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2012 IL App (3d) 100480-U

Order filed March 27, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0480
v.	)	Circuit No. 09-CF-2276
	)	
JOHNNY GOOCH,	)	Honorable
	)	Stephen D. White,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Carter concurred in part, and dissented in part.

ORDER

¶ 1 *Held:* The trial court properly admitted defendant's first written statement, as an admission against interest during the state's case in chief, and properly barred the defense from presenting testimony concerning defendant's separate, second statement which constituted inadmissible hearsay. The trial court erred by allowing the State to present other-crimes evidence to the jury because this evidence was highly prejudicial and outweighed any purported probative value.

¶ 2 After a jury trial, defendant Johnny Gooch was convicted of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and sentenced to 19-years imprisonment. Defendant appeals the court's evidentiary rulings, arguing that the trial court erred by: (1) denying his

pretrial motion to quash arrest and suppress evidence; (2) allowing the State to admit defendant's oral and written statements made to police, about the gun in question, which were allegedly made during plea negotiations; (3) refusing to allow defendant to admit a second exculpatory statement he made to police; and (4) allowing the State to admit other-crimes evidence that defendant was in possession of cannabis and on parole at the time of the traffic stop. We affirm the trial court's rulings on the first three issues. However, defendant's conviction is reversed based on the improper admission of other-crimes evidence, addressed in the fourth issue, and the case is remanded for a new trial.

¶ 3 BACKGROUND

¶ 4 The State charged defendant with the unlawful use of a weapon by a felon, occurring on or about September 28, 2009. Defendant filed an amended "Motion to Quash Arrest and Suppress Evidence and Statements," alleging the police unlawfully stopped his vehicle and subjected him to an illegal search.

¶ 5 Officer Bill Otis of the Joliet Police Department, the only witness presented to the court during the suppression hearing, testified that, on September 28, 2009, he conducted a traffic stop on a vehicle at about 5:30 p.m., after determining that the registered owner of the vehicle, Gizelle[1] Smith, had a suspended driver's license. The officer testified he did not investigate whether the registered owner of the vehicle was male or female before making the traffic stop. After the stop, the officer approached the male driver. The officer learned the driver was not Gizelle Smith, after defendant provided his state identification card pursuant to the officer's

[1] The reporters' transcripts used this spelling of "Gizelle," but defendant's motion to quash as well as a subpoena in the court records showed it spelled "Jazelle."

request for his driver's license. After relaying the identification information to dispatch, the officer also discovered defendant was on parole, did not have a valid driver's license, and the insurance on Smith's vehicle had been canceled.

¶ 6 The officer asked defendant to step out of the car and searched defendant's person. During this search, the officer found 13 baggies of purported cannabis in defendant's pockets. The officer subsequently searched the vehicle and located additional purported cannabis inside the vehicle. The officer placed defendant under arrest for possession of cannabis and transported him to the police station where defendant gave a statement, which eventually resulted in the police recovering a gun from defendant's girlfriend's residence.

¶ 7 During arguments on the motion to suppress, defense counsel conceded the initial stop of the vehicle was justified because the registered owner of the vehicle had a suspended driver's license. Defense counsel argued that, once the officer confirmed that the driver was not Gizelle Smith, the purpose of the initial stop ended. Defense counsel asserted the subsequent actions taken by the officer exceeded the scope of the initial stop and constituted a second seizure of the vehicle, which was unlawful, warranting the suppression of all evidence recovered as a result of the second stop.

¶ 8 The trial court found Officer Otis's testimony was credible, the initial stop of the vehicle was proper, and the actions taken after the stop were also proper. Accordingly, the trial court denied the motion to suppress and set the case for a jury trial.

¶ 9 On March 8, 2010, the day of the jury trial, defendant filed an amended Motion *in Limine*, asking the court to bar the following evidence because the prejudicial effect of the evidence was outweighed by any minimal probative value: (1) evidence of defendant's prior criminal

convictions for drug-related offenses; (2) evidence of the baggies of purported cannabis found on defendant's person and in the vehicle at the time of the traffic stop; (3) evidence that the insurance card for the vehicle was not valid at the time of the stop; and (4) evidence that defendant was on parole at the time of the stop.

¶ 10 The trial court granted defendant's motion *in limine* and excluded evidence that defendant did not have automobile insurance at the time of the stop. The trial court denied the request to exclude evidence that defendant was in possession of suspected cannabis and on parole at the time of the traffic stop. The court reserved ruling on the remaining portions of the motion *in limine* depending on whether defendant testified.

¶ 11 During the jury trial, Officer Otis, Officer Liebermann, and Officer Sengsouvanh all testified. Officer Otis said he stopped the vehicle because the registered owner's driver's license was suspended. When he approached the vehicle, he discovered Gizelle Smith and two young children were passengers in the vehicle and identified defendant as the driver. Defendant did not have a valid driver's license at the time of the traffic stop. Consequently, Officer Otis informed the jury he searched defendant at the scene and found 13 baggies of a green, leafy substance in defendant's pockets. According to the officer, defendant told the officer that "it ain't nothing but weed." The officer told the jury he arrested both Gizelle Smith and defendant for possession of cannabis.

¶ 12 Officer Otis testified he told defendant he was charging him with felony cannabis charges and, in response, defendant asked the officer if there was anything he could do to lessen the charge so he would not have to go back to prison for violating parole, such as providing information concerning the location of a gun. After talking with his supervisor, Officer Otis

agreed to charge defendant with a misdemeanor cannabis charge and agreed to possibly release defendant on a recognizance bond if the police recovered the gun based on information supplied to the officer.

¶ 13 Defendant told Officer Otis the gun was located in an alley and defendant would instruct his girlfriend, Gizelle Smith, to retrieve the gun and return to the station. The officers allowed defendant to speak privately with Smith, and then released Smith from custody.

¶ 14 According to the officer's testimony, Smith did not return with the gun as expected. Consequently, Officer Otis and other officers went to the alley themselves, but could not locate a gun. When Officer Otis called the jail to speak with defendant, defendant admitted he lied and the gun was not in the alley but, rather, was in a safe in Smith's apartment, where he also lived "off and on." Defendant told Officer Otis that Smith was unable to open the safe containing the gun, which is why she had not yet returned with the gun. Defendant then provided Officer Otis with the three-digit combination for the safe at Smith's apartment. Next, the police officers went to Smith's apartment, opened the safe using the combination provided by defendant, and recovered a gun, a magazine clip, ammunition, and a gun case which were all placed into evidence.

¶ 15 Meanwhile, while the other officers went to Smith's apartment, Officer Sengsouvanh testified he obtained a handwritten statement from defendant regarding defendant's knowledge of the gun. Officer Sengsouvanh read defendant's first written statement to the jury which explained that defendant bought a .40 caliber handgun, along with one-half box of shells, one clip, and a gun case, on September 20, 2009, from another person for $50 with the intent of pawning it later to make money. In this statement, defendant said he did not know the name of

person who sold him the gun, but that person came by the apartment from time to time. Defendant's written statement further said the gun had remained in his safe at Smith's apartment since he purchased the gun. After recovering the weapon, the officers told defendant he would also be charged with unlawful use of a weapon by a felon resulting in defendant's second statement.

¶ 16 Defendant gave an offer of proof which established that, during the second statement, defendant told the officer that the gun belonged to his brother, Victor, and that his brother put the gun in the safe, when he came to the area for a funeral because he did not want to leave the gun at his residence where children were living. According to defendant, he did not initially tell police because he did not want to get Victor in trouble. The trial court refused to allow the admission of this second statement because it was hearsay and did not fall under the admission against interest exception to the hearsay rule.

¶ 17 The defense presented evidence and tendered documents and stipulated testimony showing the gun in question was owned by defendant's brother, Victor. In addition, Victor testified the gun belonged to him and he put the gun in the safe, without defendant's knowledge, after he discussed the matter with Smith and she opened the combination safe for him. The defense presented evidence that defendant was living at a different address with his stepmother at the time the gun was recovered. Defendant did not testify at his trial.

¶ 18 At the conclusion of the jury trial, on March 10, 2010, the jury found defendant guilty of unlawful use of a weapon by a felon. Defense counsel subsequently filed a motion for new trial on April 5, 2010. Additionally, on April 28, 2010, defendant filed a *pro se* motion for a new trial alleging ineffective assistance of trial counsel claiming his attorney was ineffective for failing to

argue the police had tricked defendant into giving his first statement or confession. At a hearing on defendant's *pro se* motion, the trial court allowed defendant to make further statements regarding his claim of ineffective assistance of counsel. The trial court also questioned defense counsel, who stated she presented an initial motion to quash arrest and suppress statements which was denied at a pretrial hearing; she filed a motion *in limine* which the court addressed; and she made other decisions during the trial which were in the nature of trial strategy. At the conclusion of the hearing, the trial court found the *pro se* motion was without merit and scheduled a sentencing hearing.

¶ 19 On June 9, 2010, the court heard and denied defense counsel's motion for new trial and, after a sentencing hearing, sentenced defendant to 19-years imprisonment in the Illinois Department of Corrections. Defense counsel filed a motion to reconsider on June 18, 2010, which the court denied. Defendant then filed a timely notice of appeal.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant argues the trial court erred by: (1) denying defendant's motion to quash the arrest and suppress evidence and statements; (2) allowing the State to introduce evidence that defendant possessed cannabis and was on parole at the time of the traffic stop; (3) allowing the State to introduce defendant's initial written statement because the statement was made during plea negotiations; and (4) barring defendant from introducing his second, exculpatory statement for the jury's consideration. The State contends that the court properly ruled on all of the evidentiary issues.

¶ 22 Regarding the denial of defendant's motion to quash arrest and suppress evidence and statements, defendant asserts the officer lacked reasonable suspicion to make the initial traffic

stop and everything that flowed from that unlawful stop should be suppressed. As the State correctly points out, however, during the suppression hearing before the trial judge, defense counsel conceded the validity of the initial traffic stop.

¶ 23 It is well-settled in Illinois that a defendant waives or forfeits any arguments or issues for suppression on appeal if he did not raise that specific ground for suppression at the hearing before the trial court. *People v. Redd*, 135 Ill. 2d 252, 296 (1990). Additionally, defendant cannot argue a different basis for suppression that is directly contrary to the position he took in the trial court. *People v. Curry*, 56 Ill. 2d 162, 170 (1973). Here, defense counsel conceded that the officer had reasonable grounds to stop the vehicle and did not challenge the propriety of the initial traffic stop in the trial court. Therefore, we conclude defendant has forfeited this argument on appeal.

¶ 24 For the first time, defendant's reply brief on appeal asks this court to review the validity of the traffic stop by applying the first prong of the plain error doctrine because the evidence was closely balanced. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Our supreme court rules mandate that a reply brief "shall be confined strictly to replying to arguments presented in the brief of the appellee." Ill. S. Ct. R. 341(j) (eff. July 1, 2008). It is well settled that it is improper to raise a new argument in an appellant's reply brief, that was not raised in his initial brief, and such argument shall be deemed waived for purposes of appeal. *People v. Cortez* 361 Ill. App. 3d 456, 270 (2005). Therefore, on appeal, defendant has waived the plain error argument regarding the officer's initial stop of the vehicle because he did not raise it in his initial appellant's brief.

¶ 25 Defendant also argues the trial court erred by admitting defendant's first oral and handwritten statements given to the police officers, regarding the location and his possession of

the gun, because these statements were generated during plea negotiations and are barred by Supreme Court Rule 402(f) (Ill. S. Ct. R. 402(f) (eff. July 1, 1997)). Defendant asks this court to reverse his conviction and sentence, and remand this case for a new trial based on plain error or, alternatively, remand the case for further hearing on this issue as part of defendant's *pro se* posttrial claim of ineffective assistance of counsel.

¶ 26 The State argues, first, plain error does not apply, therefore, this issue has been forfeited. Next, the State asserts no error occurred because the statement in question was not plea-related and, thus, was not barred pursuant to Rule 402(f). Finally, the State asserts defendant has not properly raised the issue of ineffective assistance of counsel based on trial counsel's failure to argue defendant had been tricked into confessing to the police officers on appeal.

¶ 27 Since defendant concedes he did not raise this issue before the trial court, defendant now asks this court to review this issue under the plain error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Due to the highly prejudicial character of an error resulting from improperly admitting statements made during the course of plea negotiations, appellate courts have reviewed this unpreserved issue under the plain error doctrine. *People v. Wanke*, 303 Ill. App. 3d 772, 778 (1999). Thus, we will address the merits of defendant's argument.

¶ 28 A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991); *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010). It is well settled that statements made by a defendant in the course of plea negotiations are generally not admissible. Ill. Sup. Ct. R. 402(f) (eff. July 1, 1997); *People v. Hart*, 214 Ill. 2d 490, 501-02 (2005). Supreme Court Rule 402(f) provides:

> "If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not

> accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding." Ill. Sup. Ct. R. 402(f) (eff. July 1, 1997).

¶ 29 To determine if a defendant's statement is plea-related, a court must apply a two-part test. *Hart*, 214 Ill. 2d at 503. A court must consider: (1) whether the defendant exhibited a subjective expectation to negotiate a plea; and, if so, (2) whether that expectation was reasonable under the totality of the objective circumstances. *Id.* If both parts of the test are satisfied, the defendant's statement is plea related and may not be admitted by the State against the defendant in any criminal proceeding. *Hart*, 214 Ill. 2d at 502-03. However, " '[b]efore a discussion can be characterized as plea related, it must contain the rudiments of the negotiation process, *i.e.*, a willingness by defendant to enter a plea of guilty in return for concessions by the State.' " *Hart*, 214 Ill. 2d at 503 (quoting *People v. Friedman*, 79 Ill. 2d 341, 353 (1980)).

¶ 30 In the present case, defendant indicated to police officers he would tell them where a gun was located on the streets if they would agree to charge him with a misdemeanor cannabis charge, rather than a felony, so his parole would not be violated. The police officers agreed to defendant's offer with the condition the gun be recovered by the police. Although defendant sought to provide the police with information in exchange for leniency on the cannabis charge, there is no indication defendant indicated a willingness to plead guilty to *any* charges in exchange for some concession from the State. Upon careful review of the facts, we conclude the “rudiments of the negotiation process” are lacking and that defendant's statement is not rendered inadmissible as part of plea negotiations under Rule 402(f). Ill. S. Ct. R. 402(f) (eff. July 1,

1997).

¶ 31 Defendant's next contention on appeal is the trial court erred in barring the admission of his second statement made to police officers about the gun belonging to Victor. Defendant asserts the "completeness doctrine" applies to this situation. The State argues the completeness doctrine does not apply because the second statement was a separate statement made at a different time. Alternatively, the State argues any error that may have occurred, if the statement was erroneously excluded, was harmless on the grounds the statement was cumulative because defendant's brother, Victor, testified the gun belonged to him.

¶ 32 As previously stated, a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion on appeal. *Illgen*, 145 Ill. 2d at 364; *Dabbs*, 239 Ill. 2d at 284. It is well settled that a defendant's exculpatory or self-serving statements are generally considered to be inadmissible hearsay. *People v. Patterson*, 154 Ill. 2d 414, 452 (1992). Occasionally, however, such statements or portions thereof may be admitted pursuant to the completeness doctrine. *Patterson*, 154 Ill. 2d at 452-53. The completeness doctrine is an exception to the hearsay rule allowing an opposing party to introduce the remainder of an oral or written statement to the extent that is necessary to explain, qualify, or otherwise shed light on the meaning of a portion of a statement, that has already been received, to prevent the trier of fact from receiving a misleading impression as to the nature of the statement. *Patterson*, 154 Ill. 2d at 452-53; *People v. Boand*, 362 Ill. App. 3d 106, 132 (2005). For the completeness doctrine to apply, the statement sought to be introduced by the opposing party must concern the same subject and must have been *made at the same time* as the statement that has already been received. *Patterson*, 154 Ill. 2d at 454.

¶ 33 In the instant case, defendant's first handwritten statement to the police provided that defendant had purchased the .40 caliber gun for $50 from a person who would occasionally come around Smith's apartment; that he bought the gun so that he could pawn it for money at a later date; and that he kept the gun in his safe at Smith's apartment. Defendant also told the officers the three number combination required to open the safe at his girlfriend's house. After police officers recovered the gun and told defendant he would be charged with unlawful use of a weapon by a felon, defendant provided a second statement to the police claiming the gun actually belonged to his brother, Victor, who placed the gun in the safe when he came to the area to attend a funeral. According to the offer of proof in reference to defendant's second statement, this second statement provided that defendant did not tell the police, initially, that Victor was the owner of the gun because he did not want to get Victor in trouble.

¶ 34 Having reviewed the facts in this case, there can be little dispute that defendant's second statement to police was not a continuation of the first statement, but was a separate, exculpatory statement made at a later time. We conclude the trial court did not commit an abuse of discretion by refusing to admit the second statement, since the completeness doctrine did not apply. We also agree defendant's second statement was properly excluded as hearsay evidence.

¶ 35 Finally, defendant argues the trial court erred by allowing the State to admit evidence, at defendant's jury trial, that defendant was in possession of cannabis and on parole at the time of the traffic stop. Defendant asserts this "other-crimes evidence" should have been excluded because it lacked any probative value relative to the gun offense and was highly prejudicial to defendant. Defendant also asserts the trial court failed to consider and then balance whether the evidence was unduly prejudicial to defendant, and that this error was compounded when the trial

court failed to give the jury a limiting instruction as to the use of other-crimes evidence.

¶ 36 The State argues the trial court properly admitted this other-crimes evidence to show the circumstances explaining the reason that defendant told police about the gun. Alternatively, the State argues, even if the court erroneously allowed this evidence to be admitted, harmless error occurred because the remaining evidence of defendant's guilt was overwhelming.

¶ 37 A determination of the admissibility of evidence, including other-crimes evidence, is in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Dabbs*, 239 Ill. 2d at 284. Generally, other-crimes evidence is not admissible to show defendant's propensity to commit crimes, but is admissible if it is relevant for any purpose other than to show a defendant's propensity to commit crimes. *Dabbs*, 239 Ill. 2d at 283. For example, other-crimes evidence may be admissible for other relevant purposes, such as to show *modus operandi*, intent, identity, motive, or absence of mistake. *People v. Manning*, 182 Ill. 2d 193, 214 (1998); *Dabbs*, 239 Ill. 2d at 283. Other-crimes evidence is generally inadmissible because it "overpersuades a jury, which might convict the defendant only because it feels that defendant is a bad person who deserves punishment." *Manning*, 182 Ill. 2d at 213-14. When evidence of other crimes is offered, the court must weigh its probative value against its prejudicial effect, and may exclude the evidence if the prejudicial effect substantially outweighs the probative effect. *Manning*, 182 Ill. 2d at 214.

¶ 38 In the instant case, the record reveals that, the police stopped defendant's vehicle and discovered that defendant did not have a valid driver's license and, consequently discovered defendant was on parole and in possession of cannabis. Significantly, the only charge defendant faced during the jury trial, relative to the instant appeal, was the offense of unlawful use of a

weapon by a felon.

¶ 39 During trial, the trial judge allowed the State to introduce evidence, over defendant's objection, the officers discovered defendant was currently on parole and also possessed 16 baggies of purported cannabis at the scene of the traffic stop.[2] Defendant contends the court's ruling, allowing this "other-crimes evidence" to be admitted, constituted an abuse of discretion because this evidence was not relevant to any element of the singular weapon charge being considered by the jury and was unduly prejudicial. The State contends the trial court's decision did not constitute an abuse of discretion since the court found the evidence was probative to explain why defendant gave the police officers a statement at the police station regarding the location of the gun.

¶ 40 In this case, the trial court found this other-crimes evidence was admissible because it explained the reason for defendant's statement to the police officers about the location of a gun. We disagree. During the trial, defendant did not deny making the statement about the gun to the police officer. Rather, defendant's defense at trial was the gun did not belong to him, but it belonged to his brother, Victor, who testified before the jury. We conclude it is not relevant why defendant made a statement about the gun to the police officers, nor does this reasoning by the trial court fall under one of other relevant factors provided by the *Manning* court. *Manning*, 182 Ill. 2d at 214.

¶ 41 While the trial court found this other-crimes evidence may have explained why defendant gave the police officers the statement regarding the gun, the court failed to address the prejudicial

[2] It should be noted, at the time of trial, the substance was "purported" cannabis and was referred to as a "green leafy substance."

effect of this evidence or balance whether the probative value, if any, outweighed the obvious prejudicial effects of this type of evidence. *Manning*, 182 Ill. 2d at 214. The record does not contain any support for the view the trial court balanced the prejudicial effect of this evidence against the minimal relevance of providing an explanation to the jury for the reason defendant offered the written statement to the officer at the station, while the other officer's opened the safe at Smith's residence.

¶ 42 Here, the other-crimes evidence was highly prejudicial because it supported a reasonable inference for the jury to conclude that defendant, who was on parole while carrying small, multiple, packages of purported cannabis, may have a reason to own or possess a handgun. The reasonable inference certainly existed that defendant may have been a drug dealer who, on occasion, needed a weapon to carry out his drug-related business. We conclude this evidence may have over-persuaded the jury to believe defendant was a bad person who deserved punishment.

¶ 43 Without balancing these interests, the trial court erroneously admitted this other-crimes evidence. Due to the high risk of prejudice when using other-crimes evidence, the erroneous admission of such evidence *requires reversal*. (Emphasis added). *Id.* The case must be reversed and remanded for a new trial. See *Manning*, 182 Ill. 2d at 214.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, although we concur with some of the trial court's evidentiary rulings, the judgment of the circuit court of Will County is reversed, and the case is remanded for a new trial based on the erroneous admission of the other-crimes evidence.

¶ 46 Reversed and remanded.

¶ 47 CARTER, J., concurring in part and dissenting in part:

¶ 48 I concur with the majority on all of the issues presented on appeal, except for the last issue. On that issue–the admission of other-crimes evidence–I disagree with the majority and would affirm the trial court's ruling.

¶ 49 In the instant case, although defendant was not charged with a drug-related offense, the other-crimes evidence of which defendant complains was highly probative as to why defendant told the police about the gun. Without that evidence of the circumstances of the arrest to place defendant's statement into context, defendant's statement would have seemed highly suspicious and quite illogical to suggest. Granted, there was some prejudice to defendant, as there always is with other-crimes evidence, but I cannot say that the prejudicial effect of the evidence substantially outweighed the probative value. As the trial court pointed out, at least as to the evidence that defendant was on parole, the jury already knew that defendant was a convicted felon from the nature of the offense for which defendant was on trial. In my opinion, it is apparent from the trial court's analysis of this issue that the trial court weighed the probative value and the prejudicial effect of the evidence before it ruled upon admissibility. The trial court's ruling on this matter was not arbitrary or unreasonable and did not constitute an abuse of discretion. See *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). Reasonable minds can disagree about whether certain evidence is admissible without requiring a reversal of a trial court's evidentiary ruling under the abuse of discretion standard. See *Donoho*, 204 Ill. 2d at 186.

¶ 50 For the foregoing reasons, I respectfully concur in part and dissent in part from the majority's order in the present case. I would affirm the judgment of the trial court in its entirety.