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2013 IL App (3d) 120361-U

Order filed October 16, 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 14th Judicial Circuit,
Plaintiff-Appellee,)	Whiteside County, Illinois,
)	
v.)	Appeal No. 3-12-0361
)	Circuit No. 11-CF-145
DUSTIN A. MANON,)	
)	Honorable
Defendant-Appellant.)	Stanley B. Steines,
)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court correctly refused to instruct the jury on the defense of necessity; and (2) defendant's sentence for possession of cannabis is modified to the statutory maximum.

¶ 2 After a jury trial, defendant, Dustin A. Manon, was found guilty of two counts of possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) and one count of unlawful possession of cannabis (720 ILCS 550/4(d) (West 2010)). The trial court sentenced defendant to six years' imprisonment on each of the convictions for possession of a weapon by a

felon and a six-year extended-term sentence for unlawful possession of cannabis, with all sentences to be served concurrently. On appeal, defendant argues that the trial court erred in: (1) refusing to instruct the jury on the defense of necessity where he presented some evidence in support of the defense; and (2) imposing an extended-term sentence for possession of cannabis. We affirm as modified.

¶ 3

FACTS

¶ 4 Defendant was charged by information with two counts of possession of a weapon by a felon and one count of unlawful possession of cannabis. On September 13, 2011, the case proceeded to a jury trial.

¶ 5 Randy Dempsey testified that on May 5, 2011, a car defendant was riding in pulled alongside his car. Dempsey and defendant exchanged words and, at one point, defendant pointed a gun at Dempsey. Thereafter, defendant pulled off the road, and Dempsey notified a passing police officer that defendant had tried to shoot him.

¶ 6 John Booker testified that he was a sergeant with the Whiteside County sheriff's department. On May 5, 2011, a driver of a passing vehicle yelled to him that a passenger in another car had pointed a gun at him. The driver directed Booker in the direction of defendant's vehicle. Booker stopped the car. When Booker told defendant that he stopped him because another driver reported that a passenger was brandishing a firearm, defendant responded that he had pointed a screwdriver at a passing car. A search of defendant uncovered a bag containing cannabis, a loaded .25-caliber handgun, and a bag containing .25-caliber bullets. Defendant admitted that the items were his.

¶ 7 Mitchell Crocetta testified that on April 29, 2011, he drove to Rock Falls Liquor Store

with Penny Schmidt and defendant. Crocetta and defendant went inside the store while Schmidt waited in the car. While in the store, Crocetta and defendant walked past Pedro Galindo and another man. Defendant and Galindo exchanged a "stare." Outside of the store, Crocetta saw three men standing near a gold car. After Crocetta got into his car, the three men began swearing at defendant. Galindo and a second man came out of the store and also taunted defendant. Defendant "held his ground to see what was going to happen" and yelled back at the men. Crocetta told defendant to get in the car as Galindo took out a .22-caliber weapon. Defendant entered the car and Crocetta attempted to leave the parking lot, but the car stalled. Crocetta heard five shots, got the car restarted, and left the parking lot. Crocetta did not report the shooting to the police because he feared retribution.

¶ 8 Ashley Davis testified that a few weeks before April 29, 2011, she picked up defendant at the Rock Falls McDonald's restaurant. When Davis pulled to the side for defendant to enter the car, she noticed that a gold car was stopped at a nearby stoplight. As defendant got into her car, a man exited the gold car and ran toward Davis's car with a bat. Davis drove off, and the gold car followed. Eventually, the gold car pulled alongside Davis's car. The individuals in the gold car swore at defendant and yelled "stop the car." Davis continued driving until the gold car gave up the chase, and then she brought defendant to his home. Davis thought about going to the police station, but realized that defendant's home was closer. She did not think to report the incident after it had ended.

¶ 9 Derrick Peltier testified that defendant called him after the April 29, 2011, incident. Defendant was hysterical and reported that he had just been shot at. Defendant did not know what to do, and Peltier instructed him to "lay low" and come see him the next morning. The

following day, while defendant was speaking with Peltier, Peltier noticed that a car was circling the block. During Peltier and defendant's conversation, defendant received a telephone call from an individual named "Santos." Peltier overheard defendant and Santos swearing at each other. Defendant eventually stated that he was not afraid, and Santos responded "next time we won't miss and we will blow your head off." Peltier did not advise defendant to report the incident to the police because he thought the police would not investigate and defendant would be labeled a snitch. Peltier also did not tell defendant to leave town because he felt that a person should not have to retreat from his home in fear.

¶ 10 During the jury instruction conference, defendant requested that the court instruct the jury on the necessity defense. The State objected, and the trial court denied the instruction. The jury found defendant guilty of two counts of possession of a weapon by a felon and one count of unlawful possession of cannabis. Thereafter, the trial court sentenced defendant to concurrent terms of six years' imprisonment on the two counts of possession of a weapon by a felon and an extended-term sentence of six years' imprisonment for unlawful possession of cannabis.

¶ 11 ANALYSIS

¶ 12 I. Jury Instruction

¶ 13 Defendant argues that the trial court erred in refusing to instruct the jury on the defense of necessity where he presented some evidence that it was necessary to carry a firearm because he had been threatened and shot at.

¶ 14 A defendant is entitled to instructions on his theory of the case when there is some foundation in evidence for the instruction. *People v. Jones*, 175 Ill. 2d 126 (1997). Generally, the decision to give a certain instruction rests in the sound discretion of the trial court. *People v.*

Lovejoy, 235 Ill. 2d 97 (2009). However, the determination of whether a defendant has met the evidentiary minimum for an instruction on an affirmative defense is a matter of law that we review *de novo*. *People v. Kucavik*, 367 Ill. App. 3d 176 (2006).

¶ 15 The affirmative defense of necessity provides that conduct which would otherwise be an offense is justified by reason of necessity if defendant establishes that he: (1) is without blame in occasioning the situation; and (2) reasonably believed that his conduct was necessary to avoid a greater public or private injury than that which reasonably may have resulted from his conduct. 720 ILCS 5/7-13 (West 2010); *Kucavik*, 367 Ill. App. 3d 176. The necessity defense is viewed as involving the choice between two admitted evils where other optional courses of action are unavailable, and the conduct chosen by defendant must promote some higher value than the value of literal compliance with the law. *Kucavik*, 367 Ill. App. 3d 176.

¶ 16 Defendant's argument is meritless. Defendant could not establish that he was without blame in occasioning the offense. Crocetta testified that defendant argued with the men in the gold car before the shots were fired. Peltier observed defendant similarly swear at Santos on the telephone and state that he was not afraid before Santos threatened to kill defendant. Therefore, defendant's evidence demonstrated that he was partially responsible for the escalation in threats, and he was not without blame.

¶ 17 Likewise, defendant did not present evidence that his decision to carry a firearm was the only reasonable alternative. Notwithstanding recent case law and legislation expanding the right to carry firearms (*People v. Aguilar*, 2013 IL 112116; *Moore v. Madigan*, 702 F. 3d 933 (2012); Pub. Act 98-0063 (eff. July 9, 2013)), the public policy against felons possessing weapons remains firm. See 720 ILCS 5/24-1.1(a) (West 2010); see also *District of Columbia v. Heller*,

554 U.S. 570, 626 (2008) (asserting that nothing in its opinion should be "taken to cast doubt on longstanding prohibitions on the possession of firearms by felons"); *People v. Robinson*, 2011 IL App (1st) 100078 (section 24-1.1(a) of the Criminal Code of 1961 was a valid exercise of the state's power to protect the public from the danger posed by convicted felons possessing firearms). Here, defendant had a number of alternatives that were more reasonable than choosing to violate the law. First, defendant could have reported the shootings and threats to the police. Second, defendant could have retreated from dangerous situations or stayed away from areas where confrontations were likely to occur. Defendant's decision to violate the law was unwarranted, particularly in light of the fact that there was no immediate threat of harm to his person. Even assuming, *arguendo*, that there exists a scenario where a convicted felon could raise a necessity defense to possession of a firearm, this clearly is not it.

¶ 18 In sum, defendant did not present some evidence that warranted the issuance of a jury instruction on the affirmative defense of necessity. The trial court did not err in denying defendant's request for a necessity defense instruction.

¶ 19 II. Extended-Term Sentence

¶ 20 Next, defendant argues that the trial court erred in imposing an extended-term sentence on his conviction for possession of cannabis because it was not the most serious offense for which he was convicted and it was based on conduct that was related to the other offenses.

¶ 21 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 provided the offenses are separately charged and arise from unrelated courses of conduct.

¶ 22 The State argues that the *Coleman* exception applies to the present case because defendant's charges of possession of a weapon by a felon and possession of cannabis were based on unrelated courses of conduct. However, in *People v. Hunter*, 2013 IL 114100, ¶ 20, our supreme court held that a defendant's "simultaneous possession of cannabis and handguns was the same 'act' pursuant to the compulsory joinder statute." We find that a similar analysis applies in the present case. Defendant was charged in a single indictment with two counts of possession of a weapon by a felon, Class 3 felonies (720 ILCS 5/24-1.1(e) (West 2010)), and one count of unlawful possession of cannabis, a Class 4 felony (720 ILCS 550/4(d) (West 2010)). The evidence showed that defendant committed all three offenses simultaneously, at the time of his arrest. See *People v. Jenkins*, 383 Ill. App. 3d 978 (2008). Therefore, we hold that the *Coleman* exception does not apply, as defendant's offenses were based on a related course of conduct.

¶ 23 Having found that defendant's convictions for possession of a weapon by a felon and unlawful possession of cannabis were based on a related course of conduct, we modify

defendant's sentence for unlawful possession of cannabis to the maximum nonextended term for a Class 4 felony, three years' imprisonment. 730 ILCS 5/5-4.5-45(a) (West 2010).

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed as modified.

¶ 26 Affirmed as modified.