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2015 IL App (3d) 130565-U

Order filed September 30, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0565
CLARENCE O. HOPKINS,)	Circuit No. 11-CF-237
Defendant-Appellant.)	Honorable Stanley B. Steines, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The State violated defendant's statutory right to a speedy trial on the armed habitual criminal charge. Counsel was not ineffective where counsel's performance did not prejudice defendant. The court's failure to properly instruct the jury regarding the sentencing enhancing factors did not amount to structural error.
- ¶ 2 A jury found defendant, Clarence Hopkins, guilty of attempted first-degree murder, armed violence, aggravated discharge of a firearm, unlawful use of a weapon by a felon, and armed habitual criminal. The court sentenced defendant to 55 years' imprisonment on the

attempted murder conviction, and 30 years' imprisonment on the armed habitual criminal conviction to be served consecutively.

¶ 3 Defendant appeals, arguing that: (1) the State violated his right to a speedy trial; (2) counsel was ineffective for failing to stipulate to the fact of defendant's prior convictions and as a result of the cumulative impact of various errors throughout trial; and (3) the court failed to properly instruct the jury regarding the enhanced version of attempted first-degree murder. For the following reasons, we affirm in part, vacate the armed habitual criminal charge and reinstate the unlawful use of a weapon conviction and sentence.

¶ 4 **BACKGROUND**

¶ 5 On July 29, 2011, Chicago police arrested defendant on an arrest warrant for the attempted murder of Shaevon Collins. Defendant was on mandatory supervised release at that time. Authorities ultimately released defendant to the custody of Whiteside County on December 2, 2011.

¶ 6 On December 13, 2011, the State charged defendant with attempted first-degree murder, armed violence, aggravated discharge or a firearm, and unlawful use of a weapon by a felon. On March 20, 2012, the State filed an amended information, adding the charge of armed habitual criminal.

¶ 7 On April 3, 2012, defendant filed a motion to dismiss the late filed charge, arguing that the State violated defendant's right to a speedy trial. Specifically, defendant argued that the court should dismiss the armed habitual charge where the State did not file the amendment until 245 days after his arrest. Defense counsel also requested that the court dismissal of all charges, arguing that the State failed to bring defendant to trial within 120 days of defendant being held in custody as required by section 103-5(a) of the Code of Criminal Procedure of 1963 (the Code)

(725 ILCS 5/103-5(a) (West 2010)); defense counsel argued that the 120 days started to run when police arrested defendant on July 29, 2011. The State argued that it filed the amended information only 118 days after defendant came into custody of Whiteside County. The court denied defendant's motions and the matter proceeded on all five counts under the amended information.

¶ 8 Prior to trial, the State filed a motion *in limine* to admit several prior convictions as impeachment evidence if defendant testified. The State also argued that it had to prove that defendant had previously been convicted of two Class 2 or greater felonies, and two Class 3 or greater violations of the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq.* (West 2010)), in order to obtain convictions on aggravated discharge, unlawful use of a weapon by a felon, and the armed habitual criminal charges. Defendant argued that the court should only admit the convictions if defendant testifies. The court granted the State's motion and ruled that defendant's prior convictions would be admissible at trial during the State's case-in-chief.

¶ 9 The matter proceeded to trial on May 8, 2012. Collins testified that he smoked marijuana with defendant on previous occasions. In early 2009, Collins got into a fight with defendant. Collins and his cousin, Tyree Collins, beat defendant and drove away leaving defendant stranded in a field. Collins heard rumors that defendant wanted to "get" him.

¶ 10 On June 30, 2011, Collins drank with Shauntai Kaehler at Kaehler's house in Sterling, Illinois. He left her house to go meet other friends at Propheter Park. When he arrived at the park, he did not see anyone. Collins started walking back to Kaehler's house. As he passed an alley, he heard somebody walking in the alley. Collins turned and saw defendant coming out of the alley. Defendant said, "What is up now" and "I told you I was going to get you." Collins

threw a cup of liquor at defendant. He observed defendant pull a gun from his waist; defendant stood approximately four feet away from Collins.

¶ 11 Collins grabbed defendant's forearm and pushed it down. Defendant started firing the gun; eight bullets struck Collins. The bullets hit Collins' leg, pelvis, femur, penis, and arm. Collins believed that defendant intended to kill him. As a result of the injuries, doctors inserted a rod in Collins' arm and leg. Collins also underwent surgery the night of the incident and anticipated needing additional surgeries in the future.

¶ 12 The police arrived on the scene and questioned Collins. Collins told the police that "Blue" shot him; defendant's nickname was Blue. When the police asked who "Blue" was, Collins responded that defendant's nickname was "Blue." A detective also spoke with Collins at the hospital. Collins, again, said defendant shot him.

¶ 13 Officer Franklin Hopes testified that he was dispatched on a call of shots fired on July 1, 2011, at approximately 12:22 a.m. Upon arriving on the scene, Hopes observed Collins lying on the ground with visible gunshot wounds. Collins said defendant shot him. Hopes found a cell phone on the ground located next to Collins. Collins said that the cell phone belonged to defendant. Hopes observed spent shell casings on the ground.

¶ 14 Angela Matthews, an Illinois State Police crime scene investigator, testified that she assisted the Sterling police at the scene of the shooting in the early morning of July 1, 2011. At the scene, Matthews recovered a cell phone and twelve shell casings. Matthews recovered three fingerprints from the cell phone. She sent these prints to the State Police crime lab. Stephanie Bodine, a forensic scientist, testified that she compared the fingerprints from the cell phone to standard fingerprints lawfully taken from defendant. Bodine determined that the prints from the cell phone matched defendant's prints.

¶ 15 Tara Walker testified that she dated defendant at the time of the shooting. She had one child with defendant. Around 12:30 or 1 a.m. on July 1, 2011, defendant called her asking for a ride. Walker picked defendant up on the side of a road by a field. She drove defendant to a house a couple of blocks away and then to Chicago. Defendant usually carried two cell phones; that night defendant told Walker he was missing one of his phones. While in Chicago, Walker received a text from a friend regarding a shooting in Sterling. Walker asked defendant if he shot Collins. Defendant responded, “Allegedly I shot Poochie [Collins’ nickname].”

¶ 16 Shanti Kendrick, Tyree’s girlfriend, testified regarding the incident in the spring of 2009 between Collins and defendant. Kendrick was driving a car with Tyree, Collins, and defendant as passengers. Tyree asked Kendrick to pull over, which she did. When Kendrick looked back, she saw the passenger door open and Tyree got defendant out of the car. Tyree hit defendant once and Collins hit defendant twice. Collins and Tyree got back into the car and Kendrick drove off. At this point, defendant was standing on the side of the road.

¶ 17 On September 10, 2009, Kendrick was in the car with Tyree, when Kendrick noticed a car pass her and then spin out in the road. The car stopped in the middle of the road and blocked the street. Kendrick then heard a shot and saw a dark shadow in the driver window. Somebody continued shooting into the car. Kendrick suffered a gunshot wound to her right arm. Kendrick could not identify the shooter to the police, but was able to identify the car. After running the license plate, the police told her that defendant was the shooter. The State filed charges against defendant in that case; defendant pled guilty to aggravated battery of Kendrick without a firearm. The court admitted into evidence a certified record of conviction for that offense.

¶ 18 The parties stipulated that as of July 1, 2011, defendant was 27 years old and was serving a term of mandatory supervised release. The parties stipulated to medical reports regarding

Collins' injuries. Dr. Maurice Binns determined that Collins suffered major trauma as a result of multiple gunshot wounds to Collins' right thigh, right elbow, penis, left femur, upper pelvic area and right buttock. Collins also suffered fractures to the leg bones as a result of the gunshot wounds. Collins underwent emergency surgery during which doctors repaired the fractures to Collins' leg bones and treated the gunshot wounds. The physicians believed that the injuries were life threatening and would have lifelong disabling effects.

¶ 19 The State also tendered certified copies of defendant's two prior drug convictions. Defense counsel argued that although the State needed to prove the convictions, the court need not include the sentences defendant received. Ultimately, the court told the jury that it received certified copies of convictions for both possession of a controlled substance with intent to deliver and delivery of a controlled substance; both offenses were Class 1 offenses, making them greater than Class 2 or 3 offenses. The court also stated that, "You will consider that those elements have been proved beyond a reasonable doubt for any offense for which they are an element."

¶ 20 The court then instructed the jury on the five charges. The instructions relevant to this appeal are as follows:

"To sustain a charge of attempt first degree murder, the State must prove the following propositions: First proposition, that the Defendant performed an act which constituted a substantial step toward the killing of an individual; and second proposition, that the Defendant did so with the intent to kill an individual.

A person commits the offense of aggravated discharge of a firearm when he knowingly discharges a firearm in the direction of another person.

To sustain the charge of aggravated discharge of a firearm, the State must prove the following propositions: First proposition, that the Defendant knowingly discharged a firearm; and second proposition, that the Defendant discharged the firearm in the direction of another person.”

¶ 21 The jury found defendant guilty of all five charges. The court instructed the jury to make determinations concerning three specific factual questions: whether defendant had previously been convicted on two or more occasions of Class 2 or greater violations of the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq.* (West 2010)); whether defendant was over the age of 21 on July 1, 2011; and whether defendant was serving a term of mandatory supervised release on July 1, 2011. The jury returned affirmative answers to all three factual inquiries.

¶ 22 Defense counsel did not file a motion for a new trial. The court sentenced defendant to 55 years’ imprisonment on the attempted first-degree murder conviction to run consecutively with the 30 years’ imprisonment sentence on the armed habitual criminal and the 30 years’ imprisonment sentence on the unlawful use of a weapon by a felon conviction. The court merged the convictions for the armed violence and aggravated discharge of a firearm into the conviction for attempted first-degree murder.

¶ 23 Private counsel represented defendant at trial. After trial defendant was no longer able to pay his attorney; the court appointed counsel. Appointed counsel filed a motion for leave to file

a motion for a new trial, arguing that trial counsel was ineffective for failing to file such a motion and such a failure prejudiced defendant. The trial court granted the motion.

¶ 24 Appointed counsel filed a motion for new trial and a motion to reconsider the sentence. Specifically, appointed counsel argued that the court erred in denying defendant's motion for dismissal based on the State's violation of defendant's right to a speedy trial. Further, trial counsel was ineffective for failing to stipulate to defendant's prior convictions in order to keep the name and nature of the offense of the convictions from the jury. In his motion to reconsider, appointed counsel argued that the court could not apply the mandatory 25-year sentencing enhancement for the attempted murder where the court failed to instruct the jury to find the elements necessary to apply the enhancement. Also, the court erred in entering judgment on both unlawful use of a weapon by a felon and armed habitual criminal where the unlawful use of a weapon by a felon was included in the armed habitual criminal offense. The court vacated the sentence for the unlawful use of a weapon by a felon, but denied the motion for new trial and motion to reconsider. The court filed an amended sentencing order.

¶ 25 Defendant appeals. We affirm in part, vacate the harmed habitual criminal charge and reinstate the unlawful use of a weapon by a felon conviction and sentence.

¶ 26 ANALYSIS

¶ 27 I. Speedy Trial

¶ 28 Defendant requests that we grant him a new trial where the State failed to bring defendant to trial within 120 days of being in custody. Specifically, defendant argues that the State added the armed habitual charge three months after the State originally charged defendant, causing the delay of trial. The State argues that defendant forfeited the argument by failing to raise the argument below. Specifically, the State contends that below defendant argued that he was in

custody starting on July 29, 2011; here on appeal, defendant argues that he was in custody as of December 2, 2011.

¶ 29 To preserve an issue on appeal, defendant must object at trial and file a written posttrial motion raising the issue. *People v. Bannister*, 232 Ill. 2d 52, 64-65 (2008). Defendant does not forfeit an argument where the argument below was not completely different from the argument on appeal so that the trial court was able to review essentially the same claim. *People v. Heider*, 231 Ill. 2d 1, 18 (2008).

¶ 30 Defendant raised the issue of the speedy-trial violation below, both before and after trial. He makes essentially the same argument on appeal as he did below. The only difference is that below he argued that the 120 days began to run on July 29, 2011, and here he argues that the 120 days started to run on December 2, 2011. The trial court had an opportunity to consider the two dates; the State argued below that defendant came into custody of Whiteside County on December 2, 2011. On appeal, defendant simply adopts the State's argument that defendant was in custody as of December 2, 2011. Ergo, defendant did not forfeit the issue.

¶ 31 "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant***." 725 ILCS 5/103-5(a) (West 2012). "Every person not tried in accordance with subsections (a), *** shall be discharged from custody or released from the obligations of his bail or recognizance." 725 ILCS 5/103-5(d) (West 2012).

¶ 32 The court erred in not dismissing the armed habitual criminal charge. The State initially charged defendant on December 13, 2011. Three months later, on March 20, 2012, the State amended the charging information to include the armed habitual criminal count. Defendant filed a motion to dismiss the armed habitual criminal charge based on speedy-trial grounds on April 3,

2012; defendant had been in custody for 122 days. Moreover, on appeal, the State does not argue that it did not violate defendant's statutory right to a speedy trial if the 120 days started running on December 2, 2011. The State simply argues that defendant forfeited the issue. The State did not bring defendant to trial within 120 days of being in custody, in violation of defendant's statutory right to a speedy trial. Therefore, we vacate the armed habitual criminal conviction and sentence.

¶ 33 Defendant requests a new trial, arguing that the prior convictions admitted to prove the armed habitual criminal charge prejudiced him and would not have been admissible had the court dismissed that charge prior to trial. In order to prove the armed habitual criminal charge, the State offered evidence establishing that defendant had two previous Class 1 felony drug convictions. These prior convictions would not have been necessary to prove unlawful use of a weapon by a felon; the State offered evidence of defendant's prior aggravated battery conviction for other purposes, which would have satisfied the requirements for the unlawful use of a weapon by a felon. The State argues that if we find that defendant preserved the issue, we should vacate the armed habitual criminal charge and reinstate the conviction and sentence for the unlawful use of a weapon by a felon. We agree.

¶ 34 While we acknowledge that prior crimes are prejudicial and the erroneous admission of other crimes creates a high risk of prejudice, we find that defendant is not entitled to a new trial; the outcome of trial would have been the same even if the court did not admit evidence of defendant's prior convictions. *People v. McGhee*, 286 Ill. App. 3d 786, 794-95 (1997). At the time of trial, the court did not erroneously admit evidence of defendant's prior drug convictions; the State charged defendant with armed habitual criminal and the court allowed the State to proceed on that charge. Further, the evidence overwhelmingly established that defendant

¶ 38 The United States and Illinois constitutions afford a criminal defendant the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To prove a claim of ineffective assistance of counsel, defendant must establish that counsel’s performance fell below an objective standard of reasonableness, and the outcome of the trial would have been different but for counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984).

¶ 39 We observe that defense counsel’s failure to move to strike Kendrick’s testimony, once it was established on cross-examination that her testimony that defendant had shot at her was hearsay, is troubling and clearly deficient. Nonetheless, we need not determine whether counsel’s performance was deficient before deciding whether counsel’s performance prejudiced defendant. *People v. Montgomery*, 192 Ill. 2d 642, 671 (2000). Prejudice exists where there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A “reasonable probability” is a probability sufficient to undermine confidence in the result of the proceeding. *Id.*

¶ 40 For the same reasons that the prior convictions did not prejudice defendant, defendant cannot establish that counsel’s performance prejudiced him. Previously, Collins beat defendant and left him stranded on the side of the road. After that incident, Collins heard that defendant was “out to get him.” While Collins walked past an alley, he heard somebody in the alley. Collins turned around and saw defendant. Defendant told Collins, “I told you I was going to get you.” Collins observed defendant pull a gun from his waistband and defendant shot Collins eight times. Further, police recovered defendant’s cell phone from the crime scene. Kendrick testified that defendant usually carried two cell phones: the night of the shooting defendant was missing

one of his cell phones. Even without considering defendant's two prior convictions, the evidence clearly establishes that defendant attempted to murder Collins.

¶ 41 Notwithstanding errors of trial counsel, defendant suffered no prejudice in light of the overwhelming and properly admitted evidence of his guilt.

¶ 42 III. Sentencing Enhancement

¶ 43 Defendant requests that we vacate the mandatory 25-year sentence enhancement where the court failed to instruct the jury to specifically find that defendant personally discharged a gun proximately causing great bodily harm.

¶ 44 Section 8-4, which provides for the mandatory 25-year sentencing enhancement for attempted first-degree murder, states:

“[A]n attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court ***.” 720 ILCS 5/8-4(c)(1)(C)(D) (West 2012).

¶ 45 Defendant concedes that he forfeited the issue on appeal; defense counsel failed to object to the jury instruction at trial. *People v. Johnson*, 218 Ill. 2d 125, 138 (2005) (a defendant forfeits an issue on appeal where he fails to timely object at trial). Defendant requests that we consider his argument under the second prong of plain error.

¶ 46 A reviewing court may consider a forfeited issue under the plain-error doctrine 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 closeness of the evidence.” *People v. Sargent*, 239 Ill. 2d 166, 189 (2010) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)); *People v. Williams*, 139 Ill. 2d 1, 14-15 (1990).

¶ 47 Generally, we first determine whether the trial court committed any error prior to determining where such error constituted plain error. However, here we need not do so; the State concedes that the court erred by failing to instruct the jury regarding whether defendant personally fired a gun proximately causing great bodily harm. *People v. Thompson*, 238 Ill. 2d at 613. Thus, we will determine whether the error amounted to structural error under the second prong. The State argues that the error was not prejudicial where the court instructed the jury as to the offense of aggravated discharge of a firearm, which requires that the jury find defendant discharged a firearm in the direction of another person. In addition, the State asserts that overwhelming evidence established that defendant personally discharged a gun. We agree.

¶ 48 The second prong of the plain-error doctrine is equated with structural error. *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Structural error is “a systemic error which serves to ‘erode the integrity of the judicial process and undermine the fairness of the defendant’s trial.’ ” *Id.* (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). The Supreme Court has classified error as structural error in a limited class of cases. *Neder v. United States*, 527 U.S. 1, 8 (1999). Structural error includes a complete denial of counsel, a biased trial judge, racial discrimination in selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable-doubt instruction. *Thompson*, 238 Ill. 2d 598, 609 (2010) (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n. 2 (2006)).

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that where a fact, other than a prior conviction, enhances a penalty beyond the statutory maximum, the jury must find such fact beyond a reasonable doubt. In response to the Court's ruling in *Apprendi*, the General Assembly enacted section 111-3(c-5) of the Code (725 ILCS 5/111-3(c-5) (West 2012)). *Mimes*, 2014 IL App (1st) 082747-B, ¶ 26. Section 111-3(c-5) states:

“Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt. Failure to prove the fact beyond a reasonable doubt is not a bar to a conviction for commission of the offense, but is a bar to increasing, based on that fact, the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for that offense. Nothing in this subsection (c-5) requires the imposition of a sentence that increases the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense if the imposition of that

sentence is not required by law.” 725 ILCS 5/111-3(c-5) (West 2012).

¶ 50 As the State concedes, the court violated *Apprendi* and section 111-3 by not instructing the jury to specifically find the sentencing factors beyond a reasonable doubt. However, our supreme court has made it clear that not all *Apprendi* violations are reversible. *People v. Kaczmarek*, 207 Ill. 2d 288 (2003); *People v. Thurow*, 203 Ill. 2d 352, 371-72 (2003); *People v. Nitz*, 219 Ill. 2d 400 (2006); *People v. Rivera*, 227 Ill. 2d 1 (2007). Our supreme court held that there is no structural error where the outcome of the trial would have been the same had the court properly instructed the jury. *People v. Washington*, 2012 IL 110283, ¶ 60 (citing *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003)).

¶ 51 Here, the instructions for aggravated discharge of a firearm concerned whether defendant personally discharged the gun. The court stated, “To sustain the charge of aggravated discharge of a firearm, the State must prove *** that the Defendant knowingly discharged a firearm.” The jury found defendant guilty of aggravated discharge of a firearm, thereby finding that defendant personally discharged a gun.

¶ 52 Further, the evidence overwhelmingly proves that defendant proximately caused great bodily harm. Collins suffered major trauma as a result of multiple gunshot wounds to Collins’ right thigh, right elbow, penis, left femur, upper pelvic area and right buttock. Collins also suffered fractures to the leg bones as a result of the gunshot wounds. Doctors performed emergency surgery in order to repair the fractures to Collins’ leg bones and treat the gunshot wounds. Collins has a rod in his leg and arm as a result of the gunshot wounds. The injuries were life threatening and will have lifelong disabling effects. At trial, defendant stipulated to the medical reports detailing Collins’ injuries. On appeal, defendant does not challenge that the

sufficiency of the evidence proving that he proximately caused great bodily harm to the victim. The error does not undermine the fundamental right a jury trial where a defendant cannot establish facts contesting the elements. *Neder v. United States*, 527 U.S. 1, 19 (1999).

¶ 53 The outcome would have been the same had the court specifically asked the jury to determine whether defendant fired a gun proximately causing great bodily harm. Ergo, the court did not commit structural error.

¶ 54 **CONCLUSION**

¶ 55 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed in part and the armed habitual criminal charge is vacated; the unlawful use of a weapon by a felon conviction and sentence reinstated.

¶ 56 Affirmed in part; vacated in part and previous sentence reinstated.