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2023 IL App (3d) 210464-U

Order filed May 31, 2023

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2023

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Marshall County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-21-0464
GARY C. BERCHTOLD,)	Circuit No. 19-CF-43
Defendant-Appellant.)	Honorable James A. Mack, Judge, Presiding.

JUSTICE BRENNAN delivered the judgment of the court.
Presiding Justice Holdridge and Justice Davenport concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by reviewing evidence pretrial that was not admitted at trial.

¶ 2 Defendant, Gary C. Berchtold, appeals his convictions, arguing that the Marshall County circuit court erred in granting the State's motion for use immunity. Specifically, defendant takes issue with the court's pretrial review of a witness's potential testimony. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant with two counts of first degree murder (720 ILCS 5/9-1 (a)(1), (2) (West 2018)), dismembering a human body (*id.* § 12-20.5(a)), and concealment of a homicidal death (*id.* § 9-3.4(a)).

¶ 5 On May 25, 2021, the State informed the court that it believed its intended witness, Krystopher Williams, would try to invoke a fifth amendment privilege against self-incrimination. The State and Williams’s attorney disagreed about whether Williams had a fifth amendment right but agreed to permit the court to meet with Williams to make that determination. Defense counsel objected. The court clarified it would not determine whether the State would offer use immunity. Rather, the court would determine whether Williams had a fifth amendment right, given the disagreement between the State and Williams’s attorney.

¶ 6 On June 2, 2021, the State renewed its request that the court review Williams’s potential testimony “to determine whether or not [Williams has] a Fifth Amendment privilege. And if he does, then we will *** address that issue accordingly from the State’s perspective on whether or not we offer some type of immunity.” The State indicated that a witness “can’t just make a blanket assertion of the Fifth Amendment. *** [H]e has to specify why he believes he has a Fifth Amendment privilege.” The State suggested that the court “ask [Williams] why he believes he has a Fifth Amendment privilege.” The State requested the exchange “be done in chambers to protect [Williams’s] privilege.” Defense counsel objected, stating that the court was not “in a position” to

“make some sort of credibility determination and thereby decide whether the Fifth Amendment is available to *** [Williams]. *** You’re not the trier of fact. A jury is.

* * *

I think it's up to the State to make a decision. They're either going to put this guy on the witness stand or they're not. And if they're going to give him immunity, then they can give him immunity, and then the trier of fact can be told about that too."

The court indicated that it was uncomfortable speaking to Williams and potentially creating a new record. Instead, the court suggested that it view the video recordings of Williams's three different police interviews. Defense counsel objected again, stating that if the court were to view the evidence ahead of trial and defendant waived his right to a jury trial and proceeded by way of a bench trial "[t]hat becomes a whole other can of constitutional concerns because then we have a judge who has already heard stuff that's likely to go into evidence but without the confrontation of anything." The court overruled defendant's objection.

¶ 7 On June 8, 2021, following the court's review of Williams's three police interviews, it found that Williams had "a reasonable belief that he could be prosecuted with regards to certain aspects of his testimony," based on "not only *** what [Williams] stated, but, also, on how, his version of events—I see two different—I see an earlier statement and a later statement. It tends to have many more details in the later version of events which places him at or near where he claims things occurred." The State indicated that it would file a motion for use immunity for Williams. The court asked if defense counsel had an objection to the motion. Counsel stated that it was "more in the domain of [Williams's attorney] since it's his client." Defense counsel presented defendant's jury waiver to the court and asked for a bench trial date.

¶ 8 On June 16, 2021, the matter proceeded to a bench trial where the following evidence was adduced. Tiffani Murphy was reported missing after August 31, 2018. Murphy had been living

with defendant at the time. Defendant told police that he dropped Murphy off on August 31, 2018, and had not heard from or seen her since.

¶ 9 The State granted Williams use immunity for his testimony. Williams moved in with defendant on July 1, 2018. Defendant's property had a burn pit near the house. In the early evening of August 31, 2018, Williams contacted defendant for a ride home from Chillicothe. When defendant arrived, Murphy was sitting in the front seat. During the ride, defendant became agitated and angry with Murphy. When they arrived at defendant's residence in the early morning hours of September 1, defendant and Williams exited the truck. Murphy did not exit because she was inebriated and unconscious. Defendant asked Williams to retrieve a chair and bring it outside. Defendant placed the chair between the truck and the burn pit. Defendant had a gun in his pants. Defendant told Williams to "go inside and don't come back out no matter what [he] heard." After entering the house, Williams heard six gunshots coming from where defendant parked his truck. Soon after, defendant entered the house, retrieved matches, and returned outside. Williams slept on and off throughout the night. At some point during the night, Williams observed a fire in the burn pit.

¶ 10 Throughout the following day, Williams saw that the fire burned with flames approximately 15 to 20 feet high and noticed the remnants of the chair in the burn pit. Defendant continued to feed the fire for the next four days. After the fire went out, defendant loaded the ash and mud from the burn pit into his truck, and Williams helped defendant dispose of it on a neighbor's property. Williams did not see Murphy after the morning of September 1. Several weeks later, defendant told Williams that he "tied [Murphy] to the chair and that she had begged please, please don't do this, I'll leave, I'll never come back, I'll never bother you again, and [defendant] said he shot her six times in the chest" and "[t]he bitch is history." Defendant threw

Murphy on the fire and fed the fire with wood and tires. Human bone fragments and six shell casings were recovered from the debris and ash moved from defendant's property. Defendant initially told police that he dropped Murphy off at a gas station on August 31. When defendant was reinterviewed, he stated that he brought Murphy home where defendant, Murphy, and Williams began a physical altercation and Murphy was accidentally shot and killed with defendant's gun. Afterwards, defendant burned Murphy's body in the burn pit. Williams's interviews were not entered into evidence.

¶ 11 The court found defendant guilty of all counts. In doing so, the court stated that the evidence presented in this "case" was "surprisingly consistent." Counsel filed a posttrial motion, alleging, *inter alia*, that the circuit court erred (1) "by undertaking an *ex parte* review of statements made by *** Williams prior to the commencement of trial. *** After review of those materials the [court] ruled that Williams had a legitimate basis to refuse to testify," and (2) "in overruling the defendant's objection to the suggested procedure." Counsel continued that

"the issue of use immunity is to only review a motion to grant use immunity and make sure it is procedurally and substantively in order. There is no place for the trial court to undertake an *ex parte* review of material (never offered into evidence and not part of the trial court record) before granting use immunity."

The court denied defendant's motion. In its ruling, the court stated that it "only relied on evidence presented at trial in making [its] findings of guilt after the trial." Defendant appeals.

¶ 12

II. ANALYSIS

¶ 13

On appeal, defendant argues that the circuit court erred in granting the State's motion for use immunity. Specifically, defendant takes issue with the court's pretrial review of Williams's potential testimony.

¶ 14 At the outset, we note that the State contends that defendant declined to object to the State’s motion for use immunity for Williams. See *People v. Stewart*, 2018 IL App (3d) 160205, ¶¶ 20-24; see also *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appellate review, a defendant must object to it at trial and raise it in a posttrial motion). However, defendant did properly preserve the issue as counsel objected to the propriety of the court’s review of Williams’s testimony. See *People v. Brand*, 2021 IL 125945, ¶ 34 (there is no forfeiture when the circuit court clearly had the opportunity to review the same essential claim that is later raised on appeal).

¶ 15 In a bench trial, the deliberations of the trial judge are limited to the record made before it during the course of the trial. *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962). “A determination made by the trial judge based upon private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence, constitutes a denial of due process of law.” *Id.* “Statements made before trial are generally inadmissible for the purpose of corroborating trial testimony.” *People v. Fillyaw*, 2018 IL App (2d) 150709, ¶ 71. However, “[w]hen the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.” *Williams v. Illinois*, 567 U.S. 50, 69 (2012). This is because “ [i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.” *Id.* (quoting *Harris v. Rivera*, 454 U.S. 339, 346 (1981)). Further, the court is presumed to know and follow the law, and therefore is presumed to have considered only the evidence presented at trial when reaching its decision. *People v. Duff*, 374 Ill. App. 3d 599, 605 (2007). “This assumption will be overcome only if the record affirmatively demonstrates the contrary, as where it is established that the court’s finding rests on *** private knowledge about the facts in the case.” *People v. Tye*, 141 Ill. 2d 1, 26 (1990).

¶ 16 Here, defendant’s assertion that the court improperly considered the interviews it reviewed pretrial in reaching its verdict is directly rebutted by the record. The record shows the court expressly stated that it “only relied on evidence presented at trial” in finding defendant guilty. Moreover, as stated above (*supra* ¶ 15), courts routinely hear inadmissible evidence, know the law, understand the purpose of the inadmissible evidence, and will not rely on that evidence for any improper purpose. While defendant points to the court’s statement regarding the consistency of the evidence presented in this “case,” this is insufficient to establish an affirmative showing that the court improperly relied on evidence it heard in the pretrial proceeding, and thus, fails to rebut the presumption that the court only considered the evidence it heard at trial. *Williams*, 567 U.S. at 69; *Duff*, 374 Ill. App. 3d at 605; *Tye*, 141 Ill. 2d at 26. Thus, the court committed no error.

¶ 17 In coming to this conclusion, we note that defendant makes a conclusory argument regarding the completeness of the State’s motion for use immunity. First, defendant forfeited review of this issue by failing to raise it below. See *Enoch*, 122 Ill. 2d at 186. While counsel objected to the procedure the court used to determine whether Williams had a fifth amendment right, defendant did not object to the State’s motion for use immunity. Instead, counsel specifically declined to object and stated that it was “more in the domain of [Williams’s attorney] since it’s his client.” Second, defendant failed to make an argument for the deficiency of the State’s immunity motion under plain error and cites no law which stands for the proposition that the State’s motion was deficient. See *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 29 (“A reviewing court is entitled to have issues clearly defined with *** cohesive arguments presented; this court is not a repository into which an appellant may foist the burden of argument and research ***.”). Therefore, defendant cannot meet his burden of persuasion, and we must honor his procedural default. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 18

III. CONCLUSION

¶ 19

The judgment of the circuit court of Marshall County is affirmed.

¶ 20

Affirmed.