2014 IL App (1st) 122343-U

SIXTH DIVISION
May 9, 2014

No. 1-12-2343

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

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 CR 7716
	)	
JOSHUA TOLBERT,	)	
	)	Honorable
Defendant-Appellant.	)	Dennis J. Porter,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Reversing the judgment of the circuit court of Cook County where the defendant suffered prejudice as a result of the State's charging instrument failing to allege an essential element of the AUUW offenses.

¶ 2 Following a bench trial, the trial court found the defendant, Joshua Tolbert, guilty of two counts of Aggravated Unlawful Use of a Weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (3)(A), (I) (West 2012)). On appeal, Tolbert argues: (1) his AUUW conviction under section 24-1.6(a)(1),

(a)(3)(A) should be vacated as the section is unconstitutional; (2) his AUUW conviction under section 24-1.6(a)(1), (a)(3)(I) for possessing a handgun while under 21 years of age should be vacated as this section is facially unconstitutional; (3) the State failed to prove all of the elements of the AUUW offenses; (4) the State's charging instrument was fatally defective; and (5) defense counsel was ineffective. For the following reasons, we reverse the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 At 11:30 p.m. on April 7, 2012, Officers Matthew Sedory (Officer Sedory) and Camila Sanchez (Officer Sanchez) of the Chicago police department received a dispatch to investigate "a person with a gun" at 7747 South Seeley Avenue in Chicago, Illinois.[1] Approximately 15 minutes later the officers arrived at the address and exited their marked police cruiser. It was at this time that they first observed Tolbert and another male, Anthony Jameson, in the gated front yard. Four other men and three or four women stood outside of the gate.

¶ 5 As the two officers approached the residence, Officer Sedory requested Tolbert and Jameson exit the yard. The two men complied, after which Officer Sedory detained all of the men at the scene while Officer Sanchez secured all of the women. Once the group had been detained, Officer Sedory used a flashlight to conduct a search of the front yard. Finding nothing in the yard, Officer Sedory proceeded to the front porch of the house, where he discovered an uncased Black Ruger 9mm pistol loaded with 14 rounds of live ammunition. Officer Sedory secured the handgun and called for additional assistance. He then returned to the area in front of the yard where Officer Sanchez stood by the detained group of men and women. According to Officer Sedory, Tolbert admitted being the owner of the weapon at this time.

[1] The trial court granted defense counsel's motion *in limine* to limit the testimony of the officers regarding the contents of the dispatch.

¶ 6 Officers Anthony Brown (Officer Brown) and Armando Garza (Officer Garza), who arrived at the scene after receiving the call for assistance, arrested Tolbert and transported him to the police station. Jameson was also arrested for criminal trespass after Officer Sedory spoke with an occupant of the residence.[2] At approximately 1:00 a.m., Officer Garza read Tolbert his *Miranda* rights in the processing area of the station. Tolbert then again admitted the pistol belonged to him, adding that he carried it for protection and had placed the weapon on the porch when he noticed the police cruiser approaching the house. Officer Sedory thereafter processed Tolbert, at which point he learned Tolbert was 17 years of age.

¶ 7 At a bench trial held on June 21, 2012, Officers Sedory and Garza testified to the foregoing on behalf of the State and the trial court found Tolbert guilty of two counts of AUUW: (1) for possession of an "uncased, loaded, and immediately accessible" firearm (720 ILCS 5/24-1.6(a)(1), (3)(A) (West 2012)); and (2) for possession of a handgun while under 21 years of age (720 ILCS 5/24-1.6(a)(1), (3)(I) (West 2012)). Tolbert now appeals those convictions.

¶ 8 ANALYSIS

¶ 9 On appeal, Tolbert argues: (1) his AUUW conviction under section 24-1.6(a)(1), (a)(3)(A) should be vacated as the section is unconstitutional; (2) his AUUW conviction under section 24-1.6(a)(1), (a)(3)(I) for possessing a handgun while under 21 years of age should be vacated as this section is facially unconstitutional; (3) the State failed to prove all of the elements of the AUUW offenses; (4) the State's charging instrument was fatally defective; and (5) defense counsel was ineffective.

¶ 10 I. AUUW Under Section 24-1.6(a)(1), (a)(3)(A)

¶ 11 Tolbert contends this court should vacate his AUUW conviction under section 24-

[2] It is unclear from the record exactly when the arrest took place or who arrested him.

1.6(a)(1), (a)(3)(A) on constitutional grounds. In *People v. Aguilar*, the Illinois Supreme Court declared unconstitutional the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute. *People v. Aguilar*, 2013 IL 112116, ¶ 22. Tolbert was convicted of violating section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute and sentenced to the Class 4 form of the offense under section (d). Accordingly, the State concedes his AUUW conviction should be vacated under *Aguilar* and we likewise agree.

¶ 12 II. AUUW While Under 21 Years of Age

¶ 13 Tolbert additionally argues this court should vacate his AUUW conviction under section 24-1.6(a)(1), (a)(3)(I) because subsection (a)(3)(I) is facially unconstitutional. We need not address this argument because we reverse Tolbert's conviction on this offense on other grounds. See *In re E.H.*, 224 Ill. 2d 172, 178 (2006) ("courts must avoid considering constitutional questions where the case can be decided on nonconstitutional grounds").

¶ 14 III. The State's Charging Instrument

¶ 15 Tolbert asserts on appeal that the State's information was fatally defective because it failed to list an essential element of the AUUW offense under section 24-1.6(a)(1), (a)(3)(I). The instrument charged:

> "[Tolbert] committed the offense of AGGRAVATED UNLAWFUL USE OF A WEAPON in that HE, KNOWINGLY CARRIED ON OR ABOUT HIS PERSON, A FIREARM, AT A TIME WHEN HE WAS NOT ON HIS OWN LAND OR IN HIS OWN ABODE OR FIXED PLACE OF BUSINESS, AND HE WAS UNDER TWENTY ONE YEARS OF AGE AND IN POSSESSION OF A HANDGUN, IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.6(a)(1)/(3)(I) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED."

The information did not include language added to section (a)(1) of the AUUW statute in 2009. The amended statute provides:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> > (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, *or on the land or in the legal dwelling of another person as an invitee with that person's permission*, any pistol, revolver, stun gun or taser or other firearm" (Emphasis added.) 720 ILCS 5/24-1.6(a)(1) (West 2010).

Under Illinois law, the charging instrument shall "[set] forth the nature and elements of the offense charged." 725 ILCS 5/111-3(a)(3) (West 2012); *People v. Smith*, 99 Ill. 2d 467, 470 (1984). The invitee exception was an element of the crime of AUUW and the State bore the burden of disproving its existence. See *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 22;[3] see also *People v. Laubscher*, 183 Ill. 2d 330, 335 (1998) ("When an exception appears as part of the body of a substantive offense, the State bears the burden of disproving the existence of the exception beyond a reasonable doubt in order to sustain a conviction for the offense."); *People v. Price*, 375 Ill. App. 3d 684, 687 (2007) (finding the State must disprove the abode exception as an element of AUUW). Thus, the information should have included language regarding the exception.

[3] The State argues it does not bear the burden of disproving the invitee exception, contending that the question was not resolved in *Brisco* because it was not "at issue" in that case. This is not true. Not only was this issue resolved in *Brisco*, but the State explicitly conceded that it did bear the burden of proving the exception. See *Brisco*, 2012 IL App (1st) 101612, ¶ 22 ("The State acknowledges it was required to prove defendant was not an invitee as an element of the offense of aggravated unlawful use of a weapon.").

¶ 16 Had Tolbert attacked the sufficiency of the information in a pretrial motion, strict compliance with the requirements of section 111-3 would have been required. See *People v. DiLorenzo*, 169 Ill. 2d 318, 321-22 (1996). Because he raises his challenge for the first time on appeal,[4] however, the failure to strictly comply with the requirements of section 111-3 will not necessarily render the information fatally defective. *Id.* at 322. In this instance, we review the allegedly defective information to determine whether it apprised the defendant of the offense with sufficient specificity to: (1) allow preparation of his defense; and (2) allow pleading a resulting conviction or acquittal as a bar to future prosecution. *Brisco*, 2012 IL App (1st) 101612, ¶ 14. The ultimate question therefore becomes whether the information was "so imprecise as to prejudice defendant's ability to prepare a defense." *People v. Phillips*, 215 Ill. 2d 554, 562 (2005). We examine the record in making this determination. *People v. Maggette*, 195 Ill. 2d 336, 348 (2001).

¶ 17 The record does not indicate whether any of the parties were aware of the invitee exception. In fact, the word "invitee" does not appear once in the record. The trial court did not discuss whether the State proved Tolbert was not an invitee. The State never argued in its closing[5] Tolbert was not an invitee. Further, the State's own brief concedes the only evidence it presented that could possibly have established Tolbert was not an invitee was the testimony of Officer Sedory, in which he stated Jameson—not Tolbert—had been arrested for criminal

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[4] We note that although Tolbert raises this issue for the first time on appeal, he need not argue for plain error review because "[u]nder Illinois criminal law, the existence of certain defects in a charging instrument may be raised at any time, including for the first time on appeal." *In re J.R.*, 342 Ill. App. 3d 310, 316 (2003); see also *DiLorenzo*, 169 Ill. 2d at 321 ("The failure to charge an offense is the kind of defect which implicates due process concerns. Such a defect may, therefore, be attacked at any time.").

[5] As Tolbert did not present a defense, the parties adopted the arguments made relating to defense counsel's motion for a directed verdict as closing arguments.

trespass.[6] Lastly, and most importantly, defense counsel did not argue the State failed to prove Tolbert was not an invitee despite the conspicuous lack of evidence on the issue. Given the apparent capacity and opportunity to raise a successful defense based on the invitee exception, we thus find Tolbert suffered prejudice by the defect in the information.

¶ 18 The State contends Tolbert suffered no prejudice because "any alleged error could have been remedied by [Tolbert] simply reading the section under which he was charged." For this proposition, the State relies on *People v. Cuadrado*, 214 Ill. 2d 79 (2005), which states nothing to this effect. In *Cuadrado*, "[t]he indictment properly cited the offense" and listed all of the elements of solicitation of murder for hire, but incorrectly substituted the word "solicited" in lieu of "procured" in one of the elements. *Id.* at 88. The court "disagree[d] with the State that the substitution [was] irrelevant and that the two terms are interchangeable." *Id.* The court nonetheless found no prejudice because the defendant conceded she was aware of the State's need to prove procurement when she alleged the State failed "to prove that she 'procured' [another] to murder her husband." *Id.*[7] At no point in *Cuadrado* does the court imply the State's errors in a charging instrument fall upon the defendant to remedy simply because the document properly cites the statutory section of the offense. Under Illinois law, it is insufficient for a

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[6] The State argues in its brief that because Jameson was arrested for trespassing, it follows that Tolbert also must not have been an invitee. Regardless of whether Jameson's arrest would even suffice to prove Tolbert's status as a non-invitee beyond a reasonable doubt, we question whether the inference the State would have the fact finder draw is more reasonable than the obvious alternative; the fact that the officers arrested Jameson and not Tolbert for criminal trespassing, despite the two being together on the property, equally suggests Tolbert could have been an invitee.

[7] Indeed, this was the same reasoning we set forth in *Brisco*. In *Brisco*, the State's information, as here, failed to include the invitee exception of the AUUW offense. *Brisco*, 2012 IL App (1st) 101612, ¶ 16. Unlike this case, however, the "defendant's own testimony suggest[ed] he was aware the State needed to prove he was not an invitee." *Id.* ¶ 20. Thus, *Brisco* similarly does not apply.

charging instrument to merely provide enough notice to allow a defendant the ability to further inquire as to the elements of the charge; "the purpose of requiring specificity is to provide notice to the defendant of *precisely* what the State will attempt to prove." (Emphasis added.) *People v. Morris*, 135 Ill. 2d 540, 547 (1990). The information in this case lacked this requisite specificity and the resultant effects of this error were reflected in the shortcomings of the State's case and the failure of defense counsel to respond to them. Accordingly, we reverse Tolbert's remaining AUUW conviction on these grounds. See *People v. Rowell*, 229 Ill. 2d 82, 103 (2008). We therefore need not address Tolbert's additional arguments as our disposition renders them moot.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, we hereby reverse the judgment of the circuit court of Cook County.

¶ 21 Reversed.