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2013 IL App (3d) 110438-U

Order filed January 3, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 10th Judicial Circuit, |
| | ) | Peoria County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-11-0438 |
| v. | ) | Circuit No. 09-CF-1374 |
| | ) | |
| NIKKO J. CLARK, | ) | Honorable |
| | ) | Stephen A. Kouri, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Wright and Justice Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Counsel was ineffective for failing to offer a necessity instruction for the offense of unlawful possession of a weapon by a felon.

¶ 2 Defendant, Nikko J. Clark, was charged with first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). Following a jury trial, defendant was convicted of unlawful possession of a weapon by a felon. The jury was unable to return a verdict on the first degree murder charge. Defendant

appeals his conviction, arguing that defense counsel was ineffective for failing to offer a necessity instruction. We reverse and remand.

¶ 3 FACTS

¶ 4 On December 15, 2009, the State charged defendant with first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The cause proceeded to a jury trial.

¶ 5 At trial, defendant testified that on the night of the incident he consumed alcohol with Brandon Grant, Alexis Sims, Kendall Drummond, and Lasashai Dillard. After becoming intoxicated, they decided to return to defendant's apartment and play the video game Madden football. While defendant set up the game, he noticed Drummond reach inside his waistband, pull out a gun, and place it on the couch. Drummond and Sims then fell asleep on the couch with the gun concealed.

¶ 6 While Drummond and Sims slept in the same room, Grant and defendant played Madden football. They placed wagers on the games. At some point, Grant accused defendant of cheating and demanded his money back. Drummond woke up and joined Grant in his demand that defendant give him back his money. When defendant refused, Drummond stood up with the gun in his hand. At that moment, Grant attacked defendant, and the two crashed to the floor. Grant positioned himself on top of defendant and began punching him. Defendant then felt something hit him hard in the forearm and saw the gun lying on the floor within his reach. Defendant reached for the gun because he was afraid that it would be used against him. As he grabbed the gun, so did Drummond, and the gun went off.

¶ 7 Defendant testified that after the gun fired for the first time, Dillard came into the room

and told Grant to get off of defendant. Grant, still straddling defendant, ignored Dillard's plea and attempted to punch defendant hard enough to knock him out. Defendant did not lose consciousness, and Grant told Drummond to grab the gun. As Drummond grabbed the gun, which was still in defendant's hands, the gun went off, and Grant was killed. Defendant did not pull the trigger and did not attempt to shoot Grant.

¶ 8 At the conclusion of defense counsel's direct examination of defendant, the following sequence occurred:

> "Q. Now, just one question here, final question, when you grabbed that handgun, did you feel that it was necessary to avert danger to yourself?
>
> A. Yes, sir, and I felt like that would get the situation resolved.
>
> Q. Okay. Did you feel that what you were doing was necessary?
>
> A. Yes, sir.
>
> Q. And did you believe what you were doing when you grabbed towards the gun was reasonable under the circumstances?
>
> A. Yes, sir. I got two people that's against me, I don't want them with the gun."

¶ 9 Sims, Drummond, and Dillard also testified. Sims stated that she did not see a gun before she fell asleep on the couch. When she woke up, defendant and Grant were involved in an altercation. At some point she noticed defendant with the gun. She believed that defendant pulled the gun out of his pants; however, when pressed she admitted that she was not certain where the gun came from and was only assuming it was defendant's gun. Drummond testified that he did not remember what happened the night of the incident. His testimony, however, was impeached with a prior videotaped statement. In the statement, Drummond said that the gun was

sitting on the couch next to him and he did not know how defendant came into possession of it during the altercation. Drummond claimed that the gun must have been defendant's because it was not his. Finally, Dillard testified that she witnessed part of the fight between defendant and Grant; however, she did not see anyone with a gun.

¶ 10 Prior to the case going to the jury, defense counsel tendered self-defense, second degree murder, and involuntary manslaughter instructions as alternatives to first degree murder. Counsel did not request a necessity instruction with regards to unlawful possession of a weapon by a felon. The trial court refused to issue the proposed instructions because it found that there was no evidence that defendant intentionally fired the gun.

¶ 11 The jury found defendant guilty of unlawful possession of a weapon by a felon; however, it could not reach a unanimous verdict on the first degree murder charge. The court sentenced defendant to four years' imprisonment for unlawful possession of a weapon by a felon. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 Defendant argues that counsel was ineffective for failing to offer a necessity instruction with regards to the charge of unlawful possession of a weapon by a felon. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984). In order to establish the first prong, defendant must show that counsel's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 241 Ill. 2d 319 (2011). In

doing so, defendant must overcome a strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *Id.* This presumption may be overcome where no reasonably effective criminal defense attorney would engage in similar conduct. *People v. Fletcher*, 335 Ill. App. 3d 447 (2002).

¶ 14 In this case, we conclude that counsel's performance fell below an objective standard of reasonableness. During the course of the trial, defense counsel produced evidence supporting a necessity defense. To establish the defense of necessity, there must be evidence showing that defendant: (1) was without blame in occasioning or developing the situation; and (2) reasonably believed that his conduct was necessary to avoid a greater public or private injury than that which might reasonably have resulted from his conduct. *People v. Kucavik*, 367 Ill. App. 3d 176 (2006). Here, evidence established that defendant and the victim were engaged in a fight. Defendant testified that he did not introduce the gun into the fight; however, he struggled for possession of the gun so that it could not be used against him. Defense counsel specifically asked defendant if he thought grabbing the gun was reasonable and necessary to avert danger to himself, and defendant responded that he did believe it necessary. Therefore, based on the evidence counsel produced at trial, we find that it was unreasonable not to request a necessity instruction.

¶ 15 We further find that defendant has shown a reasonable probability that the result of the proceeding would have been different absent counsel's deficient performance. First, we find that the trial court would have granted defendant's request for a necessity instruction. A defendant is entitled to an instruction on an affirmative defense where evidence produced at trial supports such a theory. *Id.* In this case, there was evidence that defendant did not introduce the gun into

the altercation and that defendant possessed the gun only because he believed it necessary to avoid harm to himself. Therefore, evidence supported a necessity instruction and, had counsel requested it, the jury would have been so instructed.

¶ 16 Second, there is at least a reasonable probability that had the jury been instructed on necessity, they would have found defendant not guilty of unlawful possession of a weapon by a felon. As we have indicated, there was evidence that defendant grabbed the gun because he believed it necessary to avert harm to himself. Evidence also established conflicting theories regarding the origin of the gun in the apartment. Defendant claimed that Drummond brought the gun into the apartment. Drummond and Sims indicated that defendant must have brought the gun into the apartment. With this conflicting evidence, the jury would have been forced to decide who was more credible, defendant or Drummond and Sims. Our review of the record reveals that Drummond and Sims' accounts were inconsistent. Therefore, we believe there is a reasonable probability that the jury would have concluded that defendant did not bring the gun into the altercation and was justified in possessing it during the fight.

¶ 17 Based on the foregoing, we find that counsel was ineffective. Therefore, we reverse defendant's conviction and remand the cause for a new trial.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for further proceedings.

¶ 20 Reversed and remanded.