

No. 1-11-1164

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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. 08 C6 61809
)	
BENNIE GUNN,)	Honorable
)	Michele M. Simons,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction is affirmed where he invited the trial court's claimed error by agreeing to its response to the jury's question during deliberations. Defendant also failed to establish that his claim should be examined for plain error and that his trial counsel was ineffective where the evidence was overwhelming that defendant constructively possessed a handgun.

¶ 2 Following a jury trial, defendant Bennie Gunn was convicted of being an armed habitual criminal and sentenced to 10 years' imprisonment. His conviction arose from the execution of a search warrant of a home alleged to be defendant's residence, during which police officers recovered a handgun. Defendant appeals his conviction, contending the trial court committed

reversible error when it failed to respond to the jury's question during deliberations inquiring about the law of "knowingly possessed," and that his trial counsel was ineffective for failing to offer an instruction in response to the jury's inquiry.

¶ 3 On July 31, 2008, police officers executed a search warrant on the home located at 3554 Marseilles Lane in Hazel Crest. Defendant was not present at the home when the warrant was executed. Officers found a handgun in a locked bedroom at the back of the house. Officers also found in a television stand in the same bedroom a photograph of defendant with his mother and niece. They found a certificate of title to a vehicle in defendant's name with the Marseilles address and a checkbook in defendant's name with the Marseilles address. In addition to men's clothing and shoes in the closet, officers also found two traffic citations issued to defendant on July 16, 2008, with the Marseilles address.

¶ 4 When defendant was arrested, he was with his girlfriend Takiyah Childress in her Dodge Durango sport utility vehicle. Investigator Byrnes testified that he found a set of keys on the front passenger seat of the Durango and that defendant said the keys belonged to him. Byrnes tried the keys on the Marseilles house and found that they opened the front door and the back bedroom where the gun was located.

¶ 5 Officers Gutter and Kinella testified they interviewed defendant and defendant signed a written statement that Gutter wrote summarizing the interview. Of relevance to the instant appeal, the following was published to the jury:

"My name is Bennie Gunn. I am 31 years old and I live at 3554 Marseilles, and I occasionally live at 1320 [sic] South Carpenter. The police came and did a search warrant on my house at 3554 Marseilles in Hazel Crest.

I have a room upstairs in the back that I keep locked, and I have the key to the room. Everything in the room I have access to. The gun in the room is not mine. The police found the gun in my closet where most of my clothes and shoes are. I stay in the room, and my girlfriend, Kiyah, stays in the room with me when she is over.

*** The gun belongs to Kendrick Davis. The gun has been in my closet since he left it there a few months ago."

Gutter testified that he witnessed defendant sign and date the statement. Kinella also signed the statement.

¶ 6 Defendant's mother Ella Lillard testified for the defense. She testified that she owns the house on Marseilles and rented it to her sister, defendant's aunt, Rosemarie. Defendant lived with his mother at 11320 South Carpenter periodically between 2004 and 2007, and permanently since 2007. Defendant also "stayed" with his girlfriend in University Park. Lillard further testified that defendant "stayed over" at the Marseilles house to assist his sick aunt Rosemarie, but he did not live there on July 31, 2008, when the warrant was executed.

¶ 7 Eugene Scott also testified for the defense. He is the fiancé of defendant's deceased aunt Rosemarie. Scott testified that he lived at the Marseilles address at the time the search warrant was executed. He stayed in the locked bedroom where the gun was found and kept the door locked because Rosemarie told him to do so because there was a firearm in the bedroom. Defendant left some of his belongings in the bedroom when he moved out and told Scott that he could have the items. Scott testified to living at the Marseilles house "all the time." He denied telling the State's investigator that defendant stayed in the room where the gun was found or that defendant's girlfriend sometimes stayed overnight when defendant also stayed overnight.

¶ 8 Takiyah Childress, defendant's girlfriend, testified that defendant spent almost every night with her at her home in University Park in 2008, unless they were arguing. Defendant did not live with her because he also had a residence on Carpenter Street. Once a month she and defendant would go to defendant's aunt's house on Marseilles to help the aunt.

¶ 9 Defendant testified he lived at 11320 South Carpenter at the time the search warrant was executed. He did not live at the Marseilles address between the years 2004 and 2008. His state identification card issued on June 6, 2007 provides that his address is 11320 South Carpenter. He testified that the two traffic citations that police alleged were found in the locked bedroom were actually in his wallet until July 31, 2008 when an officer took possession of defendant's property and placed him in custody. He explained that the checkbook was linked to an old account he held in 2003. The certificate of title was for an old vehicle that had previously been seized by police. Defendant denied the set of keys found in the Durango belonged to him. He also denied signing the inculpatory statement that was published to the jury and denied telling Investigator Gutter that he lived at 3554 Marseilles, he knew there was a firearm in the closet, or that the owner of the gun was Kendrick Davis.

¶ 10 The parties stipulated that defendant had two qualifying felonies. In rebuttal, the State presented Officer Beard who testified that he issued the two traffic citations to defendant on July 16, 2008, and that defendant told the officer his address was 3554 Marseilles. The State's investigator, Joseph Thomas, testified that he interviewed Eugene Scott. During the interview, Scott said he occasionally lived at 3554 Marseilles but that he had other home addresses in Illinois and Indiana. He also said that defendant had a key to the locked bedroom, stayed at the house in the locked bedroom and kept his clothes in the room. Defendant's probation officer, Debra Francis, testified that she conducted a field visit to 3554 Marseilles to verify that the address defendant provided was actually his home address. When she arrived, a female relative

of defendant's stated that defendant lived at the Marseilles home. During intake on February 27, 2008, defendant informed her that his address was 3554 Marseilles. She met with defendant several times between February 2008 and September 2008 at the adult probation department in the Markham courthouse and each time, defendant said that he lived at 3554 Marseilles. She testified that when she met with him on February 9, 2009, defendant informed her that he moved to 11320 South Carpenter.

¶ 11 After the close of evidence, the jury deliberated. During deliberations, the jury sent the court six notes. The notes consisted of questions asking: the reason for the search warrant, whether defendant entered the house on Marseilles when he helped his aunt between 2004 and 2008, whether defendant testified that he did not sign the inculpatory statement, and the definition of "abode." The jury finally asked the court to come to the jury room to answer its questions. With the agreement of the parties, the court's response to the notes, in sum, was that the jury had heard all the evidence, received the law, and should apply the law to the evidence. The jury also sent a note asking the court: "[d]oes Bennie Gunn have to know that the gun was present on the premises when he was going in and out assisting his aunt to fulfill constructive possession. We are seeking clarification of the law of knowingly possessed." With the agreement of the attorneys, the trial court responded that the jury had been provided the law to assist in its deliberations and requested the jury apply the law to the facts and continue to deliberate. The jury found defendant not guilty of unlawful use of a weapon by a felon, and guilty of the offense of being an armed habitual criminal. The trial court sentenced defendant to 10 years' imprisonment.

¶ 12 On appeal, defendant first contends the trial court erred in failing to offer additional jury instructions in response to the jury's request for clarification of "knowingly possessed" during deliberations. Defendant acknowledges he failed to preserve this issue for appeal, and therefore

asks this court to review his claim under the plain error doctrine. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (in order to preserve an error for appeal, the error must be objected to and included in the post-trial motion). Before we determine whether to review for plain error, we will first examine whether defendant waived this claim altogether because he invited the trial court's claimed error.

¶ 13 "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). Here, defense counsel not only failed to object to the State's proposed response to the jury's question, defense counsel agreed to it. When the trial court read the response that it would provide to the jury, the defense failed to object. Because defendant actively participated in the trial court's response to the jury's question by acquiescing to the proposed response, he cannot now contend the trial court erred in the very course of action he welcomed at trial. See *People v. Villarreal*, 198 Ill. 2d 209, 227-228 (2001). Therefore, defendant's claim of trial court error is procedurally defaulted.

¶ 14 Further, even if we were to consider defendant's claim for plain error, the evidence was not closely balanced; consequently, there was no plain error. The evidence was overwhelming that defendant constructively possessed the handgun. Illinois law makes clear that for a defendant to be found guilty of constructive possession of a weapon, the State must prove beyond a reasonable doubt that the defendant (1) had knowledge of the presence of the weapon; and (2) had immediate and exclusive control over the weapon. See *e.g.*, *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17; and *People v. Ross*, 407 Ill. App. 3d 931, 935 (2011). The State's evidence showed that defendant knew the weapon was in the closet as shown by defendant's statement to Officers Gutter and Kinella. Gutter testified that defendant signed the statement. According to the statement, defendant informed the police that he lived at 3554 Marseilles, he

knew the gun was in his room, he had the key to the room, and he kept his clothes and shoes in the room. Although defendant's statement says that the gun belonged to someone else, defendant's statement unequivocally provides that defendant knew of the gun's presence in his room.

¶ 15 Additionally, the State presented several items of evidence establishing defendant's residency at 3554 Marseilles. This evidence included two traffic citations issued to defendant just two weeks prior to the execution of the search warrant which indicated defendant's home address was the Marseilles home. Officer Beard testified that he issued the citations to defendant and that defendant provided the Marseilles address as his home address. Defendant's probation officer, Debra Francis, testified that she verified defendant's home address and that on several meetings with defendant between February 2008 and September 2008, defendant informed her that his home address was the Marseilles home. It was not until February 2009 that defendant told Francis that he moved to 11320 South Carpenter in Chicago. Although defendant describes the evidence as closely balanced, it was, in fact, overwhelming despite the defense witnesses' testimony that defendant did not reside at the Marseilles address. See *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 88 (holding that under plain error analysis evidence is not closely balanced simply because the trier of fact was forced to resolve "credibility contest"). Therefore, there was no plain error.

¶ 16 Next, defendant contends his trial counsel was ineffective for failing to tender an instruction that would resolve the jury's question. To establish a claim of ineffective assistance of trial counsel, defendant must show that "counsel's representation fell below an objective standard of reasonableness," and that he suffered prejudice as a result, such that there is a reasonable probability that but for this deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To

succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied. *Id.* at 687. A reviewing court may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance. *Id.* at 697. For the same reasons that we found no plain error because the evidence was not closely balanced, we also find that defendant suffered no prejudice due to trial counsel's failure to tender an instruction. As discussed, the evidence was overwhelmingly that defendant constructively possessed the weapon, thus it is unlikely that defendant's suggested jury instructions would have changed the outcome of his trial. Consequently, defendant was not prejudiced by trial counsel's failure to tender an instruction in response to the jury's question during deliberations and he failed to establish that his counsel was ineffective.

¶ 17 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.