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2018 IL App (3d) 160136-U

Order filed November 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0136
v.	)	Circuit No. 15-CF-493
	)	
OMAR ELIJAH PORTER,	)	
	)	Honorable Kevin Lyons,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: While the content of the call that required the police to respond to the area was inadmissible hearsay, the admission of the call could not have significantly influenced the outcome of trial.

¶ 2 A Peoria County jury found defendant, Omar Elijah Porter, guilty of unlawful possession of a weapon by a felon. The trial court entered judgment on that verdict and sentenced defendant to eight years. Defendant appeals, arguing the circuit court erred in allowing evidence that the police were in the area investigating a "shots fired" call. We affirm.

¶ 3 BACKGROUND

¶ 4 Before defendant's trial for unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)), defendant moved *in limine* to bar the State from presenting evidence that, prior to defendant's arrest, the police were in the area investigating a "shots fired" call. Defendant stated that the police were surveilling the area as a result of the "shots fired" call that had been received "[a]n hour and a half to two hours" before the police effectuated a traffic stop on the vehicle in which defendant was a passenger. The State said that they were going to say, "The officers were investigating a report of shots fired and after following a vehicle made a stop for a traffic stop." The court allowed the State to present such evidence, stating, "I think for the jury's purpose they should be able to hear the *res gestae* of the case which is that's why we were there. This is what happened in the course of the activity, and this is the result."

¶ 5 At trial, Brock Lavin testified that he had been a police officer for the City of Peoria for 14 years. The following exchange occurred:

> "[STATE]: And I want to call your attention back to July 24, 2015. At about 9:55 in the morning did you respond to the Pierson Hills apartments in regards to shots being fired?
>
> [LAVIN]: Yes, I did.
>
> [STATE]: And did a number of officers respond to that call?
>
> [LAVIN]: Yes, there was.
>
> [STATE]: Now, about 11:25 that morning then did you begin to follow a Sonic vehicle down Nebraska?
>
> [LAVIN]: I did.
>
> [STATE]: And where was that in relation to the Pierson Hills apartments?

[LAVIN]: Approximately two blocks east."

Lavin stated that he observed the Sonic commit a "[s]top sign violation." He then activated his lights and siren, and the Sonic pulled over. When the Sonic came to a stop, "[t]he passenger immediately exited the vehicle and fled." Lavin identified defendant as the passenger. Lavin ordered defendant to stop and began chasing him. Lavin then stopped chasing defendant and returned to the Sonic to speak to the driver. He also "radioed other officers that were also in the area conducting surveillance [the] direction of travel of the person that fled." Lavin's squad car was equipped with a video camera that video recorded the stop and defendant fleeing. Lavin said he also saw defendant later at the police station and defendant was covered in mud. Lavin stated that when defendant fled from the Sonic, he was not covered in mud.

¶ 6 Corey Miller testified that he had been a police officer for the City of Peoria for over 15 years. On July 24, 2015, he was in the vicinity of Nebraska and Park Road "heading up to the area to assist officers who were on a surveillance." He heard Lavin radio that defendant had fled from him and was proceeding westbound. He "turned down Otley Road" and saw a man running, who Miller identified as defendant. Defendant was "holding his right hip area" and ran into a wooded area. Miller lost sight of defendant once he entered the wooded area. Miller parked his squad car where he saw defendant enter the woods. Miller entered the woods and saw defendant squatting over a fence, behind a small tree. Miller directed defendant to stop, climb back over the fence, and lie on his stomach. Defendant did so. Miller then placed defendant in custody. Defendant "was very dirty, muddy." Miller said that "was weird to [him] because [defendant] wasn't like that when he was running." After Miller placed defendant in custody, other officers approached the area. Miller "handed [defendant] off to a patrol officer" and went back to search the area. Miller said he went down into the ravine. He noticed it was a wooded area, with a brush

pile, and the creek bed was wet. He saw multiple shoe prints leading down to the bottom of the creek bed that appeared to be from an athletic shoe. Miller and Sergeant Brad Dixon searched the brush pile and Dixon located a handgun. The gun was located "very close" to the shoe prints.

¶ 7 Dixon testified that he had been a police officer for the City of Peoria for 15 years. He said that he arrived on the scene and began doing an area article search in the ravine. He said, "It was basically a creek bed. It wasn't like a flowing creek. There was some standing water, some mud. I found a shoe print near the bottom of the creek. I also found an indentation in the mud. It appeared to me that somebody had fallen." Dixon stated:

> "[If] I was in the bottom of the creek bed, it's a pretty steep embankment or fairly steep. Officer Miller had shown me where the suspect was arrested at or taken into custody, and it was directly up the creek bed from where I was at. About halfway up I saw a large brush pile, sticks, twigs, logs. I made my way up the embankment, and I examined the brush pile. And once I got closer, I found a pistol laying in the brush pile on a log."

Stated another way, the creek bed was at the bottom of the embankment, the police found defendant at the top of the embankment, and the brush pile containing the gun was between the two, halfway up the embankment. The gun was "covered in mud, wet," but the brush pile was dry and contained no mud.

¶ 8 John Williams testified that he had been a police officer with the City of Peoria for 17 years and had been assigned to the crime scene investigation unit for three years. He was called to the scene and took photographs of the gun, shoe prints, the indentation in the mud, and of defendant. He saw the gun in the brush pile, noticed that it was covered in "fresh mud," and noticed there was no mud in the brush pile. He collected the gun, but was not able to find any

fingerprints on it. The gun was fully loaded. He swabbed the gun for DNA, but did not recover any. Williams stated that a shoe print in the mud was located approximately five feet from where the gun was located. Williams saw defendant covered in mud and wearing a pair of muddy Nike tennis shoes. The mud on the shoes and defendant's clothing was fresh and drying. He took possession of the tennis shoes. Williams stated that the bottom of defendant's shoe matched the shoe print. He further stated that he believed the indentation in the mud near the shoe print was an elbow impression, which would have been consistent with the muddy state of defendant's clothing. Williams took photographs on a digital camera and downloaded them onto the main computer bank for the police department. He attempted to retrieve the photographs from the computer, but could not do so due to a technical error.

¶ 9 The gun was tested and determined to be fully functional. The State entered into evidence a certified copy of defendant's felony conviction. The defense did not present any evidence. After the jury had been deliberating for about 90 minutes, they sent a note to the court stating, "We, the jury, cannot come to a unanimous decision and have 11 guilty votes and 1 not guilty vote. What is the next responsibility for the jury?" The State asked the court to give the *Prim* instruction, which the court agreed to over defendant's objection. When the jury came back into the courtroom, the court gave them the *Prim* instruction and told them to go back into the jury room and decide whether they would like to continue deliberations or come back the next day. The bailiff gave the court a note from the jury, which stated, "The jury respectfully requests to adjourn for the day and resume tomorrow." Neither party objected, and the court granted the jury's request. When the bailiff went to tell the jury, the jury requested five more minutes to deliberate that evening. They reached a verdict that evening and found defendant guilty of

unlawful possession of a weapon by a felon. The court sentenced defendant to eight years' imprisonment.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant argues that the court erred when it admitted evidence of the "shots fired" call that the police were investigating. We find that the evidence that the officers were investigating a "shots fired" call was inadmissible hearsay evidence as it had no relevance at trial. However, the admission of such evidence was harmless error as it was only briefly mentioned once and could not have significantly influenced the outcome of the jury.

¶ 12 "A police officer may recount the steps taken in the investigation of a crime and may describe the events leading up to the defendant's arrest 'where such testimony is necessary and important.' [Citation.] Even then, the evidence must satisfy some relevant nonhearsay purpose. That is, the words of the communication must not be considered or used for their truth, only to show that the words were spoken when that somehow matters in the case." *People v. Warlick*, 302 Ill. App. 3d 595, 598-99 (1998) (quoting *People v. Simms*, 143 Ill. 2d 154, 174 (1991)). "At times, the contents of a radio call may be admitted where 'necessary to fully explain the State's case to the trier of fact.' " *Id.* at 599 (quoting *People v. Williams*, 181 Ill. 2d 297, 313 (1998)). When the State seeks to introduce the content of a call or other out-of-court statement, "[t]he trial judge first must determine whether the out-of-court words, offered for some purpose other than their truth, have any relevance to an issue in the case. If they do, the judge then must weigh the relevance of the words for the declared nonhearsay purpose against the risk of unfair prejudice and possible misuse by the jury." *Id.* (citing *People v. Cameron*, 189 Ill. App. 3d 998 (1989)).

¶ 13 Here, we can see no good reason why the jury had to know the police had been in the area investigating a "shots fired" call 1½ hours before pulling over the vehicle in which

defendant was a passenger. There was no issue regarding the reason the police were in the area. It would have been enough for Lavin to say that he was in the area, observed the vehicle commit a traffic violation, and pulled it over. The contents of the call had no relevance when offered for a nonhearsay purpose. "All evidence must be relevant to be admissible." *People v. Dismuke*, 2017 IL App (2d) 141203, ¶ 63; see also *Warlick*, 302 Ill. App. 3d at 599 (stating that the court need not conduct the evidentiary balancing test where the evidence has no relevance to an issue in the case). Because the contents of the call had no relevance to the case, the court erred in admitting the evidence.

¶ 14 Though it was error for the court to admit the evidence, "[t]he admission of hearsay evidence is harmless error where there is no reasonable probability that the jury would have acquitted defendant absent the hearsay testimony." *People v. Shorty*, 408 Ill. App. 3d 504, 512 (2011) (citing *People v. Sims*, 192 Ill. 2d 592, 628 (2000)). After reviewing the record, we do not see how admission of the "shots fired" call could have significantly influenced the outcome of the trial. The State only mentioned the call once in the opening statements and in its first question to Lavin. Each time it was followed by the fact that the traffic stop occurred 1½ hours later. Neither the State nor any witnesses discussed the call in later testimony or in closing statements. Moreover, the evidence showed that (1) defendant jumped out of the vehicle and ran toward the wooded area when the vehicle pulled over, (2) while running, he was holding his hand at his hip, (3) the officers found defendant squatting behind a tree in the wooded area, (4) when the officers found defendant, he was covered in mud while he had not been previously, (5) shoe prints through the creek bottom were found that matched defendant's shoes, (6) the gun was muddy and the officers found it approximately five feet from the shoe print, and (7) the officer's found the gun between the creek bed and the location they ultimately found defendant,

in the path defendant must have taken. We do not believe that there is a reasonable probability that the jury would have acquitted defendant had the "shots fired" call not been admitted.

¶ 15 In coming to this conclusion, we note that defendant argues that the "shots fired" call amounted to irrelevant other-crimes evidence. We disagree. Each of the cases defendant cites actually concerned witness testimony about another crime specifically tied to defendant, unlike the "shots fired" call here. See *People v. Lindgren*, 79 Ill. 2d 129, 133 (1980) (holding that the court erred in allowing testimony that the defendant had committed an arson after the armed robbery and murder that was the subject of the case); *People v. Spiezio*, 105 Ill. App. 3d 769, 770 (1982) (holding that the court erred in allowing testimony that the defendant had been arrested for car theft four days after the defendant committed the burglary which was the subject of the case); *People v. Thigpen*, 306 Ill. App. 3d 29, 35-36 (1999) (holding that the court erred in allowing testimony that the defendant had committed two other murders); *People v. Bedoya*, 325 Ill. App. 3d 926, 939 (2001) (holding testimony that the defendant had fired his gun at three buildings earlier in the evening irrelevant to the question of whether he had intentionally killed the victim). Instead, the cases concerning the content of a police radio call have implemented the hearsay analysis, as we do above (*supra* ¶¶ 12-14). See, e.g., *Warlick*, 302 Ill. App. 3d at 599-601; *People v. Jura*, 352 Ill. App. 3d 1080, 1085-89 (2004).

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 18 Affirmed.