

No. 1-10-3293

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. 09 CR 20259
)	
TINA DAY,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not deny defendant a fair trial by restricting examination designed to elicit who owned the gun defendant was found guilty of possessing, and trial counsel was not ineffective for failing to introduce this through documentary evidence; trial judge did not prejudge defendant's credibility; and \$5 court system fee is vacated.

¶ 2 Following a bench trial, defendant, Tina Day, was convicted of aggravated unlawful use of a weapon and sentenced to two years of intensive probation and 130 hours of community service. On appeal, she contends her due process right to a fair trial was denied on three grounds: (1) the trial court improperly restricted her examination of a witness regarding ownership of the gun she was convicted of unlawfully possessing; (2) her trial counsel performed ineffectively by

failing to present evidence of ownership in another admissible form; and (3) the trial court prejudged the credibility of her testimony and, as a result, prejudged the outcome of the trial. Finally, defendant contends that the \$5 "Court System" fee must be vacated because it is not authorized by statute in this case. We vacate the \$5 fee but affirm the trial court's judgment in all other aspects.

¶ 3 At trial, Officer Cannata testified for the State that on October 25, 2009, at approximately 5:07 a.m., he observed defendant standing at the front passenger-side of a minivan as he stood approximately 8 to 10 feet from her. Defendant was standing 4 to 5 feet from the van's open passenger sliding door. There were two other people in the van: a man later identified as Harold Nichols was in the driver's seat, while a woman later identified as Janisha Taylor was in the front passenger seat. There was no one in the rear of the van.

¶ 4 Officer Cannata observed defendant holding a water bottle in her left hand and a two-tone semi-automatic gun in her right hand. The top sliding portion of the gun was a chrome or nickel shiny metal, and the bottom grip area was black. Defendant's right hand was around the grip portion of the gun, and it was facing down toward the sidewalk. When Cannata saw the gun, he immediately drew his weapon and ordered her to drop the gun and to keep her hands where he could see them. He was still 8 to 10 feet away from defendant at this time.

¶ 5 Rather than dropping the gun, defendant began moving toward the open door of the van. Officer Cannata again ordered defendant to drop the gun and keep her hands visible. She again did not and, instead, continued moving toward the open door. She then placed the gun on the rear floorboard of the van. Cannata was approximately 3 to 4 feet from defendant when she placed the gun in the van, and he did not lose sight of the gun. He then placed defendant in custody, and while other officers took control of defendant, Cannata secured the gun. The gun was loaded with 10 live rounds in the magazine and one live round in the chamber. The gun was uncased, loaded and immediately accessible at the time of the event. Defendant did not have a

valid FOID card.

¶ 6 During cross-examination, Officer Cannata testified that Taylor and Nichols were also taken into custody. Taylor was released without being charged and Nichols received several traffic violation citations. The parties then stipulated that defendant had a 1992 felony conviction for possession of a controlled substance. After the State rested, the defense moved for a directed finding which the court denied.

¶ 7 Defendant testified that she first saw Officer Cannata as she stood outside the minivan. Taylor was also seated in the van. Defendant was obtaining her cellular phone from Taylor and was preparing to walk away when the police approached. Defendant testified that she held a water bottle in one hand and a cell phone and keys in the other hand. She did not have a gun in her hand and she did not put a gun in the back of the van. During cross-examination, defendant testified that her cell phone was approximately 3 to 4 inches in length.

¶ 8 The defense then called Officer Cannata as a witness. When Cannata testified that he did not know who the owner of the gun was and that he did not recall whether he included the owner in his police report, defense counsel showed him a copy of the report to refresh his recollection. Cannata ultimately testified that the report showed the owner was Janisha Taylor. However, this was not admitted as substantive evidence of the gun's ownership.

¶ 9 Defense counsel then inquired multiple times about the method used to determine the gun's ownership. The trial court sustained the State's objections to these questions on relevance grounds. The parties then stipulated that defendant was not the owner of the gun. Officer Cannata then confirmed that he briefly detained Taylor for unlawful use of a weapon.

¶ 10 In finding defendant guilty, the trial court stated that it considered the credibility of the witnesses and weighed their testimony. The trial court considered Officer Cannata's and defendant's ability and opportunity to observe, their manner while testifying, any interest, bias, or motives, and the reasonableness of their testimony in light of the evidence. The trial court found

that Cannata's testimony was credible, unimpeached, and consistent. It also found an "inherent bias in the testimony of [defendant], who corroborated the officer in basically all aspects of her position*** Her testimony was different only that she said she never had a gun."

¶ 11 Defendant was then found guilty of four counts of aggravated unlawful use of a weapon and unlawful use of a weapon, but judgment was only entered on count I. Defense counsel argued in defendant's motion for a new trial that he was prohibited from bringing what he believed to be impeaching evidence of Officer Cannata's testimony that defendant had the gun in her hand. Specifically, defense counsel sought to admit evidence that Cannata took the other two occupants of the van into custody for the same offense that defendant was accused of committing. However, defendant did not raise the precise issue presented in this appeal regarding evidence of the ownership of the gun. The trial court denied defendant's motion.

¶ 12 Defendant contends in this appeal that she was denied her due process right to a fair trial because the trial court improperly restricted her examination of Officer Cannata regarding whether Cannata knew that Taylor owned the gun that defendant was convicted of possessing. Because defendant failed to preserve this issue for appeal by failing to include it in her posttrial motion, she requests this court review this issue for plain error. *People v. Enoch*, 122 Ill. 2d 176 (1988) (to preserve an error for appeal, the error must be objected to and included in the posttrial motion).

¶ 13 The plain error doctrine allows a reviewing court to consider an unpreserved error 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 defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. Ill. S. Ct. R. 615(a) (eff. 1999); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65, (2007); see also *People v. Woods*, 214 Ill. 2d 455, 471-72 (2005). In reviewing a plain

error contention, this court first determines whether error occurred at all. See *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); and *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009). This requires "a substantive look at the issue." (Internal quotation marks omitted.) *People v. Naylor*, 229 Ill. 2d 584, 593 (2008)

¶ 14 The sixth amendment guarantees the right of the defendant to present evidence in her defense. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). "Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would adopt the trial court's view. *Id.*

¶ 15 To sustain a conviction for aggravated unlawful use of a weapon, the State must prove beyond a reasonable doubt that: (1) the defendant knowingly carried a firearm on or about her person, (2) the defendant was not on her own land or in her abode or fixed place of business, and (3) the firearm was uncased, loaded and immediately accessible at the time of the offense. 720 ILCS 5/24-1.6 (West 2009). Because the elements of the offense here did not require the State to prove ownership, the trial court did not err in declining to admit testimony from Officer Cannata regarding whether another van occupant, Taylor, was the registered owner of the gun. Such testimony did not relate to the elements of the offense and therefore did not make the existence of any material fact more or less probable. *People v. Jones*, 337 Ill. App. 3d 546, 554 (2002).

¶ 16 Defendant's reliance on *People v. Bailey*, 333 Ill. App. 3d 888 (2002), is misplaced. *Bailey* simply stands for the proposition that a defendant's ownership of a gun is circumstantial evidence of the defendant's constructive possession of it. The parties here stipulated that defendant was not the owner. It was not relevant that the evidence would have shown that Taylor owned the gun, particularly since Officer Cannata testified consistently that defendant was holding the gun. Establishing that Taylor was the gun's actual owner would not have made

Cannata's detailed and credible testimony of defendant holding the gun more or less probable. Such evidence also would not have made it more or less probable that defendant was holding a cell phone, rather than the gun. A reviewing court may reverse a trial court's determination of relevance only if the trial court abused its discretion. *Id.* Since it is irrelevant that Taylor owned the gun, or at most of very limited relevance, the trial court did not abuse its discretion in limiting evidence of the gun's ownership. Because the evidence is not relevant, we need not decide whether the testimony was also properly excluded on hearsay grounds.

¶ 17 Defendant next contends that defense counsel performed ineffectively by failing to present evidence of the gun's ownership in an alternative admissible form. To establish a claim for ineffective assistance of counsel, the defendant must show that her counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance was so serious as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (adopting *Strickland*).

Proceeding directly to the prejudice prong, the defendant carries the burden of affirmatively showing within a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 697, 694. Defendant has not met her burden in this case. Even if the evidence was admitted in another form, for instance via authenticated record of gun registration, this would not make the evidence relevant, nor would it change the outcome of the case. Therefore, defendant's trial counsel was not ineffective for failing to admit into evidence in an alternative form that Taylor owned the gun.

¶ 18 Defendant next argues that her due process right to a fair trial was denied when the trial court prejudged her credibility as a witness and as a result, prejudged the outcome of the case. Specifically, defendant argues that the trial court's statement that she had an "inherent bias" while the trial court gave its credibility findings and judgment connotes the trial court's prejudgment that defendant must be biased because she is a criminal defendant. Defendant failed to preserve

this issue for appeal by not objecting at trial and failing to include this issue in her posttrial motion. Despite this waiver, defendant asserts the waiver rule is less rigid where the trial court's conduct is the basis for the objection, citing *People v. White*, 249 Ill. App. 3d 57, 60 (1993), in support of this proposition. We decline to relax the waiver rule and will instead determine whether to review this error under the plain error doctrine. See e.g., *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009) (declining to relax the waiver rule under the *Sprinkle* doctrine and proceeding to plain error analysis by first determining whether a "clear and obvious" error occurred); see also *Piatkowski*, 225 Ill. 2d at 565, and *People v. Sprinkle*, 27 Ill. 2d 398 (1963). Applying the analysis for plain error cited above, this court finds that defendant's argument is not supported by the record, and thus, there was no error.

¶ 19 A criminal defendant is guaranteed the right to a fair and impartial trial. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §8. A defendant is also entitled to a trial free from improper and prejudicial comments by the trial judge. *People v. Garrett*, 276 Ill. App. 3d 702, 712 (1995). As the State properly points out, the trial court may comment on the credibility of the witnesses at the close of the evidence. *People v. Heiman*, 286 Ill. App. 3d 102, 112 (1996); and *People v. Hawkins*, 243 Ill. App. 3d 210, 220 (1993). However, the trial judge "must refrain from interjecting opinions, comments, or insinuations reflecting bias toward or against any party." *Garrett*, 276 Ill. App. 3d at 712; see also *People v. Sims*, 192 Ill. 2d 592, 636 (2000). Judicial comments constitute reversible error if the defendant establishes that the comments were prejudicial and that the defendant suffered harm as a result. *People v. Hamilton*, 361 Ill. App. 3d 836, 848 (2005).

¶ 20 Defendant argues that the trial court held an inherent bias against criminal defendants. This argument is not supported by the record. Rather, the trial court specifically stated that it evaluated the witnesses' ability and opportunity to observe, their manner while testifying, any interest, bias or motive any witness might have, and the reasonableness of the witness's testimony

in light of all the other evidence in this case. Only after explaining its evaluation of witness credibility did the trial court weigh the testimony of Officer Cannata and defendant. The record does not reveal a bias against criminal defendants nor a prejudgment of defendant's guilt or credibility. Importantly, the trial court's assessment that defendant held an inherent bias occurred *after* it heard all of the evidence and both parties rested. The trial court merely recognized that defendant has an interest in the outcome of her case. See *People v. Barney*, 176 Ill. 2d 69, 74 (1997) (holding that the jury may consider a defendant's interest in the result of the case when weighing the defendant's testimony).

¶ 21 Defendant cites *People v. Kennedy*, 191 Ill. App. 3d 86 (1989), in which this court held that the trial judge was biased against the defense witnesses, because the trial judge, at the close of evidence, classified the defense witnesses as thieves, drug addicts, fornicators and welfare recipients, even though nothing in the record supported these classifications. *Id.* at 90.

Defendant's case is entirely distinguishable from *Kennedy* because the trial judge's comment that defendant held an "inherent bias" does not reflect the egregiousness of the *Kennedy* trial court's comments nor does it show that the trial court relied on information outside of the record, as was the case in *Kennedy*.

¶ 22 Defendant also cites *People v. Ojeda*, 110 Ill. App. 2d 480 (1969), to support her argument that the trial judge prejudged her credibility. However, *Ojeda*, is also distinguishable because in that case the trial judge made statements evincing its disbelief of the defense witness before the witness took the stand. *Id.* at 485. The timing reflected the trial judge's preconceived attitude regarding the defendant's guilt. *Id.* Again, this case is significantly distinguishable because the trial court's comments in defendant's case were made after the close of evidence and were included in a colloquy of the trial court's review of the evidence and findings regarding witness credibility. Because the trial court properly commented on witness credibility and considered defendant's interest in the outcome of her case, we do not find that the trial court erred

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in finding Officer Cannata's testimony more credible than defendant's.

¶ 23 Finally, defendant contends she was improperly assessed a \$5 court system fee pursuant to section 5-1101(a) of the Powers and Duties of County Boards Act. 55 ILCS 5/5-1101(a) (West 2009). The State agrees that defendant was incorrectly assessed this fee. Our reading of section 5-1101(a) indicates that the fee is to be assessed for violations of the Illinois Vehicle Code or similar provisions. Because defendant was convicted of aggravated unlawful use of a weapon and was not convicted of violating the Illinois Vehicle Code or a similar provision, we vacate the \$5 fee. 720 ILCS 5/24-1.6(a)(1) (West 2009).

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County finding defendant guilty of aggravated unlawful use of a weapon and vacate the imposition of the \$5 court system fee. We affirm the judgment in all other aspects.

¶ 25 Affirmed in part and vacated in part.