2018 IL App (1st) 160044-U

No. 1-16-0044

Order filed November 1, 2018

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 9070
	)	
MARVELL FISHER,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for felony murder over his contentions that: (1) his trial counsel was ineffective for eliciting otherwise inadmissible inculpatory statements from a witness; and (2) his jury waiver was invalid.

¶ 2 Following a bench trial, defendant Marvell Fisher was convicted of felony murder (720 ILCS 5/9-1(a)(3) (West 2010)) and sentenced to 44 years' imprisonment. On appeal, defendant contends that his trial counsel was ineffective for eliciting testimony from a witness of a prior

consistent statement, placing defendant at the crime scene. He also argues that he did not knowingly waive his right to a jury trial. We affirm.

¶ 3 On April 14, 2011, Jamar Conner was shot to death. In connection with his death, defendant and co-defendant, Pam Carr, were charged by indictment with 33 counts of first degree murder, 3 counts of armed robbery, 6 counts of home invasion, and 8 counts of residential burglary. Pam Carr was tried in a separate proceeding.

¶ 4 Prior to trial, the State nol-prossed all but five counts against defendant: three counts of first degree murder (counts 1, 2 and 4) and two counts of home invasion (counts 37 and 38). Counts 1 and 2 alleged, respectively, that defendant intended to kill Conner or knew there was a strong possibility that death would result. Count 4 alleged that defendant shot and killed Conner while armed during the commission of a forcible felony (home invasion). Counts 37 and 38 alleged that defendant, while armed with a firearm, entered the dwelling place of another, knowing that people were present in the dwelling, and used force or threatened to use force against Conner's girlfriend and Conner, respectively.

¶ 5 At defendant's arraignment on June 29, 2011, the court asked defendant if he knew what a jury trial was and he replied that he did not. The court explained the concept to defendant as follows:

> "THE COURT: A trial by jury would be when 12 individuals are selected from the community by yourself, your attorney, and the State. They would hear all the evidence presented and determine whether or not that evidence has proven guilty [sic] beyond a reasonable doubt. The verdict must be unanimous. Do you now know what a trial by jury

is? And that's opposed to a judge finding – determining what the facts are beyond a reasonable doubt. Do you understand that?"

Defendant replied that he did.

¶ 6 On May 26, 2015, the following exchange took place:

"DEFENSE COUNSEL: Your Honor, I've talked to [defendant]. The case was set for jury. I'm prepared to go to jury. [Defendant], though, has changed his election, and he's asking for a bench trial; is that correct?

DEFENDANT: Yes' Ma'am.

THE COURT: Do you know what a trial by jury is?

DEFENDANT: Yes, your Honor.

THE COURT: And have you discussed your choice with your attorneys? Your choice about trial by jury or trial by judge?

DEFENDANT: Yes, sir. Yes, your Honor.

THE COURT: And have you reached the conclusion as to whether or not you want to proceed by trial by jury or trial by judge?

DEFENDANT: I would like to go with your decision, your Honor.

THE COURT: Say again.

DEFENDANT: I would like to go with your decision.

THE COURT: Has anybody made any promises or threats to get you to waive your right to trial by jury?

DEFENDANT: No, your Honor.

THE COURT: Did you make that determination of your own free will?

DEFENDANT: Yes, your Honor."

A written jury waiver was tendered which stated, "I hereby waive a jury trial in the above entitled cause and consent to trial before the court." The court confirmed that defendant signed the jury waiver and the case proceeded to a bench trial.

¶ 7 Arkyisha Sloan testified that, in April of 2011, she lived on the top floor of a three-flat apartment building with her two children and her boyfriend, Jamar Conner. During this time, Sloan would receive the monthly social security checks of her former husband, Cedric Carr. Sloan stated that Cedric[1] made her the payee of his social security checks after a falling out with his father. On April 1, 2011, Sloan did not receive her check. The next day, she went with her family to the social security board to reissue the check. Sloan testified that the monthly checks were in the amount of $675. Shortly thereafter, in the first week of April, Sloan got an unexpected visit from Pam, Sloan's former sister-in-law. The women had a conversation, during which Pam became angry, and Sloan ultimately asked her to leave.

¶ 8 On April 14, 2011, Sloan heard a knock on her apartment door. After looking through the peephole, Sloan saw that it was Pam and did not answer. Conner asked Sloan who was at the door, and she told him that it was Pam and that she would "go away." Conner opened the door a few inches to talk with Pam. The two exchanged words and, as Conner attempted to shut the door, Pam "bum rushed" the door, forcing her way inside. A man standing behind Pam, whom Sloan identified as defendant, followed Pam into the apartment. Sloan testified that she did not give Pam or defendant permission to enter her apartment.

[1] Because Cedric and Pam share the same last name we refer to both parties by their first name.

¶ 9 When defendant entered the apartment, he began to wrestle with Conner. As the two men struggled, Sloan went into her bedroom to find Conner's phone. Sloan was unfamiliar with electronic devices and had difficulty trying to call the police. As she was fumbling with the phone, she heard a gunshot. Sloan did not see who fired the gun. She testified that Conner did not have anything in his hands. She also testified that they did not keep a gun in the apartment.

¶ 10 Sloan then ran to her children's room, shut the door behind her, and huddled with her children in the corner. Pam kicked open the door and began arguing with Sloan. At this point, Sloan saw that Jeremiah McKnight, Pam's son, was standing next to Pam. After a few minutes, Pam and McKnight left. Sloan waited in the room, unsure if it was safe to exit. Sloan eventually made her way downstairs and outside, where she saw Conner lying in the grass at the front of the building and coughing up blood. Sloan screamed for help. A passerby called 911 and gave Sloan the phone so that she could speak with the dispatchers. The court heard an audio recording of the 9-1-1 call, for the limited purposes of identification. During the call, Sloan states that "Carr and her boyfriend bum rushed into my apartment and shot my boyfriend." Police and paramedics arrived and Conner was transported to the hospital. Sloan returned to her apartment where she spoke with police officers. She told them that Pam and her "boyfriend" were the perpetrators. Sloan described defendant to the officers as being light skinned with braids. Officers performed a gunshot residue test on Sloan at her apartment. Sloan testified that she did not wash her hands or wipe her hands on anything prior to the test being performed.

¶ 11 Later that evening, Sloan went to the police station where she identified Pam from a photograph array. On April 22, 2011, Sloan was shown another photograph array, from which

she identified defendant. On May 10, 2011, Sloan viewed physical lineups at the police station, where she identified Pam and defendant.

¶ 12 On cross-examination, Sloan acknowledged that she described defendant to police as being between six feet and six feet two inches tall.

¶ 13 Jeremiah McKnight, Pam's son, testified that, on April 14, 2011, his brother Rickey drove him, Pam, defendant, who was Pam's boyfriend, and McKnight's other brother to his "auntie" Sloan's apartment. When they arrived at Sloan's apartment, all five passengers exited the vehicle. McKnight saw defendant return to the passenger seat of the vehicle to "grab something." Defendant then walked toward McKnight, who saw that defendant had a gun in his hand. McKnight described the gun as a silver revolver. McKnight, Pam, and defendant proceeded to Sloan's apartment on the third floor. There, Pam knocked on Sloan's door as defendant stood behind her. McKnight heard voices arguing from inside the apartment. Pam knocked on the door again and Conner answered, wearing only white underwear. McKnight estimated that Conner opened the door "a little less than halfway." Pam asked if Sloan was home and Conner attempted to shut the door, but Pam "forced her way" inside. McKnight saw Pam and Conner begin to fight, at which point defendant entered the apartment. McKnight saw that defendant had the gun in his right hand as he entered the apartment. After defendant entered, the apartment door shut, obstructing McKnight's view. Shortly after, McKnight heard a gunshot.

¶ 14 Following the gunshot, McKnight saw defendant run out of the apartment and downstairs. Conner then exited the apartment and pushed past McKnight, who saw that Conner was bleeding. McKnight entered the apartment and found Pam, Sloan, and Sloan's children in a bedroom. Pam was talking loudly with Sloan, asking her to "cash the check in." Sloan refused

and Pam told McKnight to "go get the gun." McKnight stated that he "just stood there" because he was "kind of in shock." McKnight and Pam eventually left the apartment and went downstairs. McKnight saw Conner lying in the grass in front of the building. McKnight stated that Conner was bleeding and "dead." Because the car that they had arrived in was no longer parked in front of the apartment, McKnight and Pam went searching for it. They found the vehicle and reunited with Ricky and McKnight's other brother. Ricky drove them a block away from the scene and parked to wait for defendant. When defendant arrived, he told Ricky to open the trunk of the car. McKnight stated that defendant "definitely put something" in the trunk of the car and then left. Ricky then drove McKnight, his brother, and Pam to McKnight's father's home.

¶ 15 On April 22, 2011, McKnight spoke with detectives about the incident. McKnight acknowledged that he did not tell detectives the same version of events as he related in his testimony. He stated that he did not tell detectives the truth because he "was still scared" and that people "kept telling [him] what to say and what not to say." McKnight explained that his father told him to tell the truth and his mother told him to "say everything she wanted to say."

¶ 16 On cross-examination, McKnight acknowledged that he initially told detectives a different version of events. McKnight confirmed that he told detectives that he took a bus to Sloan's apartment with Pam and his brother. When they arrived and Pam knocked on Sloan's door, a naked man ran out of the apartment. Defense counsel then asked McKnight about subsequent statements he made to the police. McKnight confirmed that he later told police that he had not been telling the truth because he did not want his mother to get into trouble. McKnight told detectives that defendant had been present when they went to Sloan's apartment.

McKnight conceded that he did not tell detectives that he had seen defendant with a gun. He also admitted that he told a grand jury that, during the fighting, he heard a noise that sounded like "a desk or something falling." Counsel asked McKnight if "[t]his was the first time today" that he mentioned a gun. McKnight answered that it was.

¶ 17 On redirect-examination, McKnight stated that he told detectives a different version of events because his mother told him to protect his brother Ricky. He also stated that he did not tell detectives that he had seen defendant with a gun because they did not ask him about the gun. McKnight confirmed that he testified to the grand jury that he heard a gunshot. He also confirmed that he told the grand jury that he knew defendant had fired the gun because defendant had "something in his hand" when he exited the car before going to Sloan's apartment.

¶ 18 Linda Moore testified that she was walking with a friend when she saw Conner lying on the ground in front of an apartment building. Moore realized that Conner was bleeding. At this point, a black man in dark clothing exited the building where Conner was lying and passed by Moore. The man said something to her as he passed by and Moore called 9-1-1. Moore then saw a woman and a young boy exit the same building. While Moore was on the phone with 9-1-1 dispatchers, Sloan exited the building. Moore described Sloan as crying and hysterical. Moore ascertained that Sloan was Conner's girlfriend and gave Sloan her phone so that she could speak with 9-1-1 dispatchers.

¶ 19 The next day, two detectives came to Moore's home and showed her a photograph array. Moore identified a woman from that array who she said might have been the woman that Moore saw exiting the building. On May, 11, 2011, Moore viewed a physical lineup at the police

station, from which she identified a woman as having "the same skin color and body type" as the woman Moore saw exiting the building.

¶ 20 Chicago police detective James Scannell testified that, on April 14, 2011, he and his partner were assigned to investigate Conner's shooting. When Scannell arrived at the scene, he saw a pool of blood in front of the apartment building and drops of blood leading into the three-flat building. Scannell entered the building and made his way to the third floor, observing blood along the stairwell. When he entered Sloan's third floor apartment, he also noticed blood on the left wall of her apartment. Scannell interviewed Sloan and she told him that Pam and her boyfriend had forced their way into her apartment. Sloan described the boyfriend as being a light skinned black male, between six feet and six feet two inches tall, weighing 250 to 275 pounds, and his hair in braids. Sloan also described him as wearing a dark hat and a black jacket. Scannell testified that no shell casings were recovered at the scene and that he asked an evidence technician to perform a gunshot residue test on Sloan. Scannell confirmed that Sloan identified Pam and defendant when shown photo arrays and during physical lineups. He also confirmed that Moore tentatively identified Pam from a photo array as the woman she saw exiting the apartment building with a child and that she partially identified Pam in a physical lineup as having "the same skin tone and physical build" as the person she saw that day.

¶ 21 On cross-examination, Scannell testified that defendant was not six feet tall, as Sloan initially described him.

¶ 22 On redirect-examination, Scannell viewed a photograph of defendant from the lineup, which showed measuring tape behind defendant. Scannell testified that the photograph indicated that defendant was five feet ten inches tall.

¶ 23 Chicago police officer Joseph Serio testified that, on April 14, 2011, he was working as an evidence technician and was called to the scene of Conner's shooting. Detectives at the scene asked Serio to perform a gunshot residue test on Sloan. Serio performed that test on Sloan in the apartment approximately two and a half hours after the incident, which is within the standard 6-hour time period. Detectives also asked Serio to perform a gunshot residue test on Conner. Serio proceeded to Northwestern Hospital where he performed the same test on Conner.

¶ 24 Robert Berk, a trace evidence analyst from the Illinois State Police, testified that he analyzed the gunshot residue kits that were administered to Sloan and Conner. The results for both kits were negative, which indicated that Sloan and Conner may not have discharged a firearm. On cross-examination, Berk stated that gunshot residue could be removed from a person's hands if they thoroughly washed their hands.

¶ 25 Peter Brennan, a forensic scientist from the Illinois State Police Forensic Science Center of Chicago, testified that the bullet that killed Conner was typically associated with revolvers. He also testified that revolver cartridge casings are retained within the cylinder of the firearm as it rotates, which is consistent with no casings being recovered at the crime scene. On cross-examination, he conceded that he could not conclusively state that the bullet was fired from a revolver.

¶ 26 Based on this evidence, the court found defendant guilty of all counts. Defendant moved for a new trial, which the court denied. Prior to sentencing, the court merged all counts into the felony murder charge (count 4). The court then sentenced defendant to 44 years' imprisonment, including a 15-year firearm enhancement.

¶ 27 On appeal, defendant first contends that his trial counsel was ineffective for eliciting McKnight's otherwise inadmissible prior consistent statements, which were detrimental to defendant's case. Specifically, defendant points to trial counsel's cross-examination of McKnight, during which counsel elicited testimony about McKnight's second statement to police that placed defendant at the crime scene. He also argues that counsel, by asking McKnight if "[t]his was the first time today" that he mentioned a gun, opened the door for the State to elicit other inculpatory statements from McKnight.

¶ 28 We evaluate claims of ineffective assistance of counsel under the two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). To prevail, a defendant must first demonstrate that his counsel's performance, objectively measured against prevailing professional norms, was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *Strickland*, 466 U.S. at 687; see also *People v. Jackson*, 205 Ill. 2d 247, 259 (2001). In so doing, the defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Second, the defendant must show he was prejudiced by counsel's deficient performance, which means that that there must be a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 47. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Failure to establish either prong precludes a finding of ineffective assistance of counsel. *People v. Henderson*, 2013 IL 114040, ¶ 11. A reviewing

court need not examine counsel's performance where it may dispose of defendant's claim based on lack of prejudice. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 55.

¶ 29 Here, we find that defendant cannot show that he was prejudiced by the statements counsel elicited during her cross-examination of McKnight. Stated differently, there is no reasonable probability that the outcome of defendant's trial would have been different had his counsel not elicited the complained-of testimony from McKnight. Under the State's theory of felony murder, defendant's participation in the home invasion, during which Conner was shot to death, would be enough to support his conviction. The evidence, without McKnight's prior consistent statement, showed that defendant was identified by Sloan as the man who, along with Pam, entered her apartment by force and wrestled with Conner. In a call to 9-1-1, Sloan identified Pam and her boyfriend as the individuals who "bum rushed" her apartment and shot her boyfriend. Sloan also identified both Pam and defendant in a photo array, a physical lineup, and at trial. While Sloan did not see defendant shoot Conner, she stated that she saw defendant and Conner "wrestle" and, shortly after, heard a gunshot. She testified that Conner did not have anything in his hands and that they did not keep a gun in the apartment. When Sloan finally felt safe to leave her apartment, she discovered Conner lying on the grass in front of the apartment building, coughing up blood. Both Sloan and Conner tested negative for gunshot residue.

¶ 30 In addition to this evidence, McKnight testified that he saw defendant retrieve a silver revolver from the car before making his way to Sloan's apartment. Consistent with Sloan's version of events, McKnight saw Pam force her way into Sloan's apartment, followed by defendant with the gun in his hands. Moments later, McKnight heard a gunshot. According to Brennan, the bullet that killed Conner is typically associated with revolvers. He also testified that

revolver cartridge casings are retained within the cylinder of the firearm as it rotates, which is consistent with no casings being recovered at the crime scene.

¶ 31 Thus, even without McKnight's prior consistent statements, there was significant evidence that defendant was a participant in a home invasion, during which Conner was shot to death. Given this evidence, there was no reasonable probability that, but for counsel eliciting McKnight's prior consistent statements, identifying defendant as a participant in the crime, the outcome of the trial would have been different. Accordingly, because defendant cannot show that he was prejudiced by counsel's performance, his ineffective assistance of counsel claim fails.

¶ 32 Defendant also contends that his convictions must be reversed and the case remanded for a new trial because the trial court failed to ensure that he made a knowing, intelligent, and voluntary waiver of his right to a jury trial.

¶ 33 In setting forth this argument, defendant acknowledges that he has forfeited this issue on appeal by failing to raise the issue in the trial court and in a posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). However, he asks us to review this issue under the plain-error doctrine, arguing that the fundamental fairness of his trial was affected by the invalid jury waiver.

¶ 34 Under the plain-error doctrine, a reviewing court may consider unpreserved error 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 the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of

the closeness of the evidence." See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). Under either prong of the plain-error doctrine, the burden of persuasion remains on the defendant. *People v. Nowells*, 2103 IL App (1st) 113209, ¶ 19. Before considering whether the plain-error exception to the rule of forfeiture applies, a reviewing court conducting plain-error analysis must first determine whether an error occurred, as "without reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Here, we conclude that there was no error.

¶ 35 The right to a trial by jury is a fundamental right guaranteed by our federal and state constitutions. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). A defendant may, of course, waive the right to a jury trial, but any such waiver, to be valid, must be "understandingly waived by defendant in open court." 725 ILCS 5/103–6 (West 2014). Whether an accused knowingly and understandingly waived his or her right to a jury trial, is based upon the facts and circumstances of each particular case and not upon the application of any set formula. *People v. McGee*, 268 Ill. App. 3d 582, 585 (1994). We review whether defendant knowingly waived his right to a jury trial *de novo*. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7.

¶ 36 After examining the facts and circumstances of this case, we find that defendant knowingly and understandingly waived his right to a jury trial. The record shows that at his arraignment, on June 29, 2011, the court asked defendant whether he knew what a jury trial was and he stated that he did not. After the court explained the differences between a jury and a bench trial, defendant indicated that he understood. On May 26, 2015, before trial was to begin, defense counsel told the court that defendant wished to proceed with a bench trial. Defendant told the court that he discussed whether he wanted a jury or a bench trial with his counsel. When

asked by the court if he knew what a jury trial was, defendant responded "yes." The court then asked him if he had reached a conclusion as to whether he wanted a trial by jury or a trial by judge. Defendant responded that he "would like to go with your decision, your Honor." Defendant acknowledged that he was not promised anything, or threatened, in exchange for his jury waiver and that he was making the waiver of his own free will. Defendant then signed and delivered a written jury waiver to the court.

¶ 37 Defendant nevertheless argues that his jury waiver was unknowing because the court did not explain to him the differences between a jury trial and a bench trial at the time he elected to waive his right. He also asserts that his statement that he "would like to go with your decision" should have triggered a more complete explanation of the jury right.

¶ 38 Defendant's argument is unavailing. First, the record contains defendant's signed jury waiver and this court has previously noted that a signed written waiver, although insufficient on its own, weighs in favor of finding a valid waiver. See *People v. Parker*, 2016 IL App (1st) 141597, ¶ 50. Second, a jury waiver is generally valid where, as here, defense counsel waives that right in open court and the defendant does not object to the waiver. *People v. West*, 2017 IL App (1st) 143632, ¶ 10. Finally, "a trial court need not give any specific admonition or advice for a defendant to make an effective jury waiver." *People v. Bannister*, 232 Ill. 2d 52, 66 (2008). In this case, the court, after previously having explained to defendant the difference between a jury and bench trial, asked him if he understood what a jury trial was and defendant responded that he did. When the court asked if he would like a jury or a bench trial, defendant told the court he wanted to "go with [the court's] decision."

¶ 39 In this court, defendant merely speculates that his statement to "go with [the court's] decision" could indicate some confusion. However, in doing so, he acknowledges that this statement could "reflect an understanding that the judge would make the ultimate decision in a bench trial." This attempt to read ambiguity into defendant's answers to the court is not enough to meet the burden required to prove that defendant's jury waiver was invalid. See *Bannister*, 232 Ill. 2d at 66 (The burden is on defendant to prove that his jury waiver is invalid). This is especially so, where as mentioned, the record shows that the court explained to defendant the difference between a jury and a bench trial, and defendant acknowledged understanding the difference prior to tendering his jury waiver to the court.

¶ 40 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.