SIXTH DIVISION
November 10, 2011

No. 1-09-3211

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 20849
	)	
KEVIN WILLIAMS,	)	The Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not denied a fair trial based on a claim of prosecutorial misconduct; the aggravated unlawful use of a weapon statute does not violate the defendant's constitutional rights; and the $5 court system fee was improperly imposed. The circuit court's judgement affirmed as modified.

¶ 2 Following a jury trial, defendant Kevin Williams was found guilty of aggravated

unlawful use of a weapon (UUW) and sentenced to 24 months' probation. Defendant argues he was denied a fair trial based on two contentions grounded on the State's closing arguments: (1) the prosecutor improperly argued that Officer Vella was more credible than defendant because he was a police officer; and (2) the prosecutor misstated the evidence by telling the jury that defendant's fingerprints were on the gun. Defendant also contends that the aggravated UUW statute violates his constitutional right to bear arms, and that the $5 court system fee was improperly assessed. We affirm as modified.

¶ 3 Officer Vella testified that at about 8:22 p.m. on October 20, 2008, he was patrolling the area near Winchester Avenue and 49th Street in Chicago in an unmarked car when he saw defendant in the street holding his side. Based on Vella's 20 years of experience as a police officer, he believed that the manner in which defendant was holding his side indicated he was holding a gun. Vella got out of the car to investigate. As defendant made eye contact with Officer Vella, defendant turned and ran down an alley. Vella drew his gun and gave chase. During the chase, Vella saw defendant remove a gun from his waistband and drop it to the ground. Vella picked it up, continued his pursuit of defendant, and radioed the whereabouts and description of defendant. He radioed the address of "4928 South Winchester," but soon realized the gangway into which defendant ran was 4940 South Winchester Avenue. Vella did not send another radio message correcting the information. He lost sight of defendant as defendant ran into a gangway. As Vella ran into the same gangway, he saw Officers Killen and O'Connor detaining defendant, who was breathing heavy and sweating. The recovered weapon contained live ammunition. Vella inventoried the gun and ammunition, but did not have the gun tested for fingerprints.

¶ 4 Officer Killen testified he and Officer O'Connor responded to a radio dispatch directing them to 4940 South Winchester Avenue. Upon arriving at that address, Killen saw defendant, who matched the radioed description, run out of a gangway. Killen and O'Connor detained defendant who was sweating and breathing heavy. Vella arrived shortly thereafter and identified defendant as the individual he saw drop a gun during the chase.

¶ 5 According to defendant's testimony, he was leaving his house at 4940 South Winchester Avenue to play basketball. As he left, a police officer approached him and asked what was going on. Defendant replied he did not know. After speaking with the officer for a couple of minutes, a second officer approached and asked if "[defendant] was the guy," and the first officer responded affirmatively. Defendant was placed under arrest.

¶ 6 Prior to closing arguments, the court admonished the jury that the closing arguments they were about to hear are "not evidence and should not be considered by you as evidence." During closing and rebuttal argument, the State argued Officer Vella's experience as a police officer made him a credible witness. During its opening, the State indicated defendant's fingerprints were on the gun. In rebuttal, the State discussed the lack of fingerprint evidence in the case. During its instructions to the jury, the court reiterated closing arguments are not evidence. The jury found defendant guilty of aggravated UUW; the trial court sentenced him to two years' probation and imposed $300 in fines and fees, including a $5 court system fee.

¶ 7 Seeking a new trial, defendant contends the prosecutor's remarks during closing arguments rendered his trial unfair. He expressly alleges the prosecutor repeatedly told the jury that Officer Vella's testimony was more credible than defendant's by virtue of Vella being an experienced police officer. Defendant also maintains the prosecutor wrongly asserted that

defendant's fingerprints were found on the gun. Defendant concedes he did not object to this argument and did not include it as error in his posttrial motion. See *People v. Macias*, 371 Ill. App. 3d 632, 643 (2007) (finding the defendant waived his argument that the prosecutor made improper statements during closing arguments when he failed to raise a trial objection). In anticipation of a finding that he forfeited this claim, defendant seeks review under plain error based on his claim that the evidence was closely balanced.

¶ 8 Because forfeiture applies to the claim of prosecutorial misconduct, we review the claim under plain error as contemplated by Supreme Court Rule 615(a). *People v. Johnson*, 208 Ill. 2d 53, 64 (2004).

¶ 9 As a general rule, the State is afforded "wide latitude" in delivering closing arguments. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). To determine whether remarks by the State alleged to be improper deprived defendant of a fair trial, we consider the closing argument as a whole rather than focus on select words or phrases. *Perry*, 224 Ill. 2d at 347. A jury's verdict will not be reversed based on improper closing arguments unless the comments resulted in substantial prejudice to defendant and constituted a material factor in his conviction. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008).

¶ 10 We set out the State's arguments defendant contends constituted prosecutorial misconduct. During opening closing:

> "We heard Officer Vella testify. 20 years City of Chicago Police Department. 20 years. He talked about his arrests, talked about his gun arrests.
>
> ***

> Who is credible? You heard Officer Vella. You heard Officer Killen, and you heard the defendant. Credibility, 20 years on the job, 30 plus years experience for telling you what happened that night. Man with a gun. Drop the gun. Man caught. That is the defendant."

¶ 11 During rebuttal:

> "The degree of attention at the time of the offense. And this is important because Officer Vella is not just a lay witness. He is a 20-year trained officer, nearly 200 gun cases he has handled. He knows what he is looking for. His degree of attention is going to be little more in tune than other types of witnesses. So you have to consider that when you look - when he comes to the scene and makes the identification.
>
> ***
>
> [T]he defense wants you to think the officer is making a mistake. You shouldn't be mistaken. It is absolutely clear that this officer was experienced, saw him, this defendant, clutching his side. This is a heavy object. When you put [*sic*] in your belt, it tends to slip. You have to have something to hold it. That is what the officers are trained to do. They see it. Thought it was suspicious."

¶ 12 Defendant's contention that the State's closing argument rendered his trial unfair

appears centered on the State's use of the word "credible." While it is certainly true that error is injected when the State argues "that a witness is more credible because of his status as a police officer" (*People v. Clark*, 186 Ill. App. 3d 109, 115-16 (1989)), the word "credible" is not banned from use in closing argument. This case presented two contradictory versions of the events leading to defendant's arrest. If the jury believed defendant's version, he had exited his home minutes before his unwarranted arrest. If the jury believed the officers version, the detaining officers stopped defendant because he matched the information in a radio broadcast. The officers testified defendant was breathing heavy and sweating when he was detained. Officer Vela identified defendant as the individual he saw drop a handgun during a chase. Credibility was clearly at issue. The State argued the facts according to the officers made their version more credible. Defendant fails to direct our attention to where the State argued the officers were more credible based on their "status" as officers. *Id.* The State's argument in this case did not cross the clear line established by *Clark*. We do not see misconduct in the State's argument to the jury that it should consider the officer's substantial experience in dealing with gun cases in assessing the credibility of his version of the events. The State's argument was grounded on the evidence.

¶ 13 Even if the comments were objectionable, the comments were not so prejudicial as to amount to plain error. The defense theory was that Officer Vella was mistaken in his identification of defendant as the individual he was chasing. Defendant testified he had just left his residence, on his way to play basketball, when the police detained him. It fell to the jury to decide which of the two versions was the credible one. Both could not be true. See *People v. Davis*, 228 Ill. App. 3d 835, 840-41 (1992) (in plain error case, "the question is not whether the

argument was proper, but whether it reached the level of impropriety which deprived defendant of a fair trial.").

¶ 14 Defendant's assertion that this case was closely balanced is also suspect. Defendant appears to base his assertion on a credibility contest between Officer Vella and defendant. Defendant, however, ignores Officer Killen's testimony that corroborated Vella's testimony. Killen testified that after responding to a radio dispatch, he saw an individual run out of a gangway that matched the radioed description. Killen detained the individual, who was sweating and breathing heavy. According to Officer Killen, the encounter was not as defendant testified. We are aware of no authority that holds a case that turns on the credibility of opposing witnesses necessarily makes the case closely balanced.

¶ 15 Regardless, the trial judge admonished the jury twice that closing arguments are not evidence. The jury was instructed that any argument not supported by the evidence should be disregarded. See *People v. Garcia*, 231 Ill. App. 3d 460, 469 (1992) (instructing the jury that arguments are not evidence tends to cure any prejudice from improper remarks). The verdict in this case was unaffected by the State's comments, which, we note, did not even prompt a defense objection.

¶ 16 Defendant also contends that the prosecutor improperly argued that his fingerprints were on the gun: "Not only are [Officer Vella's] fingerprints on the gun, but the defendant's fingerprints are on the gun." In rebuttal, however, the prosecutor made clear that no actual fingerprint evidence was presented at trial.

> "Counsel is making all sorts of arguments about where are the fingerprints, where is the DNA. *** The reality is that

> police officers in this city make arrests for guns everyday. In this case they did, and that is how they do it. When somebody drops a gun on the street, they have to pick it up. They don't leave it there. They don't pick it up with rubber gloves on the end of a pencil. They don't call in the special unit in a big fancy truck to start doing some kind of radiology on it or DNA testing on the scene."

¶ 17 If we were to interpret the prosecutor's fingerprint statement as one based on the evidence, it would constitute error. However, the State's rebuttal argument makes clear that intention in the opening closing argument regarding the fingerprints was not meant to be one based on the evidence (no evidence was produced that Officer Vella's fingerprints were on the gun either). It was argument that if Officer Vella's version of the facts were to be believed, both his and defendant's fingerprints were on the gun as each handled the gun before defendant's arrest. The argument should have prompted a defense objection as unsupported by the evidence to at least remind the jury that no such evidence was introduced. That statement, however, did not deprive defendant of a fair trial. The prosecutor's comments regarding purported "fingerprints" on the gun were not so prejudicial that they amounted to plain error. *Davis*, 228 Ill. App. 3d at 840-41. A reasonable jury could discern that no such evidence existed.

¶ 18 Defendant next seeks the reversal of his aggravated UUW conviction, contending that the aggravated UUW statute violates his constitutional right to bear arms as supported by the Supreme Court's holdings in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010). Although defendant did not raise this

issue in the trial court, a challenge to the constitutionality of a statute may be raised at any time. *People v. Bryant*, 128 Ill. 2d 448, 454 (1989). Our review is *de novo*. *People v. Carpenter*, 228 Ill. 2d 250, 267 (2008).

¶ 19 The aggravated UUW statute prohibits the carrying or possession of a firearm in the presence of certain aggravating conditions. The statute provides certain enumerated exceptions from criminal liability, including carrying or possessing a firearm on one's own land or in one's own abode. 720 ILCS 5/24-1.6(a)(1)-(3) (West 2008).

¶ 20 Here, the evidence showed that defendant was carrying a concealed, loaded, and immediately accessible firearm on a public street. Defendant has not claimed that one of the enumerated exceptions under the aggravated UUW statute applies to him. Rather, he maintains that the aggravated UUW statute, which criminalizes the mere possession of a firearm outside of one's home, is unconstitutional on its face and as applied to him.

¶ 21 Initially, the parties disagree as to the appropriate level of scrutiny to be applied here. Defendant seeks a strict scrutiny review, arguing that a fundamental right is at issue; the State responds that we should review this issue using a rational basis standard or intermediate scrutiny. In this case, we follow *People v. Aguilar*, 408 Ill. App. 3d 136, 142 (2011), *appeal allowed*, No. 112116 (May 25, 2011) (appellant brief filed September 16, 2011), and apply intermediate scrutiny. See also *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 74 (applying intermediate scrutiny to a similar second amendment challenge).

¶ 22 In *Aguilar*, we noted that the majority in *Heller* rejected the use of rational basis review, but did not mandate the use of strict scrutiny, and that a number of federal courts had determined that intermediate scrutiny was the appropriate standard of review for second

amendment challenges. *Aguilar*, 408 Ill. App. 3d at 145-46. We also found that the aggravated UUW statute survives this intermediate scrutiny, and noted that its purpose is to allow for harsher penalties directed at an individual, who is not specifically exempted, from carrying an uncased, loaded weapon on his person or in his vehicle "because of the inherent dangers to police officers and the general public, even if the person carrying the weapon has no criminal objective." *Aguilar*, 408 Ill. App. 3d at 146. We concluded that the aggravated UUW statute did not violate the defendant's second amendment rights because it substantially related to an important government objective. The fit between the statute and the governmental objective is reasonable. *Aguilar*, 408 Ill. App. 3d at 146; *Mimes*, 2011 IL App (1st) 082747, ¶¶ 74-76. We follow that finding in this case.

¶ 23 We also note that the aggravated UUW statute specifically excludes from criminal liability the possession of a firearm within one's abode. *People v. Dawson*, 403 Ill. App. 3d 499, 510 (2010). Thus, the second amendment rights at issue in *Heller* and *McDonald* are not implicated here. Because the facts of this case do not fall within either case, there is no authority that the aggravated UUW statute is unconstitutional as defendant maintains.

¶ 24 Defendant challenges the foundation of our holding in *Dawson*, arguing that we relied on cases decided prior to *Heller*. We find no merit to this argument. In *Dawson*, we acknowledged our reliance on prior caselaw and found the discussion of legislative purpose behind the statute and constitutional findings in *Heller* and *McDonald* did not reach the activity barred by the aggravated UUW statute. *Dawson*, 403 Ill. App. 3d at 510,

¶ 25 Defendant also argues that the protections of the second amendment are not limited to carrying firearms within the home, and asserts that the definition of the second

amendment provided in *Heller* extends beyond the home. We reject that claim as we have on several prior occasions (*Mimes*, 2011 IL App (1st) 082747, ¶¶ 78-79, *Aguilar*, 408 Ill. App. 3d at 143; *People v. Williams*, 405 Ill. App. 3d 958, 962 (2010); *Dawson*, 403 Ill. App. 3d at 508). The issue in *Heller* was limited to firearms in the home for self-defense purposes. The narrow holding in *Heller* provides no support for defendant's claim that the right to bear arms extends to public streets. *Williams*, 405 Ill. App. 3d at 962. Illinois courts have consistently held the aggravated UUW statute does not violate the right to bear arms under the Illinois or U.S. constitutions. We reject defendant's contrary contention.

¶ 26 Finally, defendant contends, and the State agrees, that we must vacate the $5 court system fee (55 ILCS 5/5-1101(a) (West 2008)) because the enabling statute permits such a fee only for vehicular violations. See *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009) (finding the court system fee applies only to vehicle offenses and vacating its imposition where the defendant was convicted of being an armed habitual offender). We agree.

¶ 27 We vacate the $5 court system fee and affirm the judgment in all other respects.

¶ 28 Affirmed as modified.