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No. 3-09-0756

Order filed May 23, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the
)	Twelfth Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	No. 07-CF-2581
)	
MICHAEL TURNER,)	The Honorable
)	Amy Bertani-Tomeczak,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Holdridge concurred in the judgment.

ORDER

Held: Where the trial court convicted defendant for violating both the armed habitual criminal statute and the unlawful use of weapons by a felon statute, based on a single act of possessing a handgun, defendant's conviction for unlawful use of weapons by a felon was vacated and the conviction under the armed habitual criminal statute is affirmed.

The State charged defendant, Michael Turner, with armed habitual criminal (count I) and unlawful use of weapons by a felon (count III). The circuit court of Will County convicted

defendant of both charges and sentenced him to ten years' imprisonment on count I and a concurrent term of ten years' imprisonment on count III. For the following reasons, we reverse.

BACKGROUND

Police stopped defendant for a traffic violation. During the traffic stop, police discovered that defendant's driver's license was suspended. The officer testified that he also noticed a bulge in defendant's clothing. When the officer asked defendant to exit his vehicle for purposes of signing the traffic citations, defendant fled. Defendant drove to his apartment building and entered. Police followed, and an officer observed defendant walking from an upper floor to a lower floor where defendant's apartment was located. Police recovered a handgun from beneath a door mat in front of an apartment on the floor above defendant's apartment. After a stand off, police arrested defendant in his apartment.

Two officers testified that defendant told them that the gun police recovered from the apartment building was his. Defendant had requested to speak to these two officers specifically, because he trusted them. The officers testified that defendant was their confidential informant, and that he stated that he had the gun because he feared retaliation. The State also adduced evidence that defendant was previously convicted for aggravated unlawful use of weapons by a felon (exhibit 5) and that defendant was previously convicted for unlawful possession of weapons by a felon (exhibit 6).

Following the trial, the circuit court of Will County convicted defendant of both charges.

This appeal followed.

ANALYSIS

Defendant argues that his conviction for unlawful use of weapons by a felon (count III)

violates one-act, one-crime principles because that conviction is based on the same physical act as his conviction for armed habitual criminal (count I). The State agrees that each count of the complaint was premised upon defendant's possession of a single handgun and that multiple convictions based on precisely the same physical act are improper. The State concedes that possession of one firearm cannot be the basis of two convictions and, therefore, that defendant's conviction for unlawful use of weapons by a felon must be vacated. *People v. Bailey*, 396 Ill. App. 3d 459, 465 (2009) (where conviction for unlawful use of weapons was based on the same act as offense of armed habitual criminal, *i.e.*, the possession of the same firearm, unlawful use of weapons conviction must be vacated). Defendant's conviction and sentence for unlawful use of weapons by a felon are vacated. *Bailey*, 396 Ill. App. 3d at 465.

Next, defendant argues that he was denied his constitutional right to the effective assistance of counsel when trial counsel failed to move to redact State's exhibit 6, which the State offered to prove defendant's qualifying prior convictions to sustain the charges in this case. Defendant asserts that exhibit 6 contained irrelevant and prejudicial information in the form of additional charges related to the prior conviction for which he was never convicted. Defendant argues that the failure to move to redact that information fell below an objective standard of reasonableness because the additional information was inadmissible and prejudicial.

Defendant argues that counsel's error prejudiced him because "[t]he jurors' exposure to these inadmissible and prejudicial references in People's Exhibit 6 may very well have tipped the balance between a verdict of guilty and not guilty in this case." The State responds defendant failed to prove prejudice because defendant failed to prove that the jury ever saw exhibit 6. The State also argues that defendant failed to prove that defense counsel's performance fell below an

objective standard of reasonableness, because counsel did not have an obligation to seek to redact exhibit 6, knowing that the exhibit would not be submitted to the jury.

"A claim of ineffective assistance of counsel may be disposed of on the prejudice prong of the test without first addressing whether counsel's performance was deficient.

[Citation.] The burden is on the defendant to establish prejudice."

People v. Glenn, 363 Ill. App. 3d 170, 173 (2006) (citing *People v. Johnson*, 128 Ill. 2d 253, 271 (1989)).

The State asserts that the record contains no indication that the jury ever saw the exhibits or viewed the irrelevant information. The record contains no discussion of any exhibits being sent to the jury during deliberations, and shows no requests for exhibits from the jury during deliberations. Rather, the trial court simply informed the jury that the parties stipulated that the State proved defendant's prior convictions with certified copies of those convictions. Further, the State argues, defendant failed to prove that counsel's performance was deficient because defense counsel knew the jury would not see the exhibit in light of the stipulation. The State also notes defense counsel's experience in defendant's first trial, which resulted in a hung jury, where the trial court specifically denied the jury's request to see the exhibit containing the additional charges beyond defendant's prior qualifying conviction.

Defendant admits that the record is silent as to whether the jury ever saw exhibit 6, but asks this court not to assume that it did *not* from a record that is silent on the question.

Defendant argues that the fact the trial court refused the jury's request to see the exhibit in defendant's first trial does not mean that the parties took steps to shield the jury from the

inadmissible information in the second trial. Defendant argues that it is equally probable that the parties neglected to address the matter in the second trial. However, there is no evidence (or even argument) that the jury would *necessarily* see the exhibit *unless* the parties took affirmative steps to shield them from it. Therefore, even if we assume the parties did nothing, defendant has still failed to establish a threshold fact (that the jury saw exhibit 6) essential to his argument.

In *Glenn*, 363 Ill. App. 3d at 172, the "[d]efendant argue[d] that he received ineffective assistance of counsel because his attorney failed to seek to ascertain the identity of [an] informant and to present her testimony at trial." *Glenn*, 363 Ill. App. 3d at 172. The court found that "the record [did] not disclose what the informant's testimony would have been" (*Glenn*, 363 Ill. App. 3d at 173) and that "[t]his alone would normally be enough to defeat defendant's claim" (*Id.* (citing *People v. Holman*, 132 Ill. 2d 128, 167 (1989))). However, the defendant argued that "[t]he very failure to investigate and prepare for trial in a case where the informant is so pivotal should constitute the requisite prejudice." *Glenn*, 363 Ill. App. 3d at 172. The *Glenn* court characterized defendant's argument as, in essence, a request "that we presume prejudice ***." *Glenn*, 363 Ill. App. 3d at 172.

The *Glenn* court rejected that argument, finding that "[p]rejudice simply cannot be presumed under ordinary circumstances." *Id.* (citing *People v. Johnson*, 128 Ill.2d 253, 271 (1989)). The court held that the burden was on the defendant to show a reasonable probability of a different result and that, "[i]n the absence of information, the burden of proof is typically dispositive." *Glenn*, 363 Ill. App. 3d at 174. Similarly, here, defendant asks us to assume prejudice from the presence in the record of potentially prejudicial material. Defendant has failed to show that the offending material was seen or had any effect on the outcome of the

proceedings. Accordingly, defendant's argument that he received ineffective assistance of counsel must fail. *Id.*

Finally, defendant argues that he was denied a fair trial by comments the State made during its rebuttal closing argument. Defendant asserts that the State's comments had the effect of shifting the burden of proof to him by implying his guilt from the fact that defendant *failed to produce evidence* that the officers who took his alleged confession had a motive to lie.

"The defense is under no obligation to produce any evidence, and the prosecution cannot attempt to shift the burden of proof to the defense. [Citation.] Courts have found error where the prosecution implied that the defendant had an obligation to come up with evidence to create a reasonable doubt of his guilt."

People v. Beasley, 384 Ill. App. 3d 1039, 1048 (2008).

Defendant argues that the comments clearly implied that since he did not present evidence of bias, the State's case must be believed. Defendant did not object to the comments at trial or raise the matter in a posttrial motion. He argues that the State's conduct constitutes plain error that requires this court to reverse his conviction.

"The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances. [Citation.] We will apply the plain-error doctrine when:

'(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of

justice against the defendant, regardless of the seriousness of the error, or

(2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' [Citation.]

* * *

In plain-error review, the burden of persuasion rests with the defendant." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

Defendant argues that this error by the State constitutes plain error because the evidence is closely balanced and because the error caused him substantial prejudice resulting in the denial of a fair trial. Defendant states that the fact the first trial ended in a hung jury is proof of the closeness of the evidence. Defendant argues that the effect of the improper comments resulted in substantial prejudice to his right to a fair trial where the testimony of these particular officers-- that defendant confessed to the crime-- was the only direct evidence connecting him to the gun. Thus, defendant argues, absent the improper bolstering of their testimony and implication that defendant had the burden to prove their motive to lie, the outcome of the trial may have been different. Alternatively, defendant argues that trial counsel's failure to raise these issues below constitutes ineffective assistance of counsel.

In its initial closing argument, the State told jurors "you should not give the police any more credence than any other person who testifies." A short time later in closing argument, the prosecutor did say that "you don't have any motive out there for these police officers to lie about

what happened that night or about what they did." The State continued:

"And then [the officers in question] testified, and they tell you under oath, what their conversation with [defendant] was about. And, again, this is where credibility comes into play because according to [defendant] they never talk about the gun, never talk about the gun, they just talk about unrelated stuff. Well [the officers] did talk about the gun and [defendant] gave it up to them. He trusted them. You can trust them, even though they didn't tape it. *** Do we as prosecutor's wish we could have played a videotape confession for you ***? Of course we do. But if you you're going to fault them, all right, fault them for maybe not taking that statement, okay? But that doesn't mean they're liars, that doesn't mean you can't believe them."

In concluding, the State offered the following:

"[T]here hasn't been any evidence put forth in the cross examination of those witnesses by the defense to show that they would have any interest, bias or motive to lie against [defendant]. It's the officers' word against [defendant's] word. And it's up to you to decide that question."

Defense counsel countered by reminding the jury that:

"[J]ust because they're police officers, that doesn't mean you--they get a higher standard of believability than anybody else. Okay?"

You have to put [defendant] on the same plane."

He continued:

"We have the testimony of [the officers.] *** They said that [defendant] admitted he had a gun. Officer said [sic] we never videotape an alleged confession, never.

* * *

Even asked about writing down, having [defendant] write down this alleged confession and signing it. Oh, no, nothing like that either.

* * *

You have to remember it's their burden to prove him guilty beyond a reasonable doubt. [Defendant] does not have to prove his innocence. Remember that. It's not his burden, it's the State's burden. *** A simple thing like a videotape, audiotape, a written confession, if this happened. That's in the police officer's control. They chose not to do it. ***

Those are simple things *** and they didn't do it. They want you to assume [defendant's] guilty because he's a bad guy."

The State responds the comments did not shift the burden of proof to defendant and, therefore, the comments did not cause error in defendant's trial. The State also argues that, even if the comments do constitute error, defendant has waived the issue and failed to establish that plain error occurred. The State argues that plain error did not occur because the evidence in the

case was not closely balanced and, alternately, plain error did not occur because the comments, even if impermissible, did not deny defendant a fair trial. Finally, the State argues that the comments were a fair response to defendant's theory at trial that the officers who took defendant's confession lied.

"[I]t is improper for the State to suggest that it has no burden of proof or to attempt to shift the burden of proof to the defendant.

[Citation.] However, if defense counsel's closing argument provokes a response, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial." *People v.*

Robinson, 391 Ill. App. 3d 822, 841 (2009).

The State relies on defense counsel's argument pointing out to the jury that the officers did not videotape their interrogation to support its claim that "[t]he thrust of defense counsel's argument *** was to call into question [the officers'] credibility and to imply that, because they chose not to videotape the interview *** the police officers were lying at trial." The State argues that its own comments were not an attempt to shift the burden of proof to defendant and do not in themselves suggest that defendant was required to provide evidence to prove his innocence. Rather, the State asserts that, in response to the theory of defense that the officers lied, the prosecutor argued that defendant had the opportunity to cross-examine the officers, yet cross-examination failed to provide anything that would indicate that either officer had a motive to lie. Defendant agrees that "credibility was certainly the issue in this case" but argues that the State improperly implied to the jury that "inasmuch as the defense did not present certain evidence to support its position, that position could be discounted."

In support of its position, the State argues that, because its response was invited by defendant's argument, under *People v. Kitchen*, 159 Ill. 2d 1, 39 (1994), the response was permissible. See *Kitchen*, 159 Ill. 2d at 39 ("The prosecutor may respond to comments by defense counsel which clearly invite a response").

"The invited response doctrine allows a party who is provoked by his opponent's improper argument to right the scale by fighting fire with fire.

* * *

It must be emphasized that the invitation or provocation must be in the form of an improper argument from the other side.

* * *

Here, the arguments that the State contends opened the door were based on the trial evidence. Thus, in our view, the door would have remained closed to any otherwise improper bolstering arguments by the State." *People v. Gorosteata*, 374 Ill. App .3d 203, 221-222 (2007).

Although *Kitchen* was not specifically decided under the "invited response doctrine," and the State does not suggest that defense counsel's argument was *improper*, we nonetheless note that the invited response doctrine would not apply here. Defense counsel's argument was not improper. Defense counsel's arguments were clearly directed at establishing that the State failed to prove beyond a reasonable doubt that defendant actually confessed to the crime. Defense counsel attempted to persuade the jury to that position by pointing out that the State could have

provided more compelling evidence of the alleged confession other than the officer's word.

Defense counsel simply argued that, due to the scant evidence, the State was seeking to convict defendant because "he's a bad guy." Defense counsel was properly attacking the sufficiency of the evidence to prove beyond a reasonable doubt that defendant confessed to possessing the gun.

Nor do we find that the State's comments in this case deprived defendant of a fair trial. See *Gorosteata*, 374 Ill. App. 3d at 223 (analyzing resolution of defendant's challenge to the State's argument on grounds that the defendant was not prejudiced since the State's comments did not deprive him of a fair trial). The State argues that the comments went to the witnesses' credibility but did not rise to the level of burden shifting. This court has held that "[c]ounsel may comment on the credibility of witnesses if the comments are based on the evidence or inferences drawn from the evidence. [Citation.]" *People v. Adams*, 403 Ill. App. 3d 995, 1002 (2010) (quoting *People v. Flores*, 128 Ill. 2d 66, 94 (1989)). We noted that statements on the credibility of police officer witnesses are permissible when those statements:

"[are] based on the evidence or inferences drawn from the evidence. [Citations.] In contrast, those cases finding such statements improper determine that those statements are attempts to bolster the credibility of the police officer witnesses due solely to their status as police officers." *Adams*, 403 Ill. App. 3d at 1003-1004.

We find that the State's comments in this case were not prejudicial to defendant because, although the State did comment on the credibility of the police-officer witnesses, it did not attempt to bolster the officers' credibility relative to defendant based solely on their status as

police officers. See generally *People v. Gonzalez*, 388 Ill. App. 3d 566, 593 (2008) ("Argument directed at the credibility of the witnesses is a proper subject of closing arguments").

In rebuttal, the State told the jury that:

"[w]hat we're asking you to do is believe what [the officers] told you on the stand. *** He told you that the defendant admitted to everything. We're asking you to believe what the defendant told the officers, not just because he's a bad guy, that has nothing to do with it. He confessed.

* * *

[The officer] had a special relationship with the defendant, so it's not going to be videotaped. [The officer] said that he's special authority, they usually don't videotape. *** [A]nd one of them was an undercover officer ***. He is certainly not going to be videotaped.

* * *

They tell you this story. *** I had no idea about [the gun,] he told us about the gun. They find everything out. Defense had an opportunity at that point to cross examine. *** And upon cross examination, what came out that would indicate that the [officers had] any interest, bias, motive to get up here and lie right next to the judge? Zero, nothing."

We find that the State's comments with regard to the witnesses' credibility were properly

based on the evidence presented at trial. Specifically, the State commented on the relationship between defendant and the officers, why defendant would come to confess to them, explained the lack of better evidence of defendant's confession, and noted the absence of any testimony to diminish their credibility. The State did not attempt to bolster the witnesses' credibility based simply on their status as police officers. The State confined its comments to the lack of evidence to impugn their credibility as witnesses generally. Moreover, the State sought to protect against the jury's improperly giving greater weight to their testimony by voluntarily informing the jury that "you should not give the police any more credence than any other person who testifies."

The court has also found that a closing argument concerning the credibility of witnesses is not improper when the argument is based on the evidence, and the credibility of the witnesses is a dispositive issue at trial. The *Gorosteata* court cited *People v. Davis*, 228 Ill. App. 3d 835, 841 (1992), in which the defendant argued that comments that the police would not risk their careers and pensions to frame the defendant unfairly played upon the jury's sympathies. *Id.* The *Davis* court disagreed, holding as follows:

"The record shows that it was precisely defendant's strategy to make the credibility of the officers the dispositive issue;

defendant expressly attacked the credibility of the officers throughout the trial. Therefore, the pro strategy, focused the jury's attention on the dispositive issue; the comments did not unfairly play upon the jury's sympathies and did not deny defendant a fair trial." *Davis*, 228 Ill. App. 3d at 841.

Here, defendant argues that the State's only evidence that he possessed the gun was the officers' testimony that he confessed, thus agreeing that the credibility of the witnesses was

dispositive. We find nothing in the State's closing argument that invited the jury to show greater sympathy for the officers or to give their testimony undue weight. Here, defense counsel complained of the absence of better evidence of defendant's confession, beyond the officers' testimony. The *Gorosteata* court cited favorably from a dissent in *People v. Williams*, 289 Ill. App. 3d 24, 39 (1997) (McNulty, J., dissenting), which held that where defense counsel questioned the credibility of the police officers through use of the evidence presented at trial,

"the prosecutor, in turn, [is] entitled to discuss why the police officers were more credible than defendant *** by discussing the evidence at trial, [but] not by arguing that the officers should be believed because they put their lives in danger to protect people.'

[Citation.]" *Gorosteata*, 374 Ill. App. 3d at 224 (quoting *Williams*, 289 Ill. App. 3d at 39 (McNulty, J., dissenting)).

The *Gorosteata* court itself found that "the State's arguments[,] *** focused upon credibility[,] *** did not distract the jurors from confronting the appropriate question of credibility in this case." *Gorosteata*, 374 Ill. App. 3d at 226-227. Therefore, the court held, the comments did not deny the defendant a fair trial or undermine the integrity of the judicial process. *Gorosteata*, 374 Ill. App. 3d at 227.

We hold that the State's comments here, noting that there was no evidence presented at trial upon which to find that its witnesses were *not* credible, was proper. See *People v. Echols*, 382 Ill. App. 3d 309, 319 (2008) ("The comment was also proper because it was a comment on the uncontradicted nature of the State's case"). The State focused the jury's attention on the dispositive issue: the credibility of the two police officers who allegedly received defendant's

confession to the offense charged.

In light of the State's earlier admonishment not to afford the officers' testimony greater weight and defendant's argument that their testimony alone was insufficient to prove his guilt beyond a reasonable doubt, we find that the State could properly argue to the jury that its witnesses' credibility had suffered no attack and that they should be believed. *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010) ("In reviewing whether comments made during closing argument are proper, courts must view the closing argument in its entirety and remarks must be viewed in context").

CONCLUSION

For all of the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part and reversed in part, and the mittimus is corrected to reflect defendant's conviction and sentenced for armed habitual offender only.

Affirmed in part, reversed in part, mittimus corrected.