

No. 1-11-1924

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 10 CR 2869
)	
CLEON JONES,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 Held: Defendant was convicted of unlawful possession of a firearm by a gang member and being an armed habitual criminal. The appellate court held that defendant did not receive ineffective assistance of trial counsel and the trial court did not commit plain error in admitting his post-arrest statements to the police.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Cleon Jones was convicted of unlawful possession of a firearm by a gang member (720 ILCS 5/24-1.8(a)(1) (West Supp. 2009)) and being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)). The trial judge sentenced defendant to 30 years' imprisonment on the armed habitual criminal charge.

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Defendant now appeals, arguing that: (1) he received ineffective assistance of counsel because counsel failed to move to sever the charges; and (2) the trial court erred when it allowed the State to introduce defendant's post-arrest statement. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by information with one count of being an armed habitual criminal, two counts of unlawful use of a weapon by a felon, one count of unlawful possession of a weapon by a street gang member and two counts of aggravated unlawful use of a weapon. However, at trial, the State proceeded on only the armed habitual criminal and unlawful possession of a firearm by a street gang member charges.

¶ 5 Chicago Police Officer Gadzik testified that on January 3, 2010, at approximately 10:45 p.m., he and his partner, Officer Chilipala, were driving in their squad car on 116th Street. At that time, Officer Gadzik noticed a man walking into an alley near Racine Street. The area was lit by a nearby street lamp. Officer Gadzik stated that he could see that the man was drinking a beer. Officer Chilipala pulled the squad car into the alley. Officer Gadzik saw the man's profile. Officer Gadzik identified defendant as the man he saw walking with the beer.

¶ 6 According to Officer Gadzik, after defendant saw the police, he began running in the direction from which he came. Officer Gadzik exited his squad car and pursued defendant on foot. During the pursuit, another man, whom Officer Gadzik identified only as Latham, began to run in the same direction as defendant. While he was pursuing defendant, Officer Gadzik radioed in a description of him. Latham continued running westbound down 116th Street, but

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defendant ran into the backyard of a house at 11600 South Racine. Officer Gadzik testified that he saw defendant throw an object onto the roof of the attached garage at that location. Defendant then turned left around the garage and Office Gadzik lost sight of him. After a search of the immediate area, Office Gadzik was unable to find defendant.

¶ 7 Officer Gadzik further testified that he received a radio call shortly thereafter and walked to the intersection of 116th and May Streets. Two officers drove up with defendant in the back of their squad car. Officer Gadzik identified defendant as the person he had been chasing and as the person he saw throw the object onto the garage roof. Officer Gadzik then returned to the location where he saw defendant throw the object onto the roof. Another officer helped Officer Gadzik climb onto the roof. Office Gadzik stated that he retrieved a .45 caliber handgun from the gutter. He removed the magazine and ejected a round from the chamber of the gun. The gun was not submitted for fingerprints.

¶ 8 At the police station, Office Gadzik processed defendant's arrest and asked him identifying questions, including whether he was a gang member. Initially, defendant refused to answer the questions, but then told Officer Gadzik that he lived at 11601 May Street. Defendant then stated he was "GD" and made a hand gesture of a pitchfork, which Officer Gadzik stated is a sign associated with the Gangster Disciples street gang. Officer Gadzik noticed that defendant had a tattoo of a six-pointed star with a "G" in middle, which he stated represents the Gangster Disciples. Defendant also had a tattoo stating "79 Loomis Boy." Officer Gadzik identified the intersection of 79th and Loomis Streets as an area controlled by the Gangster Disciples.

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¶ 9 Over defense counsel's pretrial objection, Officer Gadzik testified to further statements defendant made at the police station. After defendant was processed, and he was being escorted to a holding cell by Officers Gadzik and Timothy Fary, defendant stated, "Y'all ain't the only ones with guns. One day someone might be waiting." According to Officer Gadzik, defendant then held up his fingers in the shape of a gun and pointed at the officers and stated, "pop."

¶ 10 On cross-examination, Office Gadzik testified that when he radioed for assistance, he gave a description of a man with a black coat and jeans. Officer Gadzik acknowledged that defendant was wearing a dark navy blue hooded sweatshirt and jeans. When asked whether he gave a description of only one man to the dispatcher, Officer Gadzik responded that he probably gave a general description of the individuals who were running. Officer Gadzik also acknowledged that when the dispatcher asked whether the man he had chased was "an older guy," he had responded, "I don't know. I'm not sure about his age. I saw him from behind."

¶ 11 Chicago Police Officer Altenbach testified that on the night in question, he and his partner responded to Officer Gadzik's radio call at approximately 10:54 p.m. Officer Altenbach saw a man walking eastward on 116th Street. According to Officer Altenbach, the man was breathing heavily. He felt the man's chest and detected a rapid heartbeat, which Officer Altenbach took as a sign that the man had been running. Officer Altenbach placed the man in his squad car and transported him to Officer Gadzik's location, where Officer Gadzik identified him as the man he had been chasing.

¶ 12 Officer Fary testified that he also responded to Officer Gadzik's radio call and saw Officer Gadzik chasing two suspects near the intersection of 116th and Racine Streets. Officer Fary

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stated that he lost sight of Officer Gadzik when Officer Gadzik veered to chase the man later identified as defendant. Officers Fary and Chilipala continued to pursue the man identified in the record as Latham and caught him approximately two blocks further west on 116th Street. When Officer Fary returned to his squad car, defendant was already in the back of the car. Officer Fary testified that while he was driving to the police station, defendant asked, "Did you find the clip?" Officer Fary asked defendant which clip, to which defendant responded, "The 45 cal," which Officer Fary understood as referring to a .45 caliber handgun.

¶ 13 Officer Fary also testified that at the police station, after Officer Gadzik read defendant his *Miranda* rights, defendant asked, "So you found the gun with all the bullets?" Officer Fary stated that he did not answer that question. Officer Fary further corroborated Officer Gadzik's testimony regarding defendant's statements as defendant was being placed in the holding cell.

¶ 14 Chicago Police Officer Emmet McClendon testified as an expert on Chicago street gangs. Officer McClendon testified that the Gangster Disciples operate in various areas of Chicago, including the area where defendant was arrested and the area around the intersection of 79th and Loomis Streets. Officer McClendon stated that the Gangster Disciples use violence to punish those who falsely represent themselves as members of the gang. Officer McClendon corroborated Officer Gadzik's testimony that the pitchfork, the six-pointed star, and the numbers seven and nine are symbols of the Gangster Disciples. Officer McClendon further testified that he examined defendant and found several tattoos including the six-pointed star and the numbers seven and nine.

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¶ 15 The parties stipulated that defendant had two prior felony convictions that satisfied the requirements for conviction under the armed habitual criminal statute: a 1994 conviction for unlawful use of a weapon by a felon and a 1997 conviction for aggravated vehicular hijacking. The State also submitted a document from the Illinois State Police stating that defendant was never issued a firearms owner's identification card.

¶ 16 The State rested its case. The trial judge denied a defense motion for a directed verdict. The defense rested its case without presenting witnesses. Following closing arguments and jury instruction, the jury deliberated and found defendant guilty of unlawful possession of a firearm by a gang member and being an armed habitual criminal. On June 7, 2011, defendant filed a posttrial motion for a new trial or an arrest of judgment. Following a hearing, the trial judge denied the posttrial motion and proceeded to a sentencing hearing. After hearing evidence in aggravation and mitigation, the trial judge sentenced defendant to serve 30 years in the Illinois Department of Corrections on the armed habitual criminal charge. Defendant moved to reconsider his sentence *instanter*, claiming the sentence was excessive. The trial court denied the motion, noting that the sentence imposed was the maximum unextended sentence, but that an extended sentence could have been imposed in this case. On June 13, 2011, defendant filed a timely notice of appeal to this court.

¶ 17

ANALYSIS

¶ 18 On appeal, defendant first argues that he received ineffective assistance of trial counsel because counsel failed to move to sever the charge of armed habitual criminal from the charge of unlawful possession of a firearm by a gang member, thereby exposing the jury to highly

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prejudicial, irrelevant gang-related evidence on the former charge. Generally, to show ineffective assistance of counsel, a defendant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), adopted by *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). We give great deference to the attorney's decisions as there is a strong presumption that an attorney has acted adequately. *Strickland*, 466 U.S. at 689. A defendant must overcome the strong presumption the challenged action or inaction "might have been the product of sound trial strategy." *E.g., People v. Evans*, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). Every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Strickland*, 466 U.S. at 687; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 19 Generally, a defense decision not to seek a severance, although it may prove unwise in hindsight, is regarded as a matter of trial strategy. *People v. Poole*, 2012 IL App (4th) 101017,

¶ 10. Defendant relies upon *People v. Edwards*, 63 Ill. 2d 134 (1976), and its progeny. In *Edwards*, the Illinois Supreme Court held that the trial court abused its discretion in refusing to grant the defendant's motion to sever an unlawful use of weapons charge from an armed robbery

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charge. *Id.* at 140. Although the State generally has an interest in its pursuit of judicial economy in prosecuting all charges against one defendant in one trial, that interest was not so strong as to justify the denial of a severance in *Edwards*. *Id.* The *Edwards* court's holding was based on the fact that the weapons count created a strong probability that the defendant would be prejudiced in his defense of the armed robbery count since the weapons count required the State to prove a previous burglary conviction. *Id.* Thus, the supreme court upheld this court's reversal of the defendant's armed robbery conviction. *Id.* Following *Edwards*, this court also rejected the argument that this type of prejudice can be cured by limiting instructions. *People v. Bracey*, 52 Ill. App. 3d 266, 274 (1977).

¶ 20 However, *Edwards* does not involve a claim of ineffective assistance of counsel. On that specific claim, the State cites *People v. Gapski*, 283 Ill. App. 3d 937 (1996). In *Gapski*, the defendant was convicted of criminal sexual assault and unlawful possession of a weapon by a felon. *Id.* at 939. On appeal, Gapski claimed he received ineffective assistance of counsel in part because counsel failed to move to sever the charges, thereby allowing the jury, while considering the sexual assault count, to hear that Gapski was convicted of burglary in 1977. *Id.* at 941.

¶ 21 On appeal, this court ruled that trial counsel's failure to seek a severance could be viewed as a matter of trial strategy. *Id.* at 942. This court reasoned that counsel no doubt anticipated that the defendant would testify at trial and that his credibility could be impeached with another prior felony conviction from Wisconsin pursuant to *People v. Montgomery*, 47 Ill. 2d 510, 515-16 (1971). *Gapski*, 283 Ill. App. 3d at 942. "Thus, regardless of whether the two counts were severed, the jury would be aware that the defendant had a prior felony." *Id.* The *Gapski* court

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considered that counsel may have "felt that it made sense to try for an acquittal of both counts in one proceeding, thinking that the impact of the additional conviction would not be significant." *Id.* at 943. Furthermore, the *Gapski* court noted that the jury for the sexual assault count would hear all the evidence regarding the related weapons charge, regardless of whether or not the counts were severed, because the evidence regarding the weapons charge was related to the sexual assault count as an admission against the defendant's interest. *Id.*

¶ 22 This case is distinguishable from *Gapski*, insofar as a jury hearing only the armed habitual criminal charge would not necessarily have heard the evidence of gang membership if the charges had been severed. Illinois courts recognize there may be a strong prejudice against street gangs and hold that "evidence indicating a defendant is a member of a gang or is involved in gang-related activity is admissible only where there is sufficient proof that membership or activity in the gang is related to the crime charged." *People v. Strain*, 194 Ill. 2d 467, 477 (2000). Nevertheless, the basic premise of *Gapski* and *Poole* is that, when deciding whether to seek a severance, defense counsel may choose to pursue an "all or nothing" trial strategy, in which the defendant is acquitted or convicted of all charges in a single proceeding. Illinois case law endorses the "all or nothing" strategy in other situations, such as where the defense decides to forego the factfinder's consideration of lesser included offenses. See, e.g., *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007) (and cases cited therein). The mere fact that an "all or nothing" strategy proved unsuccessful does not mean counsel performed unreasonably and rendered ineffective assistance. *Id.* Here, despite the admission of gang-related evidence, defense counsel may have believed that the odds of getting two acquittals were greater in one proceeding, rather

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than two proceedings. Accordingly, defendant has failed to overcome the strong presumption that defense counsel's action or inaction "might have been the product of sound trial strategy." *Evans*, 186 Ill. 2d at 93. Thus, defendant's claim of ineffective assistance of counsel fails on this point.

¶ 23 Defendant next argues that he was denied a fair trial by the trial court's admission of the statement to the police that, "Y'all ain't the only ones with guns. One day someone might be waiting," after which defendant held up his fingers in the shape of a gun, pointed them at the officers and stated, "pop." Defendant concedes he forfeited this issue by failing to raise it in his posttrial motion. *E.g.*, *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Defendant asks us to review this issue pursuant to Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). Rule 615(a) creates an exception to the forfeiture rule by allowing courts of review to note "[p]lain errors or defects affecting substantial rights." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Under Illinois' plain error doctrine, a reviewing court may consider a forfeited claim 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 strength of the evidence.' " *Johnson*, 238 Ill. 2d at 484 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

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The plain-error doctrine is intended to ensure that a defendant receives a fair trial, but it does not guarantee every defendant a perfect trial. *Johnson*, 238 Ill. 2d at 484. Rather than operating as a general savings clause, it is construed as a narrow and limited exception to the typical forfeiture rule. *Id.* The burden of persuasion rests with the defendant under both prongs of the plain-error analysis. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010). The ultimate question of whether a forfeited claim is reviewed as plain error is a question of law that is reviewed *de novo*. *Johnson*, 238 Ill. 2d at 485.

¶ 24 The first step in plain-error analysis is to determine whether error occurred at all before proceeding to consider whether either prong of the doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90. Defendant argues that the statements are not admissible as admissions. Generally, an admission is a "statement of independent fact which, when taken in connection with proof of other facts, may lead to an inference of guilt of the crime charged, but from which guilt does not necessarily follow." *People v. Muhammad*, 257 Ill. App. 3d 359, 368 (1993). However, this court has also ruled that "[a]ny statement by an accused person, unless excluded by the privilege against self-incrimination or other exclusionary rules, may be used against him as an admission, even if it is not inculpatory or against interest." See, e.g., *People v. Summers*, 353 Ill. App. 3d 367, 374-75 (2004). Defendant maintains that the statements at issue should have been excluded as irrelevant. Yet the statements here, in the context of the trial record, may lead to the inference that defendant is a gang member, which is an element of one of the offenses charged in this case. Given the record on appeal, we conclude that the trial judge did not make a clear or obvious error in admitting the statements.

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¶ 25 Furthermore, even assuming *arguendo* that the trial court erred in admitting the statements, that error would not constitute plain error in this case. Defendant asserts that the evidence was closely balanced, but he does not challenge the sufficiency of the evidence to convict him. Defendant argues that the identification testimony was weak, but overlooks that he asked the police whether they found the gun and ammunition. Although defendant does not argue the second prong of the plain error analysis, based on the reasons already stated, we conclude the admission of his statements did not affect the fairness of the trial or impact the integrity of the judicial process. See *Johnson*, 238 Ill. 2d at 484.

¶ 26 Lastly, defendant argues in passing that he received ineffective assistance of trial counsel for failing to preserve the issue regarding the statements by renewing the trial objection in the posttrial motion. Defendant relies on *Davis v. Secretary for Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003), which is easily distinguishable as involving counsel's failure to raise a meritorious claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Davis*, 341 F.3d at 1316. In this case, for the reasons already stated, we conclude that there is no reasonable probability that, had the statements been excluded, the outcome of the trial would have been different. Accordingly, defendant's ancillary claim of ineffective assistance of trial counsel fails.

¶ 27 CONCLUSION

¶ 28 In sum, we conclude that defendant did not receive ineffective assistance of trial counsel and the trial court did not commit plain error in admitting his statements to the police. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.