evidence was not closely balanced. The victim recognized defendant as soon as he was attacked, made an in-court identification of defendant as one of the men who beat him and identified defendant from a photo array as one of the men who robbed him. He also testified that he knew defendant from school and previous drug purchases, which defendant confirmed. Further, Janice positively identified defendant in a photo array as the man who attacked Miles on September 4, 2013. She also definitively identified defendant in court as the man who pointed a gun at her when she entered her son's apartment. Thus, the evidence is not so closely balanced that it could be said that the jury's verdict may have been the result of the error and not the evidence.

¶ 30 In *People v. Walker*, cited by defendant, the court reversed the defendant's conviction under the second prong of the plain error doctrine as structural error. In that case, the trial court completely failed to exercise any discretion in ruling on the defendant's request for a continuance where counsel was unprepared for trial. *Walker*, 232 Ill. 2d at 126. In this case, the error is not a "structural error" that eroded the integrity of the judicial process or undermined the fairness of defendant's trial. See *People v. Thompson*, 238 Ill. 2d 598, 613-15 (2010).

¶ 31 B. Ineffective Assistance

¶ 32 Defendant's ineffective assistance of counsel claim also lacks merit. Under the *Strickland* test, defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Failure of trial counsel to include an issue in a posttrial motion does not, by itself, demonstrate ineffective assistance of counsel. *People v.*

Sharp, 2015 IL App (1st) 130438, ¶ 125. Here, defendant has not shown that counsel's failure to include the denial of the motion to continue issue in his posttrial motion resulted in prejudice. Even if the trial court had granted a continuance, defendant failed to demonstrate that Mills would have appeared or that her testimony would have resulted in a different verdict. Counsel could well have assessed the issue and concluded that her testimony would not have altered the result and therefore decided not to raise it among counsel's posttrial claims. Counsel's failure to include the issue in defendant's posttrial motion is not ineffective where, even if raised, a new trial would not have been granted. See *Id.* ¶ 129.

¶ 33

II

¶ 34

Defendant also contends that trial counsel provided ineffective assistance of counsel by failing to request the appointment of an expert witness to testify about the unreliability of eyewitness identification testimony where his conviction was based on eyewitness testimony. Defendant argues that counsel should have challenged Jeremy and Janice Miles' identification of him by calling an expert to explain the fallibility of their eyewitness identification testimony.

¶ 35

A defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8. A defendant receives ineffective assistance of counsel where: (1) counsel's representation falls below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's errors the results in the trial court would have been different. *Strickland*, 466 U.S. at 687-88; *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984).

¶ 36

Generally, expert witnesses will be permitted to testify if their expertise, experience, and qualifications give them knowledge that is uncommon to a lay person and where the testimony will aid the jury in reaching its conclusion. *People v. Aguilar*, 396 Ill. App. 3d 43, 51 (2009).

The trustworthiness of eyewitness identifications and observations is not necessarily beyond the common knowledge and experience of the average juror. *People v. Enis*, 139 Ill. 2d 264, 289-90 (1990). As noted by our supreme court:

“[a]n expert’s opinion concerning the unreliability of eyewitness testimony is based on statistical averages. The eyewitness in a particular case may well not fit within the spectrum of these averages. It would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable.”
Id. at 289-90.

¶ 37 Here, trial counsel’s performance was not deficient in failing to call an expert witness regarding the reliability of eyewitness identification testimony where the eyewitnesses’ identification testimony did not appear unreliable. See *People v. Reid*, 179 Ill. 2d 297, 310 (1997); *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997) (to overcome the presumption that counsel trial strategy is sound, the strategy must appear irrational and unreasonable in light of the circumstances defendant is facing and that no reasonable criminal defense attorney facing such circumstances would pursue such strategies). We acknowledge that eyewitness identification is an appropriate subject for expert testimony. See *People v. Lerma*, 2016 IL 118496, ¶ 28. In this case, however, Jeremy and Janice Miles’ identification testimony was reliable; it was not vague or doubtful. Both witnesses unequivocally identified defendant in a photo array and in court. Therefore, defense counsel’s performance was not deficient in failing to present expert testimony regarding the unreliability of eyewitness identifications. Additionally, we cannot say that there is a reasonable probability that the trial results would have been different had counsel presented an expert. Thus, counsel was not ineffective in failing to request one.

¶ 38

III

¶ 39 Last, defendant argues that he was sentenced to excessive terms based on the trial court's consideration of several improper factors. Defendant acknowledges that this issue has been forfeited and seeks review under plain error.

¶ 40 The trial court's decision regarding sentencing is entitled to great deference and weight, which will not be altered on review absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977). A trial court's decision is entitled to deference because it is in a better position than the reviewing court to set appropriate sentences. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial judge views matters that reflect on the defendant's credibility, demeanor, character, personality, and propensities related to sentencing. *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986). A sentence will only be altered on review if it is clearly evident that it was improperly imposed. *Id.* at 526.

¶ 41 A reviewing court will not substitute its judgment for that of the trial court merely because it would have balanced the appropriate factors differently. *People v. Cox*, 82 Ill. 2d 268, 280 (1980). A sentence within the statutory range will not be considered an abuse of sentencing discretion unless it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999). Under plain error, the defendant must show that the evidence at the sentencing hearing was closely balanced or that the error was so egregious he was denied a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 42 The sentencing range for defendant's convictions were determinate terms of 21 and 45 years for armed robbery (720 ILCS 5/18-2(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012)), and 6 to 30 years for home invasion (720 ILCS 5/19-6(c) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012)).

¶ 43 In sentencing defendant, the trial court properly considered multiple factors, including the presentence investigation report, evidence and arguments of counsel, the statutory factors in aggravation and mitigation, the history and character of defendant, and the circumstances and nature of the offenses. Specifically, the trial court observed the defendant's behavior during trial and heard witnesses describe his demeanor. The court also addressed defendant's character, noting that he was suspended from school for fighting and insubordination. It noted that defendant had been in several physical and verbal altercations during high school and into his early adult years. Further, the trial court considered the nature of the offense. It confirmed that the victim had been brutally kicked and hit in the mouth and sustained significant injuries that required several surgical procedures. The court also evaluated defendant's rehabilitative potential and discussed defendant's defiant attitude, his refusal to conform his behavior to a peaceful society, and his apparent disdain for authority figures. Considering the totality of the trial court's sentencing remarks, we find that the court properly exercised its sentencing discretion. The sentences that were imposed are significant. However, the court properly considered the crimes that were committed, the circumstances in which they were committed, and the nature of the offenses as important factors in aggravation.

¶ 44 Defendant also claims that the trial court considered improper factors when it commented on the extent of the injuries sustained and the environment in which the crime occurred at the sentencing hearing. Although a factor that is necessarily implicit in an offense cannot be used as an aggravating factor, courts may consider the degree of harm and the nature of the offense in determining the appropriate length of a particular sentence. *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). In this case, the court properly considered the nature and extent of the injuries Miles sustained and the number of people inside his apartment when the crimes were committed

in reviewing the appropriate length of defendant's sentence. Accordingly, the trial court did not err in sentencing defendant to concurrent terms of 36 years for armed robbery and 24 years for home invasion.

¶ 45

CONCLUSION

¶ 46

The judgment of the circuit court of Peoria County is affirmed.

¶ 47

Affirmed.