No. 1-09-0665

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FIFTH DIVISION
March 18, 2011

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. 07 CR 1663
	)	
LEE MOORE,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

O R D E R

HELD: Where expert witness gave methodology for reaching her conclusion, the trial court did not err in admitting her opinion into evidence; defendant's conviction for violating the Armed Habitual Criminal Act did not violate the constitutional prohibits against *ex post facto* judgments; and defendant's concurrent convictions for unlawful use of a weapon by a felon and being an armed habitual criminal violate the one-act one-crime doctrine.

Following a bench trial, defendant Lee Carl Moore was convicted of being an armed habitual criminal, aggravated fleeing

of a peace officer, unlawful use of a weapon by a felon, and robbery. Defendant was sentenced to 15, 12, 10 and 10 years' imprisonment to be served concurrently. On appeal, defendant raises three issues, including that: (1) the trial court erred in allowing expert testimony regarding his fingerprints without proper foundation; (2) his conviction for armed habitual criminal violates the constitutional prohibition against *ex post facto* convictions, and; (3) his concurrent convictions for armed habitual criminal and unlawful use of a weapon violate the one-act one-crime doctrine. For the reasons that follow we reverse defendant's conviction for unlawful use of a weapon by a felon, vacate the corresponding sentence, and affirm his remaining convictions.

Robbery victim Mark Bajorinas testified that about 7:20 a.m., on September 28, 2006, defendant approached him while at a Greyhound bus terminal and asked him to light defendant's cigarette. After Bajorinas did so, defendant asked if Bajorinas would light defendant's girlfriend's cigarette. She was seated in the front passenger's seat of a black Nissan SUV. After he lit her cigarette, she opened the door and got into the back seat, while defendant pushed Bajorinas into the front passenger seat. Defendant then got into the driver's seat and drove away with the victim.

Defendant eventually stopped the vehicle and demanded money from the victim. The victim told defendant that he only had a credit card, and defendant then put a knife to his head and demanded cash. Defendant took the victim's wallet, which contained $200 cash and pressed what the victim described as a "cold metal thing," to the back of the victim's head before fleeing. The victim saw the temporary license plate number and reported it to the police, and later identified defendant from a photo array.

On December 30, 2006, police observed defendant driving a Buick Century and attempted to curb the vehicle. Defendant did not stop and instead led police on a high-speed chase on the interstate and through residential areas. Defendant eventually crashed the vehicle and was arrested. A search of the vehicle revealed a loaded .380 caliber handgun and additional ammunition.

The State then entered certified copies of two convictions. The first conviction was entered against defendant for aggravated unlawful use of a weapon on September 3, 2004. The second was a conviction for delivery of a controlled substance under the name "Carl Fleet," entered on November 13, 1986. Defense counsel refused to stipulate that defendant and Carl Fleet were the same person, and the trial court continued the case to allow the State to procure the 1986 fingerprint card for that latter conviction.

Retired officer Robert Drozd identified defendant as the man he arrested as Carl Fleet in 1986. He testified that defendant used several other aliases including Carl Moore when he arrested him in 1986. He also verified that the fingerprint card from 1986 was the card that he used to obtain defendant's fingerprints. Defendant's fingerprints were taken mid-trial and compared to the 1986 print card by fingerprint technician Latania Rios.

Rios testified that she had worked as a level two fingerprint technician with the Chicago Police Department for seven years. Her position involved supervising employees, comparing known fingerprints against unknown prints through the AFIS system and manually, and performing criminal background checks on arrestees. Before her work in this case, she had performed thousands of fingerprint comparisons. She received her training at the Chicago Police Academy and is certified by the City of Chicago and the State of Illinois to use the AFIS system and perform patent fingerprint comparisons. Prior to this case, she had never been qualified as an expert to testify in a criminal case, and had never been published or had her work reviewed by peers except through the City of Chicago.

On that evidence, the trial court permitted Rios to testify as an expert in patent fingerprint analysis, over defendant's objection. Rios testified that she compared the known prints of

defendant to the 1986 arrest card with the name "Carl Fleet" and concluded that the prints were a match within a reasonable degree of scientific certainty. Rios explained that she reached her conclusion after comparing "all [of] the characteristics, the same unit relationship and relative position on each individual print card." She did not recall how many points she used to make the comparison, but she recalled that her comparison resulted in a positive match.

Lavieda Dunn testified that she was dating defendant in December 2006 and that she owned a .380 caliber handgun. She stated that the last time she saw the gun it was in a shoe box in the trunk of her Buick Century. She acknowledged that defendant had access to the vehicle and its contents, but denied any knowledge of the events on December 30, 2006.

Defendant also testified and denied ever striking or robbing the victim. Defendant explained that he was waiting for a female friend to sell her crack cocaine at the Grey Hound bus station on September 28, 2006. He met the victim when he asked the victim for a light and some papers, so defendant could roll a marijuana joint. The victim then asked defendant to sell him a joint, and, after defendant agreed, the victim got into the front passenger's seat with defendant.

Defendant's female friend arrived and sat in the rear of the vehicle. The victim reportedly asked defendant if he had

anything stronger than marijuana and defendant agreed to sell him crack cocaine. The three left the Greyhound Station to find a more secluded place to smoke the crack cocaine. After the victim and the female passenger smoked crack cocaine the group continued to drive around the west side of Chicago, and eventually defendant dropped them off near the intersection of Springfield Avenue and Monroe Street at the female passenger's request.

Defendant further testified that on December 30, 2006, he was on parole and dating Lavieda Dunn. He acknowledged driving Dunn's vehicle that day, but claimed he was unaware of the gun in the vehicle. He acknowledged being signaled to stop by Chicago police, but explained that he drove away because he had crack cocaine on his person and was on parole. He stated that he threw the cocaine out of the vehicle during the chase.

Defendant did not recall being arrested under the name Carl Fleet in 1986, but stated that he had been arrested many times and used multiple aliases. Following closing argument defendant was found guilty of robbery, unlawful possession of a weapon by a felon, aggravated fleeing, and being an armed habitual offender. Defendant filed a motion for a new trial, which was denied and he was subsequently sentenced.

Defendant's first claim of error is based on the trial court permitting Latania Rios to testify to her conclusions without proper foundation. The State contends that defendant forfeited

this issue by failing to object to it at trial and raise it in his post-trial motion. Defendant acknowledges that he did not preserve the error because he did not raise the issue in his post-trial motion, but, nevertheless contends that this court should review his claim for plain error.

In order to preserve an error for appellate review, defendant must make an objection at trial, and in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 187 (1988). Where a defendant fails to preserve an error, it is forfeited unless he can show that the evidence was so closely balanced that the error caused his conviction, or that the error was so great that it denied defendant a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Where, as here, defendant contends that the evidence was closely balanced, he bears the burden of establishing that the trial court committed an error that led to his conviction. *Herron*, 215 Ill. 2d at 186. Whether an expert provided a sufficient basis for her opinion is a question of law, which this court reviews *de novo*. *People v. Safford*, 392 Ill. App. 3d 212, 211-12 (2009).

Defendant argues that the trial court abused its discretion by permitting Rios' expert testimony where her explanation of the basis for her conclusion was vague and, therefore, insufficient to establish the proper foundation for her opinion. The State

responds that Rios explained that seven characteristics she was trained to use and uses to compare fingerprints.

In this case, we find that the record supports the State's position. Rios testified that she was trained to identify seven characteristics for making fingerprint comparisons and that she reached her conclusion after she "compared all [of] the characteristics, the same unit relationship and relative position on each individual fingerprint card." Thus, Rios testified to her methodology used in reaching her conclusions, as required to establish proper foundation for her opinion testimony. *Safford*, 392 Ill. App. 3d at 223. By testifying to her methodology, Rios provided a basis for her opinion, which defendant used extensively during cross-examination to challenge the credibility of her ultimate conclusion. Thus, we find no error in the trial court admitting Rios' testimony, where she provided her methodology for reaching her conclusion and her testimony provided a basis for defendant to challenge its credibility. *Safford*, 392 Ill. App. 3d at 223. Having found no error in the trial court's decision to permit Rios' testimony, there can be no plain error, and defendant's claim is forfeited. *Herron*, 215 Ill. 2d at 178.

Defendant, nevertheless, contends that permitting Rios to testify to her conclusion without more specific information about how many points of comparison she used in reaching her conclusion

was erroneous. We disagree, and, in doing so, follow our supreme court's holding that the number of points of comparison used for a conclusion affects the weight given to the expert's testimony and not its admissibility. *People v. Campbell*, 146 Ill. 2d 384-85 (1992).

Defendant's reliance on *Safford* is misplaced, where the expert in *Safford* failed to explain the method he used to reach his conclusion, except to say that he relied on his experience and training. *Safford*, 392 Ill. App. 3d at 226. That basis was held insufficient where it left defendant without an objective basis to challenge the expert’s opinion. *Safford*, 392 Ill. App. 3d at 226.

Here, Rios testified that she compared all seven characteristics that she was trained to compare. She also testified that she compared the unit relationship and relative position of each characteristic on the respective print cards. Moreover, the record shows that defense counsel cross-examined Rios extensively regarding her conclusion, the basis for it, and her lack of recollection regarding some of the specifics of her methodology. Thus, her testimony did not lack foundation such that it "curtail[ed] the ability of the defendant to challenge the conclusion drawn by the expert." *Safford 392 Ill. App. 3d at 223.*

Defendant next argues that his conviction for being an armed habitual criminal violates the United States and Illinois Constitutions' prohibitions against *ex post facto* judgments, where his two prior convictions occurred before the effective date of the legislation creating the offense of armed habitual criminal. We review a constitutional challenge to a statute *de novo*. *People v. Malchow*, 193 Ill. 2d 413, 418 (2007).

The Armed Habitual Criminal Act, which took effect August 2, 2005, prohibits the possession of a firearm by any person with any combination of two or more convictions for unlawful use of a weapon or a Class 3 or higher felony violation of the Illinois Controlled Substances Act. 720 ILCS 5/24-1.7(a) (West 2008). Defendant claims the use of his prior convictions, which predated the enactment of the armed habitual criminal offense, to satisfy the second element of that offense violated the constitutional prohibitions against *ex post facto* punishment.

Defendant contends that this court wrongly decided this issue in *People v. Bailey*, 396 Ill. App. 3d 459 (2009), when it held that the Armed Habitual Criminal Act, as applied to a similarly situated defendant, was constitutional. We decline defendant's invitation to depart from the well-reasoned opinion in *Bailey*, and find that defendant's armed habitual criminal conviction was constitutional. As this court explained in *Bailey*, the United Stated and Illinois Constitutions prohibit

after-the-fact punishment for conduct which was not criminalized when committed because it deprives defendant of fair warning that his conduct could give rise to criminal punishment. *Bailey*, 396 Ill. App. 3d at 463. However, acts done after a statute is enacted does not deprive a defendant of fair warning, and therefore do not violate the prohibition against *ex post facto* punishments. *Bailey*, 396 Ill. App. 3d at 464.

Such is the case before us. Defendant is not being punished for the offenses he committed in 1986 and 2004, but, instead, for his possession of a handgun in 2006, after the enactment of the offense. His prior convictions merely made him eligible for the armed habitual criminal conviction. *Bailey*, 396 Ill. App. 3d at 464. Thus, we hold that defendant’s armed habitual criminal conviction does not violate the prohibitions against *ex post facto* punishments. *Bailey*, 396 Ill. App. 3d at 464.

Defendant's final contention on appeal, which the State concedes, is that his concurrent convictions for unauthorized use of a weapon by a felon and armed habitual criminal violated the one-act one-crime principle because they were based on the criminal act of possessing a single one firearm. We agree, and vacate his conviction for the lesser offense of unlawful use of a weapon by a felon. *Bailey*, 396 Ill. App. 3d at 465.

For the foregoing reasons we find no error regarding Rios' expert testimony, affirm defendant’s conviction for armed

habitual criminal, but reverse his conviction for unlawful possession of a weapon by a felon and thereby vacate the resulting sentence for that crime only.

Affirmed in part, reversed in part; sentence vacated in part.