

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).

2013 IL App (3d) 110827-U

Order filed November 8, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 10th Judicial Circuit,
Plaintiff-Appellee,) Peoria County, Illinois,
)
v.) Appeal No. 3-11-0827
) Circuit No. 11-CF-546
DEANGLIS D. TURNER,)
) Honorable
Defendant-Appellant.) Stephen Kouri,
) Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The defendant's conviction for aggravated unlawful use of a weapon is vacated because the weapon statute violates the constitutional right to keep and bear arms; (2) the defendant received effective assistance of counsel; (3) the defendant's mob action sentence is reduced to three years' imprisonment because it was not of the most serious class for which the defendant was convicted; and (4) the defendant's remaining sentence was not an abuse of discretion.

¶ 2 After a jury trial, the defendant, Deanglis D. Turner, was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), aggravated discharge of a firearm (720

ILCS 5/24-1.2(a)(2) (West 2010)), aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1) (West 2010)), and mob action (720 ILCS 5/25-1(a)(1) (West 2010)). The trial court sentenced the defendant to 30 years' imprisonment for aggravated battery with a firearm and extended-term sentences of 14 years' imprisonment for aggravated unlawful use of a weapon and 6 years' imprisonment for mob action, with all sentences to be served consecutively. On appeal, the defendant argues that: (1) he received ineffective assistance of counsel; (2) his AUUW conviction violates the one-act, one-crime rule; (3) his extended-term sentences on his AUUW and mob action convictions were improper; (4) his overall sentence was an abuse of discretion; and (5) the AUUW statute violates his constitutional right to bear arms. We affirm in part, reverse in part, and modify in part.

¶ 3

FACTS

¶ 4 The defendant was charged by indictment with two counts of attempted first degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2010)) and one count each of aggravated battery with a firearm, aggravated discharge of a firearm, AUUW, and mob action. On September 19, 2011, the matter proceeded to a jury trial.

¶ 5 The victim, Marckus Davis, testified that on May 30, 2011, he was at Casie Ledgerwood's home on Wiswall Street in Peoria with his friend David Purdle. Just before noon, Purdle got into an argument with Demarquis Turner over a "Link card" that Demarquis had sold to Purdle a week earlier. Purdle refused to return the card, and Demarquis became upset and left the house to get his family.

¶ 6 Shortly thereafter, Demarquis returned with a group of people. Purdle went outside to speak with Demarquis, and an argument ensued. Approximately one minute later, four to five

people ran toward the home with guns. Davis entered the argument, and a young thin African-American male returned his gun to a nearby house. The recently unarmed male then got into a fight with Purdle. Davis ran towards Purdle and got into a fight with the defendant. Davis estimated that 20 minutes elapsed between Demarquis' return and the fight. During the fight, a woman hit Davis with a milk crate. Davis turned, grabbed the crate, heard several gunshots, and realized that he had been shot. Davis saw the defendant and the thin African-American male shooting. Ledgerwood attempted to drive Davis to the hospital, but they were stopped by the police. Paramedics transported Davis to the hospital where he received treatment for 13 to 15 gunshot wounds.

¶ 7 While Davis was in the hospital, he was interviewed by the police. Davis identified the individuals involved in the shooting from a photographic lineup. Davis was sure that he saw two people shooting on May 30, 2011. Davis also admitted that he had a 2004 juvenile burglary adjudication and that he had smoked marijuana on the morning of the shooting.

¶ 8 Purdle stated that he was incarcerated in the Peoria County jail on pending charges for unlawful possession with intent to deliver and he had prior convictions for burglary, retail theft, obstructing justice, and unlawful delivery of a controlled substance.

¶ 9 On the day of the shooting, Purdle was with Davis at a house on Wiswall street. The house was located two houses down from where the defendant and his family lived. Purdle had a "little altercation" with Demarquis over a Link card he had borrowed, but had not returned. Purdle did not return the card because he had lost it. Sometime after Demarquis left, Purdle got into a fight with William Morris. Charlene Alexander attempted to break up the fight because Morris was her younger brother. When Purdle heard gunshots, he dropped to the ground. Purdle

heard six or more shots, but he did not see Davis get hit. Purdle did not report the incident to the police because he was on parole.

¶ 10 A few days later, Purdle was arrested for possession of a controlled substance and agreed to speak with the police about the shooting with the hope that they would drop his controlled substance charge. The police showed Purdle a photographic lineup, and he identified the defendant and Demarquis from their pictures and nicknames. Purdle also said that he and Davis had taken Ecstasy pills on the date of the shooting.

¶ 11 Alexander testified that the defendant, Demarquis, and Morris were her brothers. Alexander was also charged in the May 30, 2011, incident, but agreed to a plea deal in exchange for her testimony in the instant case.

¶ 12 On the day of the shooting, Demarquis called Alexander and asked her to get his Link card from Purdle. Alexander sent Morris to get the card, but Purdle would not give the card to Morris. Alexander attempted to get the card from Purdle, but Purdle again said that he did not have the card. Thereafter, Purdle and Morris started fighting. Alexander tried to break up the fight by hitting them with a milk crate. Purdle grabbed Alexander, and they fell to the ground. While on the ground, Alexander heard six gunshots. The defendant was not at the scene on the day of the shooting.

¶ 13 Alexander remembered that she participated in a videotaped interview with the police. However, she denied saying that the defendant was standing off to the side at the time of the shooting. Alexander also stated that she had prior convictions for delivery of a controlled substance and a juvenile adjudication for aggravated battery.

¶ 14 Mike Bornsheuer testified that he was an investigator for the Peoria County State's

Attorney's office. On September 1, 2011, he conducted a videotaped statement with Alexander. In the statement, Alexander said that the defendant was at the scene and fought with Purdle's brother, Charles. Alexander reported that Charles was a "chubby guy" and the fight between Charles and the defendant was "big one versus big one."

¶ 15 Tamia Howell testified that she was nine years old and she lived at 2124 Wiswall Street. Just before noon on May 30, 2011, she was getting ready to leave her house when she saw two African-American males arguing. The argument escalated into a fight, and the defendant pulled out a gun and began shooting. The shooting occurred across the street from Howell's house.

¶ 16 John Secretan testified that on May 30, 2011, he lived at 2126 Wiswall Street. Around noon, he was in his bedroom watching television when he heard 12 or more gunshots from two guns. Secretan looked out the window and saw several people coming out of the house across the street. Secretan thought that one African-American male was carrying a gun.

¶ 17 Detective Steven Garner spoke with Purdle about the incident on June 3, 2011. Garner showed Purdle a photographic lineup containing pictures of several African-American males. Purdle identified the defendant as a shooter. In a different photographic lineup, Purdle identified Avery McShan as another shooter. Purdle also identified photographs of Demarquis, Morris, and Alexander as other individuals involved in the fight.

¶ 18 Peoria Police Officer Paul Tuttle testified that he recovered nine nine-millimeter shell casings and two copper jackets from the scene. Tuttle did not find a gun at the scene, and he was unable to recover fingerprints from the shell casings and jackets. An Illinois State Police forensic scientist confirmed that the casings had been fired from the same gun.

¶ 19 The parties stipulated that the defendant was previously convicted of a felony.

¶ 20 Nakesia Hollins testified that the defendant was the father of her two children. On May 29, 2011, the defendant came to Hollins' apartment to celebrate her birthday. The defendant spent the night at Hollins' apartment. Around 10 or 11 a.m., or possibly as late as 11:45 a.m. the following morning, Hollins and the defendant were awoken by a telephone call. After the call, the defendant got out of bed, dressed, and left the apartment without Hollins. Hollins later learned that there had been an altercation, but she noted that the defendant was with her at the time the altercation occurred. Hollins estimated that it would take between 5 and 20 minutes to drive between her apartment and Wiswall Street.

¶ 21 The defendant testified that he got together with Hollins on May 29, 2011, to celebrate her birthday. The defendant spent the night at Hollins' apartment and was awakened late the next morning by a telephone call from Marvin McShan. After the call, the defendant went to Wiswall Street where he was met by police officers who told him he could not travel any further because there had been a shooting. The defendant was not present when the shooting occurred. Bystanders informed the defendant that there had been a fight in front of his sister's house.

¶ 22 On cross-examination, the defendant agreed that he had been arrested on June 7, 2011. The defendant told the police that he was at Hollins' apartment at the time of the shooting. In rebuttal, Garner testified that the defendant did not tell him that he had spent the night before the shooting at Hollins' apartment.

¶ 23 The jury found the defendant not guilty of attempted first degree murder and guilty of aggravated battery with a firearm, aggravated discharge of a firearm, AUUW, and mob action.

¶ 24 At the sentencing hearing, Hollins testified that the defendant was a good father to their children. Hollins also stated that the defendant helped his mother with her health problems and

had never been a violent person. The defendant's presentence investigation report stated that the defendant was 27 years old. He had a prior felony conviction for unlawful possession of a stolen motor vehicle, a juvenile adjudication for burglary, and four misdemeanor convictions. The trial court stated that it had considered the defendant's presentence investigation report, the evidence and arguments presented by the attorneys, the defendant's statements, and the statutory matters in aggravation and mitigation. The court concluded that it was not insensitive to "the hardship and the hurt that is imposed upon family members of the [d]efendant" but stated that it was "sick of handing out stiff sentences for shootings" and was going to continue entering stiff sentences "until the message sinks in." The court sentenced the defendant to a term of 30 years' imprisonment for aggravated battery and consecutive extended-term sentences of 14 years' imprisonment for AUUW and 6 years' imprisonment for mob action. The court ordered that the sentences be served consecutively in order to protect the public from further criminal conduct by the defendant. The court did not impose a sentence on the defendant's conviction for aggravated discharge of a firearm.

¶ 25

ANALYSIS

¶ 26

I. AUUW Conviction

¶ 27 The defendant raises several issues concerning the validity of his AUUW conviction, including: (1) his AUUW conviction violated the one-act, one-crime rule; (2) the extended-term sentence on his AUUW conviction is invalid; and (3) the AUUW statute violates his second amendment right to bear arms for self-defense outside of the home. We find that the defendant's third issue resolves each of the remaining AUUW issues.

¶ 28 In *People v. Aguilar*, 2013 IL 112116, our supreme court ruled that section 24-1.6(a)(1),

(a)(3)(A) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)) violates the right to keep and bear arms as guaranteed by the second amendment to the United States Constitution (U.S. Const., amend. II). The *Aguilar* ruling rendered the offense of AUUW void *ab initio*; that is, "it was as if the law never existed." *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). Therefore, we reverse the defendant's AUUW conviction.

¶ 29 II. Ineffective Assistance of Counsel

¶ 30 The defendant argues that he received ineffective assistance of trial counsel because his defense attorney agreed to the admission of his prior felony conviction based on the mistaken belief that it was an element of AUUW. The State agrees that the defendant's prior felony conviction was not an element of AUUW, but argues that counsel's error did not prejudice the outcome of the case. Although we reversed the defendant's AUUW conviction, we review this issue to determine if the admission of the defendant's prior felony conviction affected the other convictions.

¶ 31 To prevail on an ineffective assistance of counsel claim, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced the defendant as to deny him a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). The determination of whether counsel provided ineffective assistance is a mixed question of fact and law. *People v. Davis*, 353 Ill. App. 3d 790 (2004). We defer to the trial court's findings of fact, but review the ultimate legal issue *de novo*. *Id.*

¶ 32 In the instant case, the parties agree that defense counsel's representation was deficient. Under section 24-1.6 of the Code, a defendant's prior felony conviction enhances an AUUW conviction from a Class 4 felony to a Class 2. See 720 ILCS 5/24-1.6(d)(3) (West 2010).

However, the State's decision to seek an enhanced sentence is not an element of the offense and may not be disclosed to the jury. 725 ILCS 5/111-3(c) (West 2010). Thus, we agree with the parties that defense counsel's performance was deficient.

¶ 33 In addition to the deficient performance prong, the defendant must establish that he suffered prejudice. *People v. Henderson*, 2013 IL 114040. That is, it must be shown that except for counsel's errors, there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland*, 466 U.S. 668; *Henderson*, 2013 IL 114040.

¶ 34 Here, the defendant has not established prejudice. The erroneous admission of the defendant's prior felony conviction had little impact, considering the other evidence of the defendant's guilt.

¶ 35 The parties' core dispute is whether the defendant was present at the time of the shooting. Several witnesses saw the defendant at the scene around the time the shots were fired. Specifically, Davis identified the defendant in court and in a prior police photographic lineup as a shooter. Garner stated that Purdle identified the defendant as a shooter during his police interview. Howell also identified the defendant as the shooter. Purdle told the police that the defendant was involved in the incident, and Alexander told the police in a videorecorded statement that the defendant was present at the scene. In contrast, the defendant presented evidence that he was at Hollins' apartment at the time of the shooting. However, Hollins' testimony that the defendant left her apartment as late as 11:45 a.m. did not preclude the possibility he traveled from her apartment to the scene before the brawl broke out around noon. Consequently, the evidence was not so close that the erroneous admission of the defendant's prior felony conviction prejudiced the outcome of the case.

¶ 36

III. Extended-Term Sentence

¶ 37 The defendant argues that the trial court erroneously imposed an extended-term sentence for his mob action conviction because he was also convicted of aggravated battery with a firearm, a more serious class offense. The State concurs that the defendant's extended-term sentence for mob action was improper.

¶ 38 Section 5-8-2(a) of the Unified Code of Corrections states that:

"A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present." 730 ILCS 5/5-8-2(a) (West 2010).

In *People v. Jordan*, 103 Ill. 2d 192 (1984), our supreme court interpreted the above language to mean that a defendant convicted of multiple offenses may be sentenced to an extended-term sentence only on those offenses within the most serious class. However, in *People v. Coleman*, 166 Ill. 2d 247 (1995), our supreme court carved out an exception to this rule, allowing the imposition of an extended-term sentence on a lower class of offenses where the offenses are separately charged and arise from unrelated courses of conduct.

¶ 39 Here, the most serious offense the defendant was convicted of was aggravated battery with a firearm, a Class X felony. 720 ILCS 5/12-4.2(b) (West 2010). The defendant was also convicted of mob action, a Class 4 felony, and the trial court entered an extended-term sentence on this conviction. 720 ILCS 5/25-1(b) (West 2010). We find that the defendant's aggravated battery with a firearm and mob action charges were based on a related course of conduct, the

brawl that led to the shooting of Davis. Therefore, we conclude that the defendant's extended term sentence for mob action was improper. We modify the mob action sentence to the maximum nonextended-term sentence for a Class 4 felony, three years' imprisonment. 730 ILCS 5/5-4.5-45(a) (West 2010).

¶ 40

IV. Sentence

¶ 41 The defendant argues that the trial court abused its discretion when it imposed an aggregate 50-year prison sentence because of the defendant's youth, lack of prior violent felonies, and potential for rehabilitation. Further, the defendant cites the trial court's statement that it was going to continue to hand out stiff sentences for shootings "until the message sinks in" as evidence that the court was disinterested in the facts of his case.

¶ 42 We review the defendant's sentence for an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203 (2000). We proceed with caution when reviewing the propriety of the defendant's sentence as we must not substitute our judgment for that of the trial court. *People v. Cameron*, 2012 IL App (3d) 110020. However, a sentence that is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense will be deemed excessive and the result of an abuse of discretion. *People v. Calabrese*, 398 Ill. App. 3d 98 (2010).

¶ 43 Initially, we note that the defendant's aggregate sentence has been reduced to 33 years' imprisonment as a result of our aforementioned rulings.

¶ 44 The defendant was convicted of aggravated battery with a firearm, a Class X felony that carried an applicable sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2010). In entering the defendant's sentence, the trial court stated that it had considered the

relevant factors in mitigation and aggravation. In addressing those factors, the trial court noted the hardship that the sentence would cause the defendant's family, but found that a lengthy sentence was necessary to deter future gun violence crimes. See 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2010). We find no error in this determination. Further, we note that the defendant's conduct caused serious harm to the victim, as he was involved in an altercation where the victim was shot between 13 and 15 times. The imposition of consecutive sentences was an act within the trial court's discretion and was supported by the defendant's criminal history. 730 ILCS 5/5-8-4(c)(1) (West 2010). Consequently, we do not find that the trial court abused its discretion in sentencing the defendant.

¶ 45

CONCLUSION

¶ 46 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part, reversed in part, and modified in part.

¶ 47 Affirmed in part, reversed in part, and modified in part.