2013 IL App (3d) 110267-U

Order filed June 4, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0267
v.	)	Circuit No. 08-CF-2169
	)	
ANTHONY HAWKINS,	)	Honorable
	)	Carla Alessio-Policandriotes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held:* (1) Trial court's error in admitting racially inflammatory statements made by defendant was, nevertheless, harmless based on overwhelming evidence of defendant's guilt.
(2) Trial court did not abuse its discretion in refusing to admit defendant's statement made to a police officer during his arrest, and refusing to allow defendant to testify about a conversation defendant had with another witness days before the shooting.

¶ 2 Defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and

aggravated unlawful use of weapons (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2008)). The trial court sentenced him to consecutive terms of 45 years and 2 years. On appeal, defendant argues that the trial court erred in (1) admitting his racially charged statement, which had no probative value, and (2) refusing to allow defendant to testify regarding statements he made to an arresting officer and statements a witness made to defendant a week before the murder. We affirm.

¶ 3 Defendant Anthony Hawkins was charged by indictment with two counts of first degree murder and one count of aggravated unlawful use of a weapon. The indictment alleged that on September 7, 2008, defendant shot and killed Ronald Rob and that he knowingly carried on his person an uncased and loaded handgun.

¶ 4 Prior to trial, defense counsel filed a motion *in limine* seeking to bar the admission of videotaped statements made by defendant while sitting alone in the interview room at the police station following his arrest. The trial court denied the motion. Subsequently, defendant requested that some portions be redacted because of the racially inflammatory statements they contained. Counsel argued that the remarks were more prejudicial than probative. The trial court agreed and redacted most of the statements. However, the following statement was not redacted: "Let's just go sit with the fucking niggers and Mexicans and shit and just kill one of them in there, too, what the fuck." The trial court ruled that the probative value of the statement outweighed its prejudicial effect because it demonstrated defendant's "flippant" attitude about shooting the victim.

¶ 5 At trial, Tina Schure testified that she dated the victim. On the morning of September 7, 2008, she went to see Rob at the Rite-A-Way auto shop. Rob was there working on a truck for his stepfather. He was drinking beer, which was normal. She stayed and drank with Rob. They were still there in the afternoon when defendant showed up. They had run out of beer, so defendant left

and returned with beer and drank it with them. All three of them socialized for a while.

¶ 6 Edward Ziomek, the owner of Rite-A-Way, arrived around 3 p.m. Rob, Tina and defendant were there and still drinking. Ziomek's friend, Christopher Blaess, dropped by around 5:20 or 5:30. He also knew Rob. He testified that it appeared that Tina, Rob and defendant had been drinking because they were talking loudly and he saw empty alcohol bottles.

¶ 7 Tina, Ziomek and Blaess all testified that at some point defendant became loud and argumentative toward Rob. Ziomek asked him to leave, and defendant got in his truck and sped away, spraying gravel in the parking lot. About 15 minutes later, defendant returned to the shop. Rob went outside. Tina testified that Rob said he was going to talk to defendant but did not appear angry. Blaess testified that Rob said he was going to give defendant "a piece of his mind" for kicking gravel against the other vehicles in the lot. Ziomek testified that Rob headed outside in "kind of a swift walk." Blaess heard Rob say something, and then he heard a bump or thump against a truck. Within a few seconds, they heard shots and ran outside. Tina saw Rob on his knees. Defendant was standing above Rob pointing a gun at him, and Rob fell forward on the ground. Defendant put the gun in his waistband, walked to his truck and drove away. Blaess called 911.

¶ 8 Ziomek testified that he and defendant had previously engaged in several transactions in which they sold and traded guns with each other. But he testified that they did not have a conversation about guns that day and that he did not expect defendant to return to the shop to sell him guns for any reason.

¶ 9 Tina, Blaess and Ziomek all testified that they knew Rob carried a small knife in his pocket. They did not see a knife or any other weapon in Rob's hand or on the ground near his body after the shooting. Tina testified that she did not remove Rob's knife from the scene, or put it in his pocket.

¶ 10 Officer Grozik was the first officer to respond. He did not see any weapons on the ground or in the victim's hand. Paramedics also testified that they did not see any weapons at the scene when they arrived. Rob had a single gunshot wound to the chest. He was not breathing and had no pulse.

¶ 11 Dr. Larry Blum, a pathologist, revealed that Dr. Bryan Mitchell performed the autopsy on the victim but that Mitchell died before trial. Blum reviewed the autopsy and other relevant evidence in the case. He opined that Rob suffered a contact wound. Blum could not determine the body position of the shooter. Toxicology tests showed that Rob had a blood alcohol level of 0.295.

¶ 12 Shortly after the shooting, Officer Rando Simeon went to Silver Cross Hospital to recover the victim's clothing. He collected a small pocket knife from the victim's pants pocket.

¶ 13 Detective Doug Furlong was dispatched to the scene of the crime and noticed a vehicle matching the description of the suspect's vehicle leaving a nearby driveway. He attempted to stop the vehicle, but defendant drove past him. Other officers joined in the pursuit, and defendant was eventually apprehended. Furlong testified that defendant resisted the officers and was "tasered." After defendant was placed in the squad car, he began banging his head on the passenger's door.

¶ 14 Furlong recovered a loaded handgun from defendant's person. One of the arresting officers saw the gun fall out of defendant's waistband as defendant was forced to the ground. The gun was a Taurus 9mm handgun. Three other handguns and boxes of ammunition were also recovered from defendant's truck. Crime scene investigator, Mike Eriks, found a spent 9mm casing at the shop where the victim had been shot.

¶ 15 Officer Brett Bjork, one of the officers who responded to assist in the chase, recalled defendant saying that "he fucked my wife, I did what I had to do." On cross-examination, Bjork

admitted that he had a hearing impairment and that he wore hearing aids in both ears. He acknowledged that defendant could have said "he pulled a fucking knife" rather than, "he fucked my wife," since knife and wife sound similar.

¶ 16 Two officers interviewed defendant around 8:15 p.m. on September 7, 2008. The redacted DVD of the interview and the statements defendant made while he waited for the investigators in the interview room was played for the jury. During the interview, defendant stated that the victim pulled a knife on him in the parking lot and he acted in self-defense. He said he left the shop and returned before the shooting but could not remember why he left.

¶ 17 Diane Guerra lived with defendant as his common law wife for 28 years. She testified that defendant had been unemployed for more than a month. On the morning on September 7, 2008, defendant left home and did not return until 5 or 5:30 p.m. She heard him go to the bedroom and open a safe. She thought he kept his handguns in the safe. He left shortly after that. A few minutes later, he returned and was "very shaken." He told her that he loved her and told their 19-year-old son to take care of her. He went to the bedroom and then left again.

¶ 18 Defendant testified that he was 57 years old at the time of trial. He formerly worked for a company owned by Rob's mother. He and Rob were on good terms. He testified that Rob bragged about having been in prison for beating someone up. Rob could become aggressive and angry when he drank. On one occasion, defendant saw Rob argue with a man in the parking lot and pull a knife. The other man left.

¶ 19 Defendant stated that he had a valid Firearms Owner's Identification (FOID) card and owned four handguns and three rifles. He purchased three of them from Ziomek. He and Ziomek had engaged in several gun transactions. Defendant kept the Taurus 9 mm loaded and on top of the safe

in his bedroom. He stored the other handguns inside the safe.

¶ 20 Defendant went to a flea market the day before the incident. When he returned home, Diane told him that Ziomek had stopped by and wanted to see him. The next day, defendant went to Rite-A-Way to "hang out." He drank beer with Tina and Rob. At some point, he and Rob started arguing and Ziomek asked him to leave. He got in his car and drove home. When he got home, he remembered that Ziomek wanted to see him and thought that maybe he wanted to buy back his guns. He put the Taurus in his waistband and changed into a T-shirt that hung over his waistband. He drove back to the shop, but did not expect any trouble. When he returned, Rob met him in the parking lot and came at him "pretty quickly." Rob punched defendant in the chest, causing defendant to fall back against the truck. Rob then came after him with a knife. Defendant was trapped between Rob and the truck. He pulled the Taurus out of his waistband and pointed it at Rob. Defendant testified that Rob kept coming, so he fired a single shot, which caused Rob to fall to the ground. He then got back in his truck and drove home.

¶ 21 Defendant stated that he was attempting to go to the police station when officers stopped him in the driveway. One officer exited his car and drew a gun. Defendant was afraid of being shot, so he drove away. When he was eventually pulled over, he told police that he had a gun in his waistband. He denied telling Officer Bjork that he did what he had to do because Rob "fucked [his] wife." Following his testimony, defendant presented a certified copy of Rob's 1995 Arizona conviction for aggravated assault.

¶ 22 In rebuttal, Detective Jack Ellingham testified that when he interviewed defendant, defendant did not mention anything about selling guns to Ziomek on the day of the shooting. Defendant seemed to be confused about why he left the shop the first time, but he clearly stated that the victim

pulled a knife on him and that he shot Rob in self-defense.

¶ 23 The jury was instructed on self-defense, unreasonable-belief second degree murder and provocation second degree murder. The jury convicted defendant of first degree murder and aggravated unlawful use of weapons.

¶ 24 I

¶ 25 Defendant claims that the trial court erred in admitting the inflammatory statement he made while he was alone in the interrogation room waiting for investigators. Defendant argues that the statement was irrelevant to his mental state and that, even if it was relevant, it was extremely prejudicial and likely distracted the jury.

¶ 26 As a general rule, evidence is admissible if it is relevant. *People v. Begay*, 377 Ill. App. 3d 417 (2007). Evidence is considered relevant if it tends to make the existence of any fact in consequence more or less probable than it would be without the evidence. *People v. Beaman*, 229 Ill. 2d 56 (2008). Relevant admissions of a party, whether statements or conduct, are admissible when offered by the opponent as an exception to the hearsay rule. *People v. Cruz*, 162 Ill. 2d 314 (1994). However, not all relevant evidence is admissible at trial. Relevant evidence may be excluded if "its prejudicial impact substantially outweighs its probative value." *People v. Gonzalez*, 142 Ill. 2d 481, 487 (1991).

¶ 27 The determination as to whether evidence is relevant and admissible is within the sound discretion of the trial court, and its ruling will not be reversed absent a clear abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404 (2001). A trial court abuses its discretion when its ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would take the same view. *Id.* at 455.

¶ 28 In *People v. Lampkin*, 98 Ill. 2d 418 (1983), the defendant was charged with the murder of two white police officers. At trial, the State was allowed to introduce evidence that upon his arrest six years prior, the defendant told another police officer, "You white honky coppers are [expletive deleted] with us now, and we will get you later." Our supreme court held that the remarks should have been excluded because they were very likely to arouse prejudice and hostility in the jury. The court also dismissed the State's argument that the statement was admissible as evidence of malice or criminal intent toward the victim, noting that the statement was so generalized and impersonal that it could not reasonably be characterized as being directed toward anyone in particular. *Id.* at 427-28.

¶ 29 Here, defendant's derogatory reference to two minority groups was highly inflammatory and was likely to arouse passion and hostility on the part of the jury. We caution that "[t] here is no place in a criminal prosecution for gratuitous references to race, especially when a defendant's life hangs in the balance." See *Smith v. Farley*, 59 F.3d 659, 663 (7th Cir. 1995). A remark revealing racial or ethnic predilections can violently affect a jury's impartiality. *United States v. Doe*, 903 F. 2d 16 (D.C. Cir. 1990).

¶ 30 Moreover, we reject the State's argument that defendant's statement is probative because it shows mental state and intent at the time of the incident. Defendant's remark was not probative. It was a general reference that did not advance the State's case that defendant killed the victim. While a statement that pointedly supports an evidentiary finding of defendant's guilt would need to be carefully balanced with any prejudice, this case needs little balancing. Here, the remark was offensive with no relative value to the charge in the case. The trial court should have scrupulously avoided any possibility that the jury's verdict might be clouded by racial issues by redacting the entire statement.

¶ 31 Although the trial court committed clear error in admitting the statement, it's erroneous conduct does not permit us to ignore the law of harmless error. Our supreme court has emphasized that not every erroneous admission of evidence requires reversal; a new trial is warranted only where the evidence improperly admitted was so inflammatory that it deprived the defendant of a fair trial or where the improper evidence affected the outcome of the trial. See *In re Rolandis G.*, 232 Ill. 2d 13 (2008). The effect of the inflammatory evidence depends on the circumstances of the case. *People v. Rozo*, 303 Ill. App. 3d 787 (1999). In deciding whether error is harmless, a reviewing court may (1) consider the error to determine whether it might have contributed to the conviction, (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction, or (3) consider whether the improperly admitted evidence is merely cumulative. *In re Rolandis G.*, 232 Ill. 2d at 43.

¶ 32 In this case, the evidence at trial did not suggest that the crime was motivated by racial bias; defendant and Rob were friends. Instead, the evidence focused on defendant's theory that he shot Rob to protect himself. Defendant acknowledged to the police and at trial that he shot Rob but claimed that he did so in self-defense because Rob pulled a knife on him. However, the overwhelming evidence demonstrated that defendant shot Rob without justifiable provocation. Defendant returned to the shop with a loaded, uncased weapon in his waistband; he shot Rob at close range; Rob's knife was found safely concealed in Rob's pocket; and defendant did not have any defensive wounds on his body. Thus, even if the brief and isolated statement defendant made while awaiting investigators was improperly admitted, it was not so detrimental to his theory of self-defense as to deny him a fair trial or affect the trial's outcome.

¶ 33 II

¶ 34 Defendant contends that the trial court erred in precluding him from testifying that he told Officer Bjork that "he pulled a fucking knife and I did what I had to do," not "he was fucking my wife." Defendant also claims that the trial court erred in barring his testimony that Ziomek told him a week or two before the shooting that if defendant ever needed money, Ziomek would buy his guns.

¶ 35 A defendant's out-of-court statement offered in support of defendant's position at trial constitutes inadmissible hearsay. *People v. Barnwell*, 285 Ill. App. 3d 981 (1996). Such statements are considered inadmissible hearsay because their relevance depends on the truth of the matter asserted or the defendant's belief in the truth of the matter asserted. *People v. Patterson*, 154 Ill. 2d 414 (1992). Where there is room for doubt, the admissibility of a statement should be left to the discretion of the trial court. See *People v. Kimbrough*, 138 Ill. App. 3d 481 (1985).

¶ 36 *A. Statement Made to Officer Bjork*

¶ 37 During the state's case-in-chief, defense counsel cross-examined Officer Bjork regarding the possibility that defendant's statement that he did what he had to do concerned a "knife," not his "wife." Bjork acknowledged the possibility that defendant could have said "knife." As part of defendant's case-in-chief, he attempted to introduce his own testimony in support of his statement to Officer Bjork following his arrest. It is well settled that a criminal defendant's self-serving statement made while in police custody constitutes inadmissible hearsay, as would be the result with any exculpatory declaration by a party not subject to a recognized hearsay exception. See *Barnwell*, 285 Ill. App. 3d at 989. Since defendant's testimony was offered to prove the truth of the matter asserted or, at the least, his belief in the truth of the matter asserted and the statement had no other indicia of reliability, the trial court was well within its discretion to exclude the statement.

¶ 38 *B. Conversation with Ziomek*

¶ 39 The trial court ruled that the following testimony was also inadmissible hearsay:

"Defense Counsel: Why were you trying to bring guns back to Ed's that you had, in fact, purchased from him?

Defendant: Previously a week before this and many times before this, Ed would say if you ever need money...

ASA: Objection.

Court: Sustained.

Defense Counsel: Without going into what Ed would say, what was your opinion as to why you were bringing them back?

Defendant: To sell to Ed."

¶ 40 Defendant's testimony was properly excluded under the hearsay rule. It was an out-of-court statement being admitted for the truth of the matter asserted or for defendant's belief that Ziomek was willing to purchase defendant's guns for cash. Thus, the trial court did not err in finding that it was inadmissible.

¶ 41 Defendant argues that the court's ruling impaired his fundamental constitutional right to present a complete defense. Defendant claims that if the jury had heard about Ziomek's standing offer to buy his guns, it might have believed that defendant returned to the shop with an innocent purpose in mind.

¶ 42 Here, the record evinces that the trial court's ruling did not impair defendant's ability to present his theory of an innocent purpose to the jury. A review of the testimony at trial indicates that there was ample evidence admitted that Ziomek and defendant had engaged in gun transactions in the past. Ziomek testified that he and defendant had been involved in gun transactions. Defendant

was also allowed to testify that he brought the guns back to the shop to sell to Ziomek and that he and Ziomek "always had gun transactions." Defendant testified, without objection, that he believed the reason Ziomek stopped at his house a few days earlier was to buy guns from him. He further testified that he and Ziomek "always purchased guns" and that there was "always an exchange of money." Thus, defendant's ability to present his defense to the jury was not hindered by the trial court's ruling.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Will County is affirmed.

¶ 45 Affirmed.

¶46 JUSTICE McDADE, dissenting.

¶ 47 The majority has affirmed the conviction of defendant, Anthony Hawkins, for first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2008). In so doing, the majority found that (1) the trial court erred in admitting the defendant's racially inflammatory statements but that the error was harmless, (2) defendant's testimony countering Officer Bjork's testimony about what was actually said at the scene was properly excluded as inadmissible hearsay, and (3) Defendant's attempted testimony about a statement made to defendant a week before the killing was also properly excluded as inadmissible hearsay.

¶ 48 I agree with the third finding, but, for the reasons that follow, dissent from the other two and from the ultimate decision to affirm the defendant's conviction.

¶ 49 Looking first at the videotape made at the jail, I agree with the majority that the admission of defendant's inflammatory racial statements was error. The victim of the shooting

was neither African-American nor Mexican, nor do the comments say anything one way or the other about whether or why defendant shot Ronald Rob. They do not, contrary to the finding of the trial court, evidence a "flippant" attitude about shooting the victim. Rather they appear to constitute nothing more than an irrelevant, drunken rant and to lack anything even remotely probative of defendant's guilt or innocence. Indeed, the majority's discussion in ¶ 32 clearly demonstrates its irrelevance and lack of probative value and that its admission was a breach of the evidentiary principle that allows only the admission of relevant evidence. See *Ford v Grizzle,* 398 Ill. App. 3d 639, 646 (2010).

¶ 50 All of which begs the question: why was the State so determined to get this small portion of the videotaped comments before the jury? Certainly their prejudicial impact was great given their potential for poisoning the minds of some or all of the jurors against the defendant. Moreover, we have no indication that the admission of defendant's toxic rhetoric had no effect or played no role in the jury's verdict, so we cannot *reasonably* conclude, as the majority has tried to do, that the error was harmless.

¶ 51 There is, I think, another reason why the error is not "harmless." Finding error here was not a close call – every member of this panel has agreed the tape was wrongly admitted. When we exculpate clear error, we undermine the integrity of rules and practices designed to ensure fair hearings/trials, promote just verdicts, and engender trust in our judicial system. That result is not harmless in either the short or the long term and its risk should not be ignored.

¶ 52 I would find the admission of the videotape excerpt was an abuse of discretion constituting reversible error and requiring a new trial.

¶ 53 Turning to the issue of whether defendant's version of what he was reported to have said

to Officer Bjork was properly excluded as hearsay, I would find that the testimony should have been allowed. Bjork's testimony regarding his version of defendant's alleged out-of-court statement was offered for its truth. Bjork acknowledged on cross examination that he has a hearing problem and may not have accurately heard or recounted what defendant said. Despite this indicia of possible unreliability, his testimony was allowed to stand. Defendant denied the accuracy of the statement but was not permitted to rebut it when he testified in his own behalf.

¶ 54 In *People v. John M. Theis,* 2011 IL App (2d) 091080, the court found that a statement necessary to show its effect on the listener's mind or explain the listener's subsequent actions is not hearsay. Citing *People v. Robinson*, 391 Ill App. 3d 822, 834 (2009), the *Theis* court held the detective's statements were necessary to keep defendant's answers from being "nonsensical." *Theis* at ¶ 33.

¶ 55 In the instant case, allowing Hawkins to testify that he actually said, "he pulled a fucking knife, I did what I had to do," rather than, "he fucked with my wife, I did what I had to do," would have provided the jury with an alternate explanation for how Bjork, with his impaired hearing, *might* have arrived at what he reported hearing. Under *Theis* and *Robinson,* this is not hearsay. Such an interpretation has the added value of presenting the jury with a full picture on which to base its decision.

¶ 56 One might argue that, in light of defense counsel's cross-examination, defendant's direct testimony adds nothing of value. But it represents the difference between a mere possibility, conjured up by counsel, of what defendant might have said and an outright assertion by defendant that he said something different than what Bjork heard.

¶ 57 Moreover, the difference is not mere semantics; it is legally critical. One asserts a motive

grounded in jealousy or retaliation for a real or imaginary non-contemporaneous wrong; the other asserts a current defense of self, which is the essence of defendant's claim of justification.

¶58 Because I believe (1) admission of the snippet of the videotape was unfairly prejudicial and harmful and (2) the exclusion, as hearsay, of defendant's affirmative assertion of what he claims to have said to Officer Bjork was erroneous; I would reverse defendant's conviction on this basis as well and remand for a new trial.

¶ 59 Accordingly, I dissent from the majority's contrary decision.