

NOS. 4-08-0556, 4-09-0260 cons.

FILED

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CLERK OF THE APPELLATE
COURT 4TH DISTRICT

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DEMETRICE C. PHILLIPS,)	No. 06CF1346
Defendant-Appellant.)	
)	Honorable
)	Katherine M. McCarthy,
)	Judge Presiding.

ORDER

In June 2008, the State tried defendant, Demetrice C. Phillips, for his role in the September 2006 shooting death of Jeremiah Maclin. During that trial, the State called defendant's codefendant, Shaunessy Grimes (who had already been convicted for his role in Maclin's death), to testify. However, Grimes refused to do so. After holding Grimes in contempt for refusing to testify, the trial court concluded that Grimes was "unavailable" and allowed the State to read Grimes' testimony from his trial to the jury in this case.

The jury thereafter convicted defendant of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)), and possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). The trial court later sentenced defendant to (1) 35 years in prison based on the first-degree-murder count and (2) two 10-year prison terms on the discharge and possession counts to run concurrently to defendant's first-degree-murder sentence.

Defendant appeals, arguing that (1) the trial court erred by allowing the State to read Grimes' trial testimony to the jury because doing so violated his constitutionally protected right to confront Grimes, and (2) his conviction for aggravated discharge of a firearm must be vacated because it was premised upon the same act as his conviction for first degree murder. Because we agree that the court erred by allowing the State to read Grimes' testimony to the jury, we reverse and remand for a new trial.

I. BACKGROUND

In October 2006, the State charged defendant with multiple counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2006)), asserting, in part, that defendant, Grimes, and a getaway driver were accountable for Maclin's death. The State also charged defendant with (1) aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)) and (2) possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). The trial court later severed defendant's case from that of his codefendants.

At defendant's June 2008 trial, the State presented evidence of the following narrative of the events that led to those charges.

In September 2007, Breanna Turner, Grimes' girlfriend and the mother of his child, got into an argument with another young woman because Turner believed that woman was having a relationship with Grimes. Later that same day, Turner and a

female friend confronted the woman near Van Dyke Street in Decatur, Illinois. Turner and the woman began fighting, and a crowd gathered. Someone in the crowd threw a brick, which hit Turner's friend in the head. The woman then knocked Turner to the ground and several people from the crowd began to kick and stomp Turner. Turner's cousin pulled her away from the crowd.

That same evening, Turner told defendant and Grimes about the incident. Defendant asked Grimes whether he wanted to "shoot it up" and Grimes replied, "Come on." The group then drove to Grimes' house, where Grimes retrieved his .22-caliber rifle. Grimes placed the rifle in the floorboard of the car, and the group proceeded to Van Dyke Street.

When the group arrived at the scene of the earlier fight, defendant instructed Turner's female friend, who was driving, to pull into a nearby alley. Grimes handed defendant the rifle, and the two men walked down the alley toward Van Dyke Street. Several minutes later, defendant fired a shot into the crowd. Maclin fell to the ground, bleeding from a fatal wound to the back of the neck. Defendant and Grimes ran back to the car, where the girls were waiting. The next day, defendant and Grimes threw the rifle into the Sangamon River.

At defendant's trial, the State called Grimes to testify. Grimes refused, invoking his fifth-amendment right not to incriminate himself (U.S. Const., amend. V). In response, the trial court ordered Grimes to testify, finding that Grimes had waived his fifth-amendment right not to incriminate himself

when he responded to questions about Maclin's death at his own trial. Nonetheless, Grimes persisted in his refusal to testify. As a result, the court held Grimes in criminal contempt. The court also found Grimes "unavailable" and noted the following:

"So, *** the question becomes[, given Grimes] refused to testify and made himself unavailable[, whether the trial testimony was subject to cross[-]examination by the adverse party in [Grimes'] trial for purposes of allowing it into [his codefendant's] trial. It's a[n] unusual situation because in the first trial[, the State was the adverse party and the State was the one cross [-]examining the witness because he was a co[]defendant who chose to testify on his own behalf.

[The court] find[s] that the witness is unavailable and that there was ample opportunity for meaningful cross[-]examination. Having reread the transcripts[, *** there were numerous attempts to discredit his testimony. And, obviously, the co[]defendant had strong motive to lie and to indicate that it was this defendant that had actually shot the gun. And so, certainly that's something that's going to be argued.

Plus[,] the [c]ourt's going to give [a jury instruction,] *** which cautions the jury to examine the testimony of *** Grimes with a suspicious eye and should be considered by them with caution. [The court] think[s] that's [a] sufficient safeguard in that respect.

* * *

*** So, [the court] will allow the State to introduce the testimony of *** Grimes in their case [in] chief."

As part of its case in chief, the State thereafter read excerpts from Grimes' testimony to the jury.

Following the presentation of evidence and arguments, the jury convicted defendant of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)), and possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). In July 2008, the trial court sentenced defendant as previously stated. Defendant later appealed (No. 4-08-0556).

In March 2009, while defendant's direct appeal was pending, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In that petition, defendant argued that his conviction should be vacated because Grimes' testimony, which the State read to the jury, was perjured testimony. Defendant asserted that Grimes had

perjured himself when he testified that defendant was the one who (1) suggested that they "shoot it up" and (2) fired the shot. Defendant attached to his petition a January 2009 affidavit in which Grimes claimed that (1) he controlled the rifle, (2) defendant was against bringing the rifle, and (3) he alone shot Maclin. In March 2009, the trial court denied defendant's petition after finding that Grimes' affidavit lacked credibility. In April 2009, defendant appealed the court's denial of his section 2-1401 petition (No. 4-09-0260).

In July 2009, on defendant's motion, this court consolidated that appeal with defendant's direct appeal.

II. ANALYSIS

Defendant appeals, arguing that (1) the trial court erred by allowing the State to read Grimes' trial testimony to the jury because doing so violated defendant's constitutionally protected right to confront Grimes, and (2) his conviction for aggravated discharge of a firearm must be vacated because it was premised upon the same act as his conviction for first degree murder. We address defendant's contentions in turn.

A. Defendant's Claim That the Trial Court Erred by Allowing the State To Read Grimes' Trial Testimony to the Jury

Defendant contends that the trial court erred by allowing the State to read Grimes' trial testimony to the jury because doing so violated his constitutionally protected right to confront Grimes. We agree.

1. An Initial Note About Defendant's Phraseology

Although we agree with defendant's general contention, we initially note that in his brief to this court, defendant phrases his argument in such a way as to indicate that the trial court erred, at least in part, because it accepted Grimes' testimony as substantive evidence. We decline to follow that phraseology because the problem with admitting this evidence was not based upon whether the State presented it as substantive evidence or used it for purposes of impeachment. The problem was with the jury hearing it at all. See People v. Cruz, 162 Ill. 2d 314, 362-63, 643 N.E.2d 636, 659 (1994) (noting that when the State's case is not affirmatively damaged, the State has no legitimate need to pursue impeachment); see also People v. McCarter, 385 Ill. App. 3d 919, 932-33, 897 N.E.2d 265, 278-79 (2008) (discussing at length the "mere disappointment" versus "affirmatively damaged" dichotomy). Accordingly, we have not included the substantive-evidence phraseology in our disposition.

2. Defendant's Underlying Claim

The sixth amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to *** be confronted with the witnesses against him[.]" U.S. Const., amend. VI. Consistent with this bedrock constitutional right, the United States Supreme Court has held that an out-of-court testimonial statement made by a witness is barred as unreliable unless (1) that witness is unavailable and (2) the defendant had a prior opportunity to cross-examine that witness. Crawford v. Washington, 541 U.S. 36, 42, 158 L. Ed. 2d

177, 187, 124 S. Ct. 1354, 1359 (2004).

Initially, we note that the testimonial statement at issue in this case--that is, Grimes' testimony from his trial--was clearly "testimonial." See Crawford, 541 U.S. at 68, 158 L. Ed. 2d at 203, 124 S. Ct. at 1374 ("Whatever else the term covers, [the term 'testimonial'] applies at a minimum to prior testimony *** at a former trial"). We further note that Grimes was "unavailable." See People v. Patterson, 217 Ill. 2d 407, 417-18, 841 N.E.2d 889, 896 (2005) (witness was "unavailable" because she invoked her fifth-amendment right not to incriminate herself). Accordingly, the only issue before this court related to determining if a Crawford violation occurred is whether defendant had a prior opportunity to cross-examine Grimes about the subject of his earlier testimony. See Crawford, 541 U.S. at 42, 158 L. Ed. 2d at 187, 124 S. Ct. at 1359.

Here, we conclude, and the State appears to concede on appeal, that defendant had no opportunity to cross-examine Grimes and, thus, the trial court erroneously allowed the State to read his prior testimony to the jury in defendant's case. See People v. Redd, 135 Ill. 2d 252, 314, 553 N.E.2d 316, 344 (1990) (holding that it was reversible error to allow the State to read out-of-court statements during its case in chief). Nonetheless, the State posits that the court's error was harmless.

3. The State's Claim That Any Error Was Harmless

To determine whether a Crawford violation is harmless, a reviewing court must answer the following question: Does it

appear beyond a reasonable doubt that the error did not contribute to the verdict? In re Rolandis G., 232 Ill. 2d 13, 43, 902 N.E.2d 600, 617 (2008). In answering this question, a reviewing court may (1) focus on the error to determine whether the error might have contributed to the conviction; (2) look to the other evidence presented to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is cumulative or duplicates properly admitted evidence. Rolandis G., 232 Ill. 2d at 43, 902 N.E.2d at 617.

Having reviewed the record, it does not appear beyond a reasonable doubt that Grimes' testimony did not contribute to the jury's verdict in this case. Here, Turner and the getaway driver both testified in large part consistently with the State's narrative. However, the testimony of both women was, given the context, inherently self-serving. Also significant is the fact that Grimes was defendant's codefendant. Thus, Grimes had a substantial motive at his trial to pin more responsibility for Maclin's death on defendant. On this record, we conclude that the trial court's error was not harmless.

**B. Defendant's Claim That His Conviction for
Aggravated Discharge of a Firearm Must Be Vacated**

Defendant also contends that his conviction for aggravated discharge of a firearm must be vacated because it was premised upon the same act as his conviction for first degree murder. Because we are reversing defendant's conviction and remanding for a new trial, we need not address defendant's claim in this regard.

In closing, we note that despite our conclusion that the trial court committed reversible error when it allowed the State to read Grimes' testimony, we nonetheless view the evidence in this case as sufficient to convict defendant of the crimes charged. Accordingly, no double-jeopardy impediment exists regarding a new trial. People v. Wheeler, 226 Ill. 2d 92, 134, 871 N.E.2d 728, 751 (2007).

III. CONCLUSION

For the reasons stated, we reverse the trial court's judgment and remand for a new trial in case No. 4-08-0556. We also vacate the trial court's judgment in case No. 4-09-0260.

No. 4-08-0556, Reversed and remanded.

No. 4-09-0260, Vacated.

STEIGMANN, J., with KNECHT and McCULLOUGH, JJ., concurring.