

FIRST DIVISION
May 18, 2015

No. 1-13-1645

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).

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. 12 CR 12080
)	
DARREN ROBINSON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant was not proven guilty beyond a reasonable doubt of the offense of being an armed habitual criminal because the State failed to establish that one of the qualifying convictions was a forcible felony. Defendant's claim of ineffective assistance of counsel must fail because he cannot establish how he was prejudiced by the complained-of errors.

¶ 2 After a bench trial, defendant was found guilty of the offense of being an armed habitual criminal and of the offense of the unauthorized use or possession of a weapon (U UW) by a felon. The trial court merged the U UW by a felon charge into the armed habitual criminal charge. He was sentenced to eight years in prison for the armed habitual criminal conviction. On appeal,

defendant contends that his conviction for the armed habitual criminal offense must be vacated because the State failed to establish that one of the qualifying prior convictions was in fact a “forcible felony.” He further contends that he was denied the effective assistance of counsel because trial counsel elicited certain testimony from defendant which served to bolster the credibility of the arresting officer. We reverse defendant’s conviction for the armed habitual criminal offense and remand for the entry of judgment and sentence on the conviction of unauthorized use or possession of a weapon by a felon.

¶ 3 In June 2012, defendant was charged by information with the offense of being an armed habitual criminal in that he possessed a firearm after having been convicted of attempted burglary in case 08 CR 17727 and unlawful use of a weapon by a felon in case 07 CR 25157. Defendant was also charged with, *inter alia*, unlawful use or possession of a weapon by a felon.

¶ 4 Defendant filed a motion to quash arrest and suppress evidence. At a hearing on the motion, Officer Walter Bucki testified that he was on patrol in a marked car with his partners at approximately 9 p.m. when he encountered defendant and Aaron Steward. Bucki explained that the officers had been flagged down by a man named Murray who stated that someone had just fired a gun at him at the corner of 79th and Kimbark. The defense objected, and the court overruled this objection. Bucki followed Murray to 7816 South Avalon where he saw defendant standing on the sidewalk with a gun. As Bucki began to exit his vehicle, defendant tossed the gun to the ground and began to walk away. Defendant was detained, and Bucki recovered the gun, which was a loaded semi-automatic.

¶ 5 Defendant’s cousin Aaron Steward testified that he and defendant were walking when they were stopped by two officers. They were handcuffed and asked for their “information.” Defendant was arrested and Steward was told to go home. When he asked why defendant was

being arrested, he was told that defendant was involved in a shooting. He had spent the day with defendant and did not see defendant in possession of a gun.

¶ 6 The trial court denied the motion to quash arrest and suppress evidence. The case proceeded to a bench trial on the charges of being an armed habitual criminal and unlawful use or possession of a weapon by a felon. The parties agreed to incorporate by reference the evidence heard at the hearing on the motion to suppress. The State then made a motion pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971), seeking to admit defendant's prior convictions for, *inter alia*, attempted burglary, theft and unlawful use of a weapon by a felon, to use for impeachment purposes should defendant testify. The trial court granted the motion. The parties then stipulated that defendant had been convicted of attempted burglary in case 08 CR 17727, and unlawful use of a weapon by a felon in case 07 CR 25157.

¶ 7 Defendant, who admitted that he had previously been convicted of attempted burglary, theft, unlawful use of a weapon by a felon, and a "Class 1" drug offense, testified that he was walking with Stewart when they were stopped by police. He denied pointing a gun at anyone or tossing a gun to the ground. He was handcuffed and placed in the back of a squad car. Defendant later heard officers ask Demetrius Murray if defendant was the person who shot at him. During cross-examination, defendant was asked if he was "sure that Demetrius said, 'That is the guy who shot at me?'" Defendant responded, "Yes."

¶ 8 After defendant's testimony, the trial court indicated that it would consider defendant's previous convictions for "credibility purposes only." In finding defendant guilty "in the matter and form charged in the indictment," the court found the officer's testimony to be "credible and compelling beyond a reasonable doubt." The trial court merged the counts and sentenced defendant to eight years in prison for the armed habitual criminal conviction.

¶ 9 On appeal, defendant contends that his conviction for being an armed habitual criminal must be reversed because the State failed to prove beyond a reasonable doubt that his prior conviction for attempted burglary was a “forcible felony” under section 2-8 of the Criminal Code of 1961 (the Code) (720 ILCS 5/2-8 (West 2012)).

¶ 10 In assessing the sufficiency of the evidence, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. To sustain a conviction, the State must prove every element of an offense beyond a reasonable doubt. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 20.

¶ 11 A person commits the offense of being an armed habitual criminal if he receives, sells, possesses, or transfers any firearm after having been convicted two or more times of certain delineated offenses. See 720 ILCS 5/24-1.7 (West 2012). The State must prove the prior convictions and the present conduct beyond a reasonable doubt. *People v. Adams*, 404 Ill. App. 3d 405, 412 (2010).

¶ 12 Here, the information alleged that defendant had two prior qualifying convictions, attempted burglary and unlawful use of a weapon by a felon. The parties agree that defendant’s prior unlawful use of a weapon by a felon conviction in case 07 CR 25157 is a qualifying offense under section 24-1.7(a)(2) of the Code. See 720 5/24-1.7(a)(2) (West 2012). They also agree that attempted burglary is not specifically listed in section 24-1.7 of the Code, and therefore cannot serve as the second qualifying conviction unless it is a “forcible felony as defined in section 2-8” of the Code (see 720 5/24-1.7(a)(1) (West 2012); 720 5/2-8 (West 2012)). In addition to certain enumerated felonies, section 2-8 defines “forcible felony” to include “any other felony which involves the use or threat of physical force or violence against any

individual.” See 720 ILCS 5/2-8 (West 2012).

¶ 13 Defendant contends, and the State concedes, that it cannot be argued that the offense of attempted burglary is one that *always* includes the use or threat of physical force or violence against a person. Defendant thus argues that absent a specific factual basis, his prior conviction for attempted burglary does not fit within any of the statutory definitions of “forcible felony,” and the State therefore failed to establish that he was convicted of two or more qualifying offenses. Although the State tacitly acknowledges that it did not prove defendant guilty of the offense of being an armed habitual criminal in the manner alleged in the information, it argues that such a failure is of no consequence because defendant had the requisite number of qualifying convictions in his background.

¶ 14 Although the information listed defendant’s prior conviction for attempted burglary as one of the two qualifying convictions for the offense of being an armed habitual criminal, the State failed to establish that this conviction was a “forcible felony,” because attempted burglary is not one of the delineated offenses and the record does not contain facts sufficient to determine whether that burglary included the use or threat of physical force or violence against a person. See 720 ILCS 5/2-8 (West 2012); 720 5/24-1.7 (West 2012). Therefore, because the State failed to prove that defendant had two or more prior qualifying convictions, the State failed to prove defendant guilty of the offense of being an armed habitual criminal beyond a reasonable doubt. See *Steele*, 2014 IL App (1st) 121452, ¶ 20 (the State must prove every element of an offense beyond a reasonable doubt).

¶ 15 The State nonetheless argues that the evidence at trial was sufficient to prove defendant guilty of the offense of being an armed habitual criminal because defendant testified he had a prior Class 1 drug conviction. See 720 ILCS 5/24-1.7(a)(3) (West 2012) (including as a

predicate offense “any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as Class 3 felony or higher”). Although the State admits this conviction was not contained in the information and was only admitted pursuant to *Montgomery*, the State argues that the specific convictions used as qualifying convictions for the offense of being an armed habitual criminal are “surplusage” as long as a defendant has actually been convicted of the requisite forcible felonies. In other words, because defendant apparently had two qualifying prior convictions, the State contends it is irrelevant whether those convictions were the specific ones listed in the information. We disagree.

¶ 16 The record reveals that defendant’s “Class 1” drug offense was admitted pursuant to *Montgomery* only for the limited purpose of impeachment and that the trial court stated after defendant’s testimony that it would consider defendant’s previous convictions for “credibility purposes only.” This conviction was admitted solely to impeach defendant and not as substantive evidence of a predicate offense. See *People v. Edwards*, 63 Ill. 2d 134, 140-41 (1976) (when the State was required to prove a felony to sustain a charge of unlawful use of a weapon by a felon, and the jury received evidence of that felony as well as an instruction that it only be used for impeachment, the defendant’s conviction for unlawful use of a weapon by a felon could not stand).

¶ 17 We are unpersuaded by the State’s reliance on *People v. Adams*, 404 Ill. App. 3d 405 (2010), and *People v. Corder*, 212 Ill. App. 3d 322 (1991). In *Adams*, the State amended the indictment, as it erroneously listed defendant’s prior conviction as aggravated discharge of a firearm, rather than armed robbery. On appeal, the reviewing court determined that the error fell within the rubric of “miswriting” as the case number was correct but the prior conviction was “misnamed,” that is, the correction did not make a material change to the indictment. *Adams*,

404 Ill. App. 3d at 415 (when a defendant’s “prior convictions fall within those categories [of certain enumerated offenses], the actual offense was essentially surplage,” and a matter to which the parties could stipulate). In *Corder*, the court determined that the State was not required to use the same prior conviction at trial as it did before the grand jury when the indictment did not specify a particular conviction and merely stated that the defendant had been previously convicted of a felony. *Corder*, 212 Ill. App. 3d at 323.

¶ 18 Unlike *Adams*, the State did not move to amend the indictment either to make the Class 1 drug offense one of the prior qualifying convictions or to include facts sufficient to establish that the attempted burglary was a “forcible felony.” Here, unlike in *Corder*, the information listed two specific prior felony convictions which would be used to prove the State’s case at trial.

¶ 19 Under the facts of this case, this court cannot conclude that defendant’s attempted burglary conviction is a “forcible felony,” and, consequently, the State failed to prove beyond a reasonable doubt that defendant had “two or more” qualifying convictions as alleged in the information. See 720 ILCS 5/24-1.7 (West 2012). Therefore, the State did not prove every element of the offense of being an armed habitual criminal beyond a reasonable doubt, and defendant’s conviction and sentence for armed habitual criminal must be vacated. See *Adams*, 303 Ill. App. 3d at 412 (for an armed habitual criminal conviction, both the prior convictions and the present conduct must be proved beyond a reasonable doubt). We remand to the circuit court so that judgment and sentence may be entered on defendant’s conviction for unlawful use or possession of a weapon by a felon.

¶ 20 Defendant next contends that he was denied the effective assistance of counsel when trial counsel elicited and then failed to object to certain hearsay evidence. Specifically, defendant contends that trial counsel’s decision to elicit testimony from defendant that officers asked

Murray if defendant was the person who shot at him permitted the State to elicit during cross-examination that Murray identified defendant as the shooter. Defendant argues that without this testimony bolstering Bucki's testimony there is a reasonable probability that the trial court would not have credited Bucki's testimony and defendant would have been acquitted.

¶ 21 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, a reasonable probability exists that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). If the defendant fails to establish either prong, his ineffective assistance claim must fail. *Strickland*, 466 U.S. at 687. "If it is easier, a court may proceed directly to the second prong of *Strickland* and dismiss an ineffective assistance claim on the ground that it lacks sufficient prejudice, without first determining whether counsel's performance was deficient." *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 70. To establish prejudice, the defendant must show a reasonable probability that, absent counsel's deficient performance, the trial's outcome would have been different. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). "A reasonable probability of a different result is not merely a possibility of a different result." *Id.*

¶ 22 Here, defendant contends that he was prejudiced by trial counsel's decision to elicit testimony from defendant that he overheard Murray identify defendant as the person who shot at him because that information bolstered Bucki's testimony that he saw defendant with a gun. We disagree. Even if we agreed that counsel's question regarding what defendant heard was objectively unreasonable, defendant's claim of ineffective assistance fails because he cannot establish how he was prejudiced by this information.

¶ 23 Here, the State established, through the testimony of Bucki, that defendant threw the

firearm he was holding to the ground. Although defendant argues that his testimony that Murray identified him as shooter bolstered Bucki's testimony that defendant possessed a gun, defendant ignores the fact that the trial court found Bucki's testimony to be "credible and compelling beyond a reasonable doubt." In other words, the trial court found Bucki to be a credible witness, and although defendant's testimony about Murray's identification of defendant as the person who shot at him was further evidence that defendant possessed a gun, defendant's argument must fail because this testimony was not essential to the trial court's assessment of Bucki's credibility. See *Steele*, 2014 IL App (1st) 121452, ¶ 20 (the trial court is responsible for assessing the credibility of witnesses and determining the appropriate weight to give to testimony). Accordingly, we reject defendant's speculative assertion that the outcome of the trial probably would have been different had the evidence at trial merely consisted of Bucki's testimony that he saw defendant holding a gun and defendant and his cousin's testimony that defendant did not have a gun. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice"). Therefore, because defendant has failed to show a reasonable probability that, absent counsel's alleged error, the outcome of his trial would have been different (*Evans*, 209 Ill. 2d at 220), his claim of ineffective assistance of counsel must fail (see *Strickland*, 466 U.S. at 687).

¶ 24 We reverse defendant's conviction for armed habitual criminal and remand to the circuit court of Cook County for the entry of judgment and sentence on defendant's conviction for unauthorized use or possession of a weapon by a felon. See *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982). We affirm the judgment of the circuit court in all other aspects.

¶ 25 Affirmed in part; reversed in part; remanded.