2016 IL App (1st) 131866-U
No. 1-13-1866
September 6, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	No. 05 CR 10919
v.	)	
	)	
KEVIN LUNDY,	)	The Honorable
	)	Diane Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Where three eyewitnesses identified the defendant as the offender from an appropriate, non-suggestive photo array before viewing a suggestive lineup, and the witnesses all expressed a high degree of certainty that they had identified the offender correctly, the trial court's finding of attenuation between the suggestive lineup and the in-court identification of the defendant as the offender is not against the manifest weight of the evidence.

¶ 2 The trial court entered judgment on a jury verdict finding defendant, Kevin Lundy, guilty of first degree murder and aggravated battery with a firearm. He presents three issues for our review: (1) whether the trial court erred when it found the eyewitnesses' identification of

Lundy in court sufficiently attenuated from an impermissibly suggestive line-up; (2) whether the trial court erred by allowing the State to introduce into evidence a written statement a witness signed; and (3) whether the trial judge erred by failing to ask prospective jurors whether they understood and accepted all of the four principles codified in Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012). We find that the trial court's ruling on attenuation is not contrary to the manifest weight of the evidence, and the trial court did not commit plain error in its ruling on the written statement and in its admonishments to the jury. Accordingly, we affirm the trial court's judgment.

¶ 3 BACKGROUND

¶ 4 On the afternoon of April 24, 2005, Vernard Butler drove his sister, Tierra Smith, and her friend, Virginia Hines, to a store at the corner of 79th and Bennett in Chicago. When they left the store, Butler stopped to speak with Larry Williams while Smith and Hines went back to the car. As Butler walked to the car, a man came from the alley, wearing a black mask and a black jacket and carrying a large gun. The man shot Butler in the foot, then turned around and shot Williams. After a brief tussle, the man shot Williams two more times and ran away. Williams died from the gunshot wounds. Butler got in his car and drove home.

¶ 5 Later that evening, Butler went to the police station. The detectives showed Butler a group of photos and he identified Lundy as the shooter. Smith and Hines also identified Lundy as the shooter from a group of photographs. On April 26, 2005, Butler, Smith and Hines returned to the police station to view a line-up. Lundy wore a black t-shirt in the line-up. All of the other participants in the line-up wore white t-shirts. Butler, Smith and Hines

identified Lundy in the line-up as the shooter. Prosecutors charged Lundy with the first degree murder of Williams and with the aggravated battery with a firearm of Butler.

¶ 6 Lundy filed a motion to suppress evidence that the witnesses identified Lundy as the shooter. The trial court denied the motion after an evidentiary hearing.

¶ 7 *Voir Dire*

¶ 8 During *voir dire*, Judge Cannon informed the prospective jurors of the charges against the defendant and explained:

> "[T]he charges in this case come by way of a grand jury indictment. They are not evidence against the defendant. The defendant is presumed innocent and the State has the burden of proving him guilty beyond a reasonable doubt.
>
> ***
>
> Should the State fail to meet their burden of proof beyond a reasonable doubt is there anybody seated in the jury box who could not or would not go into the jury room with your fellow jurors and the law that governs this case as I give it to you and sign a verdict form of not guilty? No response.
>
> The defendant has a right to testify. He has a right to remain silent. Should he exercise his right to remain silent is there anybody that would hold that against him? No response."

¶ 9 The trial court did not ask any of the prospective jurors whether they understood and accepted the principle that a defendant need not present any evidence.

¶ 10 Trial

¶ 11 At trial, Butler again identified Lundy as the shooter. Butler testified that Lundy wore all black clothing on April 24, 2005. Lundy's mask left his eyes, nose, and cheek bones uncovered. When Butler realized he had been shot, he ran to the northwest side of the street where he knew a police officer stayed. Butler testified that Lundy crossed the street but then he stopped, took off his mask, looked behind him and then put the gun in the mask and took off running.

¶ 12 Butler testified that he had known Lundy for two to three years prior to the shooting. Butler often saw Lundy walking in the neighborhood, and Butler would speak to Lundy whenever he came around.

¶ 13 Smith and Hines also identified Lundy in court as the man they saw shooting Butler and Williams. Smith and Hines agreed that the mask left Lundy's eyes and nose uncovered, and that he wore only black clothing. Smith admitted that she had not known Lundy prior to the shooting.

¶ 14 David Ridley testified that he had known Lundy for a long time and he was a close friend. Ridley acknowledged that he faced serious charges for gun offenses and possession of a stolen motor vehicle. When police arrested him on the charges, they asked him whether he knew anything about the shooting of Williams. Ridley admitted that he hoped to do as little time as possible on the charges against him.

¶ 15 Ridley testified that he could not recall much about the conversations he had with Lundy about the offense nor could he recall exactly what he told the assistant State's Attorneys or the grand jury about these conversations. When the State confronted him with his

handwritten statement and read aloud portions of his grand jury testimony, Ridley did not deny making the statements, but he testified that he could not remember making most of the statements.

¶ 16 The prosecutor questioned Ridley about the following passage from the transcript of grand jury proceedings:

> "Question. What happened when [Lundy] saw Larry on the corner. Answer. He shot him. He shot him in the stomach or the chest first. He *** said Larry started tumbling toward him, you know like he was trying to grab him or something and he said he backed up. He shot him *** [and] the blood [was] coming out of Larry's mouth like he was choking on his blood. So I assumed it was somewhere up here in his throat or his face. And he said he just shot him 2 more times up in the face or in the neck somewhere. It was up. He wasn't really sure where, but it was up high somewhere. Question. Again, when you say he, who are you referring to. Answer. Kevin [Lundy]."

¶ 17 The prosecutor asked Ridley whether the transcript of grand jury proceedings accurately recounted Ridley's testimony. Ridley answered, "Yeah, I believe so." The trial transcript also includes the following testimony:

> "Q Did the defendant ever tell you during a conversation over the phone that he shot Larry Williams at 79th and Bennett?
>
> A I don't know if it was over the phone or not. He told me but I don't know if it was over the phone ***.
>
> Q Okay. The defendant told you that he shot Larry Williams?

A Yes."

¶ 18 Despite this testimony from Ridley, the prosecutor decided to introduce into evidence testimony about both the written statement Ridley signed at the police station and Ridley's grand jury testimony. An assistant State's Attorney identified the statement Ridley signed and read it into the record, over Lundy's objection.

¶ 19 The assistant State's Attorney who presented Ridley's testimony to the grand jury read from the transcript of the grand jury testimony. According to that transcript, Ridley testified that Lundy told him a group of men, including one named Larry, surrounded him, pushed him, and called him names in April 2005. In a phone call on April 24, 2005, Lundy told Ridley that he caught Larry off guard in front of a store at 79th and Bennett. Lundy said he walked up to a man who had been talking to Larry, and as that man ran away Lundy fired at him. Lundy then shot Larry repeatedly. According to Ridley's testimony to the grand jury, Lundy repeated the story when Ridley saw him in person on April 25, 2005.

¶ 20 According to the handwritten statement, Lundy told Ridley that a man named Larry called him names and picked on him. In a phone call on April 24, 2005, Lundy said he caught Larry off-guard in front of a store at 79th and Bennett. Lundy said he walked up to a man who had been talking to Larry, and as that man ran away Lundy fired at him. Lundy then shot Larry repeatedly. Lundy repeated the story when Ridley saw him in person on April 25, 2005.

¶ 21 Lundy did not testify and the defense presented no evidence. Following closing arguments, the jury found Lundy guilty of first degree murder and aggravated battery with a firearm. The trial court denied Lundy's motion for a new trial and sentenced Lundy to fifty

years for first degree murder and twelve years for the aggravated battery, with the sentences to run consecutively.

¶ 22 Appeal and Hearing on Remand

¶ 23 On Lundy's direct appeal, this court found the line-up impermissibly suggestive, and remanded the case for a hearing on whether sufficient attenuation from the line-up permitted the witnesses to identify Lundy in court as the shooter.

¶ 24 At the attenuation hearing, Smith testified that as she sat in the car, she saw Lundy come out of the alley with his face partially masked. Lundy put a gun to Butler's head. Smith got out of the car and looked at Lundy in broad daylight, from about two car lengths away, for about two minutes. Later that day, she looked at an array of photographs at the police station and chose Lundy's photograph as a picture of the man who shot Williams and Butler. Smith admitted that Lundy's mask covered his mouth and chin, but she could see his eyes, nose and forehead. She was "very sure" she identified the shooter correctly, both in the photo array and in court.

¶ 25 Hines testified similarly as to her opportunity to see the shooter, except that Hines saw the shooter for only a few seconds. Nonetheless, she was "one hundred percent sure" she correctly identified the shooter both in the photo array and in court.

¶ 26 The prosecutor relied on Butler's testimony from Lundy's trial as proof that the improper line-up did not taint Butler's identification of Lundy at trial as the shooter.

¶ 27 The trial court found "little doubt that the in-court identifications made by these witnesses were independent of the line-up." The trial court reinstated Lundy's convictions and sentences. Lundy again appeals.

¶ 28 ANALYSIS

¶ 29 Lundy raises three arguments on appeal: (1) the trial court should have found that the suggestive line-up tainted the identifications of Lundy in court; (2) the trial court should not have admitted into evidence the content of the handwritten statement Ridley signed; and (3) we should remand for retrial because the trial court failed to question the venire in accord with Supreme Court Rules.

¶ 30 Attenuation

¶ 31 Police ensured the eyewitnesses would identify Lundy as the shooter by placing him, wearing a black t-shirt, in a line-up with four other persons who all wore white t-shirts. The trial court found that the eyewitnesses could identify Lundy in court, despite the suggestive line-up, because the witnesses all had sufficient bases for their identifications, independent of the suggestive line-up. We will reverse the trial court's finding on attenuation only if it is against the manifest weight of the evidence. *People v. Bates*, 267 Ill. App. 3d 503, 505 (1994).

¶ 32 "Once an out-of-court identification has been found to be unnecessarily suggestive and, therefore, inadmissible, the State has the burden of proving by clear and convincing evidence that the in-court identification is predicated upon observations made of defendant which are independent and uninfluenced by the inadmissible identification." *People v. Rockman*, 144 Ill. App. 3d 801, 808 (1986). "In determining whether an identification has an independent origin, we consider the following factors: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty demonstrated by the

witness at the suggestive confrontation; and (5) the length of time between the offense and the suggestive confrontation. [Citation.] We also consider whether the witness was acquainted with the suspect before the crime, and whether there was any pressure on the witness to make a certain identification." *People v. Brooks*, 187 Ill. 2d 91, 129-30 (1999).

¶ 33 Smith testified that she saw the shooter in daylight from a distance of about two car lengths for about two minutes, with his face partially masked but with his eyes, nose and forehead left uncovered. Hines saw the partially masked shooter from a similar distance, but she saw him for only a few seconds. Butler testified that he saw the shooter partially masked, and after he and the shooter ran, he saw the shooter take the mask off completely, giving Butler an unobstructed view of his face.

¶ 34 No one asked any of the eyewitnesses how they described the shooter to police. An officer testified that he received a vague and general description of the shooter, but no evidence established the source of the description. Only Butler knew Lundy prior to the shooting.

¶ 35 All three eyewitnesses testified that the shooter had their undivided attention for the time they saw him. Lundy argues that we should not count this factor in favor of the attenuation, because the presence of the gun made the situation highly stressful and directed attention to the gun rather than the person holding it. Lundy points out that "Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification." *State v. Henderson*, 27 A.3d 872, 904 (N.J. 2011); see *People v. Allen*, 376 Ill. App. 3d 511, 525-26 (2007). While this may be true, we defer to the trial

court's assessment of the witnesses' credibility. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007).

¶ 36 All three witnesses testified that they were quite certain they identified the shooter correctly. Lundy argues that courts should no longer consider the witnesses' certainty as a factor favoring admissibility, because "[p]sychological research has established that the witness's faith is equally strong whether or not the identification is correct." *Newsome v. McCabe*, 319 F.3d 301, 305 (7th Cir. 2003); see Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, *Report and Recommendation to the Judges* (2013). Due to this psychological research, the certainty of the witnesses may deserve less weight, but that does not vary our view of the factors as a whole.

¶ 37 About two days passed between the shooting and the suggestive line-up. In that time, police presented an array of photographs to each of the three eyewitnesses. All three chose Lundy's photo as a picture of the shooter. Lundy has not argued that the photo array improperly suggested that the witnesses should choose him. No evidence showed that the witnesses faced any special pressure to make a certain identification from the photo array. We must assume from this record that the photo array did not suggest the identification of Lundy as the shooter. The identification of Lundy in the photo array counts as a telling factor in favor of the trial court's ruling. Weighing all the *Brooks* factors, we find that the manifest weight of the evidence sufficiently supports the trial court's finding that all three witnesses' identifications of Lundy in court as the shooter had a basis independent of the impermissibly suggestive line-up.

¶ 38 Out of Court Statement

¶ 39 Ridley testified in court that shortly after the shooting, Lundy told Ridley that Lundy shot Williams. The prosecutor found Ridley's testimony unsatisfactory. The prosecutor sought to introduce both Ridley's testimony to the grand jury and a handwritten statement Ridley signed at the police station. Lundy did not object to the recitation of the grand jury testimony, which fleshed out the account of Lundy's confession. Lundy objected to the testimony about the handwritten statement, which effectively matched the grand jury testimony.

¶ 40 However, Lundy did not include the issue in his motion for a new trial. He contends that this court should review the issue as a "constitutional issue previously raised at trial *** [which he could raise] in a later postconviction petition." *People v. Cregan*, 2014 IL 113600, ¶ 18. He claims that the improper admission into evidence of testimony about the handwritten statement involves his "constitutional due process right to a trial without improperly admitted evidence." We find that the evidentiary error alleged here does not rise to the level of a constitutional due process violation. See *People v. Wright*, 2015 IL App (1st) 123496, ¶ 65, appeal allowed 2015 IL 119561. Because Lundy failed to preserve the issue for review, we will consider it only to determine whether the trial court committed plain error. *People v. Herrett*, 137 Ill. 2d 195, 209 (1990).

¶ 41 The State makes no effort to defend the admission into evidence of testimony about the handwritten statement. The court could not admit the statement as substantive evidence because Ridley had no personal knowledge concerning the shooting. See *People v. Simpson*, 2013 IL App (1st) 111914, ¶ 18; *People v. Fillyaw*, 409 Ill. App. 3d 302, 312 (2011); *People*

v. McCarter, 385 Ill. App. 3d 919, 930 (2008). The court could not admit the statement for the State to impeach Ridley, because Ridley's testimony did not damage the State's case -- in fact, Ridley's testimony substantially aided the State's case against Lundy. See *People v. Miller*, 302 Ill. App. 3d 487, 493 (1998).

¶ 42 The erroneous admission of a confession into evidence rarely constitutes harmless error because confessions generally carry "extreme probative weight" (*People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988)), and they "frequently constitute the most persuasive evidence against a defendant." *People v. Clay*, 349 Ill. App. 3d 24, 30 (2004). We find that this case presents the rare circumstance in which the erroneous admission into evidence of a confession does not count as plain error. Lundy's confession to Ridley came into evidence in three separate ways: first, Ridley testified that Lundy confessed to him; second the transcript of grand jury proceedings showed that Ridley testified there that Lundy confessed to him; and third, the handwritten statement repeated the grand jury testimony. Lundy objected only to the handwritten statement.

¶ 43 Lundy appropriately conceded that the trial court correctly permitted Ridley to testify that Lundy told him he shot Williams. Illinois Rule of Evidence 801(d)(2) establishes that a party's out-of-court statement does not count as hearsay when an opponent seeks to present evidence of the statement. See *People v. Aguilar*, 265 Ill. App. 3d 105, 113 (1994). Also, Ridley's testimony that Lundy admitted he shot Williams is substantive evidence admissible under an exception to the hearsay rule. See *People v. Cruz*, 162 Ill. 2d 314, 374-75 (1994).

¶ 44 Lundy also appropriately conceded that the trial court correctly permitted the prosecution to read to the jury the transcript of Ridley's testimony to the grand jury. The Code of

Criminal Procedure makes that testimony admissible, because Ridley gave that testimony under oath, and Ridley's grand jury testimony conflicted with Ridley's testimony in court to a sufficient extent to render it admissible. 725 ILCS 5/115-10.1(c)(1) (West 2004); *People v. Flores*, 128 Ill. 2d 66, 86-87 (1989).

¶ 45 The trial court erred when it admitted Ridley's handwritten statement into evidence, but the statement merely repeated Ridley's grand jury testimony. See *People v. Harvey*, 366 Ill. App. 3d 910, 920-22 (2006); *People v. Schmidt*, 61 Ill. App. 3d 7, 9-10 (1978). Along with Ridley's admissible testimony about Lundy's confession and Ridley's grand jury testimony going into Lundy's confession in greater detail, the State presented three credible eyewitnesses who identified Lundy from an array of photographs, and again in court, as the shooter. In the circumstances of this case, we find neither an error affecting the fundamental integrity of the trial, nor an error in a case with closely balanced evidence. See *People v. Hall*, 194 Ill. 2d 305, 344 (2000). Thus, we cannot say that the trial court committed plain error. While we agree with Lundy that the trial court committed error when it permitted the prosecutor to present evidence of the handwritten statement Ridley signed, we find that the error does not require reversal.

¶ 46 Jury Admonishments

¶ 47 Finally, Lundy contends that we must reverse the convictions because the trial court did not comply with Supreme Court Rule 431(b). Under Rule 431(b), the trial court had a duty to "ask each potential juror, individually or in a group, whether that juror understands and accepts the *** principl[e] *** that the defendant is not required to offer any evidence on his

or her own behalf." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). We review *de novo* the issue of whether the trial court complied with the rule. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 48 Here, the trial court unequivocally violated Rule 431(b). The court never asked the venire about the principle that the defendant has no obligation to present evidence. However, Lundy did not object to the court's admonishments to the jury, so we review the issue only for plain error. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 49 Lundy concedes that inadequate admonishments under Rule 431(b) do not constitute errors affecting the integrity of the judicial process. See *People v. Thompson*, 238 Ill. 2d 598, 611-15 (2010). In view of Lundy's confession to Ridley, and the three credible eyewitnesses, including one who knew Lundy from the neighborhood, we cannot view the evidence as closely balanced. Therefore, we find that the inadequate admonishments do not amount to plain error requiring a retrial. See *Hall*, 194 Ill. 2d at 344.

¶ 50 CONCLUSION

¶ 51 Especially in view of the eyewitnesses' identification from a photo array before they saw the impermissibly suggestive line-up, we find that the manifest weight of the evidence sufficiently supports the trial court's finding that the State proved, by clear and convincing evidence, that the witnesses had an adequate basis, independent of the line-up, for identifying Lundy in court as the shooter. Although the trial court erred when it permitted the prosecutor to present evidence of the handwritten statement Ridley signed, we find no plain error. The trial court also erred when it failed to admonish the jurors that Lundy had no obligation to present evidence, but because we cannot characterize the evidence in this case as closely

balanced, we find the improper admonishments do not constitute plain error. Accordingly, we affirm the trial court's judgment.

¶ 52 Affirmed.