

No. 1-09-2810

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

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 08 CR 17074
CODY RIVERA,)	
)	
Defendant-Appellant.)	Honorable
)	Nicholas Ford,
)	Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

HELD: Trial court abused its discretion in not allowing the jury to be instructed on the statutory exemption for the offense of aggravated unlawful use of a weapon; the statute for aggravated unlawful use of a weapon did not violate the second amendment's right for an individual to bear arms.

¶ 1 Following a jury trial, defendant Cody Rivera, was found guilty of one count of unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)/(3)(A) (West 2008)). Defendant was sentenced to

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Cook County boot camp. On appeal, defendant contends that: (1) the trial court abused its discretion in not allowing the jury to be instructed on the statutory exemption for the offense of aggravated unlawful use of a weapon; (2) his trial counsel was ineffective for failing to tender Illinois Pattern Jury Instructions (IPI) 18.07A and 4.18 applicable to his asserted defense at trial; and (3) the statute creating the offense of aggravated unlawful use of a weapon violates the individual right to bear arms set forth in the second amendment of the United States Constitution. For the following reasons we reverse.

¶ 2

BACKGROUND

¶ 3 Defendant was initially charged with six counts of aggravated unlawful use of a weapon (AUUW) stemming from an incident that occurred on August 24, 2008 near 3167 South Green Street. The State nol-prossed five of the six counts in the indictment and proceeded to trial on count I, alleging that defendant committed the offense of AUUW based on possession of a firearm that was immediately accessible, uncased, and loaded.

¶ 4 During opening argument, defendant's trial counsel made several statements relevant to this appeal. First, counsel stated that a weapons analyst from the Chicago Police Department provided a written report regarding the condition of the gun when it was inventoried. Counsel further stated that the report showed that the gun "was not an operable weapon, that it was in fact broken down and that it was not capable of being fired." Counsel then commented on the instructions of law that the court would provide at the end of the trial, stating in relevant part:

"We believe when you hear all the instructions of law
which the judge will give you, aside from that, assuming that you

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assume that there in fact was someone with a weapon at any time, you will also have to find as one of the elements that in fact it was an operable weapon. That is a condition of law which I believe at the close of all the facts and evidence that you will be instructed by his Honor Judge Ford."

¶ 5 The trial court then conducted a jury instruction conference prior to calling the State's first witness. The State proposed a non-IPI jury instruction for the offense of AUUW based on the elements set forth in sections 24-1.6(a)(1) and 24-1.6(a)(3)(A) of the Criminal Code of 1961 (Code). 720 ILCS 5/24-1.6(a)(1)/3(A) (West 2008). The state's jury instruction number 12, provided in relevant part:

"To sustain the charge of aggravated unlawful use of a weapon, the State must prove the following propositions:

First Proposition: That the defendant knowingly carried a firearm; and

Second Proposition: That when the defendant did so, he was not on his land, in his abode, or in his fixed place of business; and

Third Proposition: That the firearm was uncased, loaded, and immediately accessible at the time of the offense."

Defendant's trial counsel objected and requested that the State's proposed instruction be amended to include a fourth proposition setting forth the statutory exemption contained in section 24-

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1.6(c)(I) of the Code (720 ILCS 5/24-1.6(c)(i) (West 2008)) that a person does not commit a AUUW offense if the weapon is "broken down in a nonfunctioning state." In support of adding the fourth proposition, defendant's counsel argued that the evidence at trial would show that the weapon recovered from defendant was not functioning and broken down. The court granted defendant's request to include the fourth proposition. However, at the conclusion of the conference, the court revisited its decision. Contrary to its earlier ruling, the court found that the jury would not be required to find that the gun was not in a "broken down and non-functioning state" as the fourth element of the offense of AUUW. The court concluded that because the IPI does not provide instructions for AUUW, it is reasonable to use the IPI instructions for the offense of unlawful use of a weapon (UUW) as guidance, which does not include the statutory exemption for weapons in a "broken down nonfunctioning state."

¶ 6 The case proceeded to trial. The State first called Blanca Osorio, who testified that she was standing in front of a building located near 3167 South Green Street on the night of August 24, 2008 at approximately 12:30 a.m. While she was standing and talking with a group of people, her nephew Nico shouted, "watch out, a gun." Osorio then observed defendant with a gun pointed in her direction, and immediately called "911."

¶ 7 Officers Jerry Crisp and Edward Johnson testified that they responded to a report that a male described as a "short Hispanic using a black t-shirt to cover his face" was in the vicinity of the Chicago Housing Authority's Bridgeport Homes with a gun. Once they arrived in the area, they observed a man matching the description given to them, running westbound and clutching his right hip. The officers followed the suspect and then observed him bend down on one knee in

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a gangway and place an object under a newspaper. At this point, the suspect was placed under arrest. Subsequently, Officer Johnson found a loaded, uncased, Colt model 1911 .45 caliber semiautomatic pistol, with one round in the chamber and three in the magazine under the newspaper located in the gangway. Officers Crisp and Johnson both identified defendant in open court as the suspect placed under arrest.

¶ 8 After defendant's arrest, Officers Crisp and Johnson inventoried the recovered handgun. Officer Johnson testified that before the gun was inventoried, he first attempted to clear the gun of a round in the chamber. He stated that the slide was unable to move freely, so in order to remove the live round from the chamber, he struck the gun against a desk to get the slide to move backward. Officer Johnson testified that he did this once, and then the recoil spring came out of the gun.

¶ 9 Officer Crisp testified that he was present when his partner attempted to clear the gun. Yet, he stated that neither he nor Officer Johnson damaged the slide of the gun. Officer Crisp further testified that when Officer Johnson handed him the gun, the recoil spring was intact; however, the gun was not operable and unable to slide. Officer Crisp testified that he prepared an inventory report, but admitted that he did not include the condition of the gun in the report. He further stated that it is not standard police procedure to first "break down" a gun before it is inventoried.

¶ 10 Thereafter, the State rested its case-in-chief. Defendant did not testify on his own behalf and called Officer Armando Alonso as his only witness. Alonso testified that he is employed by the Chicago Police Department as a firearms evidence technician. He stated that when he

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received the handgun, the frame was damaged and the recoil spring was broken in half and outside the gun. Based on these conditions, Officer Alonso stated, "I rendered it unsafe to fire, and it was inoperable as I received it." He further stated that the slide of the gun "was rigged to the back and it was not free of movement." Since the gun was damaged and "inoperable" when he received it, Officer Alonso was unable to perform a test firing. Officer Alonso testified that the inventory report did not indicate that the arresting officers had damaged the gun. Defendant then rested his case-in-chief.

¶ 11 Closing arguments commenced with the State arguing that the frame of the gun was damaged before it was recovered by the officers, and the recoil spring was broken during Officer Johnson's attempt to clear the gun. In contrast, defendant argued that the condition of the gun had been called into question by the conflicting testimony of Officers Johnson and Crisp. Defendant further argued that the gun was inoperable due to the damaged frame.

¶ 12 After deliberation, the jury found defendant guilty of aggravated unlawful use of a weapon.

¶ 13 Defendant thereafter filed a post trial motion, alleging that the trial court erred **by excluding the statutory exemption language as the fourth proposition** in jury instruction number 12 which set forth the elements for the offense of AUUW. The trial court denied defendant's motion, and sentenced defendant to Cook County boot camp.

¶ 14 This timely appeal followed.

¶ 15 **DISCUSSION**

¶ 16 Defendant has raised the following issues on appeal: (1) whether the trial court abused its

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discretion by failing to include within the jury instruction defendant's tendered statutory exemption that a person does not commit the offense of AUUW if the recovered weapon is "broken down in a nonfunctioning state."; (2) whether his trial counsel was ineffective for failing to tender the appropriate defense instructions explaining the law applicable to the statutory exemption that the AUUW statute does not apply to the possession of a firearm that is "broken down in a nonfunctioning state."; and (3) whether the statute creating the offense of AUUW violates the individual right to bear arms set forth in the second amendment of the United States Constitution.

¶ 17 Jury Instruction

¶ 18 Defendant first contends the trial court abused its discretion by failing to include the statutory exemption language for the offense of AUUW in the instructions provided to the jury. Specifically, defendant asserts that the trial court erred when it failed to include as the fourth proposition to State's jury instruction number 12, that the jury must find that the firearm was not in a "broken down nonfunctioning state."

¶ 19 Determining which instructions should be submitted to the jury generally rests within the discretion of the trial court. *People v. Dunlap*, 315 Ill. App. 3d 1017, 1024 (2000). Whether the defendant introduced sufficient evidence to obtain an instruction on his theory of defense is a question of law that is reviewed *de novo*. *Dunlap*, 315 Ill. App. 3d at 1024. Defendants are entitled to instructions relating to a theory of defense so that the jury can make a fair determination, even if the proof is conflicting and there is "slight" evidence upon which a theory is based. *People v. Hari*, 218 Ill. 2d 275, 296 (2006). Providing instructions on a

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defendant's theory of defenses that are supported by the record enables a jury to use the evidence presented at trial with the applicable law to make a fair determination of the defendant's guilt or innocence. *People v. Lockett*, 339 Ill. App. 3d 93, 101 (2003)

¶ 20 We find that the trial court was provided with sufficient evidence of the defense theory that the gun recovered from the scene was "broken down in a nonfunctioning state." Defendant's trial counsel provided the court with an evidentiary basis for including the exemption as an element of the offense. In his opening statement, counsel explained that a weapons analyst would testify that the gun "was not an operable weapon, that it was in fact broken down and that it was not capable of being fired." Counsel further stated in support of the defense theory that the jury would be instructed on the law and required to find that the firearm was an "operable weapon" before finding defendant guilty of the offense. Although the jury instruction conference occurred before **any witness was called**, in reviewing the entire record we find that defendant's counsel consistently presented the same theory of defense that the gun was not an "operable" weapon. Defendant's only witness, Officer Alonso, testified in relation to the gun: "I rendered it unsafe to fire, and it was inoperable as I received it." He further stated that the slide was "rigged to the back and it was not free of movement." Finally, at the end of trial, counsel argued that the gun was inoperable because of the damaged frame.

¶ 21 After a careful review of the record, we find that the trial court erred in failing to instruct the jury on the statutory exemption for the offense of AUUW. An abuse of discretion occurs when the ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view. *People v. Ward*, IL 108690 ¶ 21 (2011). We find that the trial court was

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unreasonable **when it failed** to include within the jury's instructions the **statutory** exemption to the offense of AUUW that was codified in section 24-1.6(c) of the Code. Consequently, having found that the record supports defendant's theory of defense, we therefore conclude that the trial court abused its discretion by failing **to include** the fourth proposition for jury instruction number 12 stating that a defendant is not guilty of the offense of AUUW if the gun was found in a "broken down nonfunctioning state."

¶ 22 Having already concluded that the trial court abused its discretion by failing to admit a jury instruction for the statutory exemption, we therefore need not consider whether counsel provided ineffective assistance of counsel with respect to this same instruction.

¶ 23 Second Amendment

¶ 24 Defendant next contends that the statute creating the offense of AUUW violates the individual right to bear arms set forth in the second amendment of the United States Constitution. Specifically, defendant contends that the statute is facially unconstitutional. Although defendant did not raise this issue at trial or in his post-trial motion, a constitutional challenge to a statute may be raised at any time. *People v. Bryant*, 128 Ill. 2d 448, 454 (1989). Moreover, although this is not a dispositive issue, we shall address it briefly because of the likelihood of this court being presented with this issue in the future.

¶ 25 Defendant was found guilty for the offense of AUUW:

"(a) A person commits the offense of aggravated unlawful
use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or

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concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; and

(3) one of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense."

720 ILCS 5/24-1.6(a)(1)/(3)(A).

¶ 26 The second amendment provides that a "well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court concluded that the second amendment constitutes a free-standing personal right, as opposed to a collective right.

¶ 27 In support of his position, defendant contends that *Heller* and *McDonald* protect his individual right to possess a handgun. We disagree. In *Heller* and *McDonald*, the court found that individuals have the right to possess a handgun in their home or legal dwelling. Yet, here the AUUW statute specifically prohibits a person from possessing a handgun except "when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm." As such, we find that defendant inaccurately

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characterizes the AUUW statute as a complete ban on handgun possession. The AUUW statute does not prohibit individuals from possessing a gun in their home or legal dwelling, and, therefore, is consistent with the holdings in *Heller* and *McDonald*. Accordingly, we conclude that defendant's argument that the AUUW statute is facially unconstitutional as a restriction on the second amendment individual right to bear arms lacks merit.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

This cause is remanded for a new trial.

¶ 30 Reversed and Remanded.