2017 IL App (1st) 140778-U

No. 1-14-0778

Order filed November 3, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 C6 612701
	)	
THELVIN CARR,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's procedural default must be honored when he cannot establish that the evidence at trial was so closely balanced that the verdict at trial resulted from the complained of errors rather than the evidence properly adduced at trial. Defendant's claim of ineffective assistance of counsel must fail when he cannot establish that he was prejudiced by counsel's failure to object to certain jury instructions or the closing argument by the State.

¶ 2 Following a jury trial, defendant Thelvin Carr was found guilty of the unlawful use of a weapon by a felon and sentenced to six years in prison. On appeal, he contends that he is entitled

to a new trial because the jury was given an "inaccurate and incomplete instruction" regarding a witness's prior inconsistent statement, and because the State relied on this inaccurate jury instruction during closing argument to improperly argue that the prior inconsistent statement was admissible as substantive evidence. Alternatively, defendant contends that he was denied the effective assistance of trial counsel by counsel's failure to object to the inaccurate jury instruction and the State's closing argument. Defendant finally contends that the State erred during closing argument by arguing that a witness' testimony was corroborated by certain information received by the police prior to arriving at the scene when the trial court had previously prohibited the State from eliciting testimony regarding that information. We affirm.

¶ 3 At trial, Valerie Jordan testified that around 7:45 p.m. on October 3, 2012, she left her home in Park Forest and walked down the street to 199 Westwood to meet defendant. She was accompanied by her 18-year old daughter. Jordan went to discuss an "incident that happened." Defendant lived "about" seven houses away. Jordan rang the doorbell and defendant's mother answered the door. Defendant was not home. Jordan began to tell defendant's mother about the incident. At one point, defendant pulled into the driveway in a SUV. Defendant walked up to Jordan and began "hollering and screaming and cursing." Defendant called Jordan a "b***" and threatened her. Jordan was "so scared" she told her daughter that they should leave. They then went home.

¶ 4 About an hour after Jordan returned home, the doorbell rang. When Jordan opened the door, defendant was there. Defendant had a "long barrel shotgun" that he pointed at Jordan's face. Defendant stated that he was going to kill everyone in Jordan's "motherf*** house." Defendant "went on and on cursing and cursing" and stated that he would "kill you b***." Jordan begged for her life and cried. Defendant then began to curse about Jordan's daughter.

After "a good 45 minutes" defendant left and entered a grey SUV and left.[1] Jordan immediately called the police. After the police arrived, Jordan went with them to defendant's home. Later, at a police station, Jordan identified the "long barrel shotgun" that defendant placed in her face.

¶ 5 During cross-examination, Jordan testified that she went to the house to ask defendant about a dispute, but that she had never met him before. When she opened the door at her home, she observed a short man and a gun. The gun was "right in [her] face." Jordan felt like she was about to faint. She testified that the time between the door opening and closing was "four to five minutes" but that it "seemed like a long time." Someone else actually phoned the police.

¶ 6 Detective Tom Piszczor testified that when he and other officers arrived at defendant's home they formed a perimeter with a "shield team" due to the nature of the call, *i.e.*, a person with a gun. Prior to arriving at the location, Detective Piszczor received a description of the firearm. When the State then asked what he "learn[ed] the description to be," the defense objected. The trial court sustained the objection. The State next asked whether Piszczor received any communication regarding the firearm while he was en route to defendant's home, and he answered in the affirmative. When the State asked what he learned, the defense objected and the trial court again sustained the objection.

¶ 7 When he arrived at defendant's home, Piszczor observed a silver SUV in the driveway. At one point, defendant exited the house carrying a garbage bag and was detained by officers. Defendant's mother then exited the house. During a subsequent conversation, Piszczor asked defendant's mother whether there were any firearms in the house. She gave Piszczor permission to enter the house and led him to an upstairs bedroom closet. Inside this closet was a shotgun

[1] During direct examination, Jordan testified that the encounter lasted "a good 45 minutes." However, during cross-examination, she testified that the encounter "seemed like an hour but it had to be a good four or five minutes."

"resting up against some clothes." He took custody of the "12-guage shotgun" and transported it to a police station.

¶ 8 Detective Kristopher Vallow testified that he spoke with defendant on October 4, 2012 in an interview room. After advising defendant of the *Miranda* warnings, defendant agreed to speak with Vallow. Defendant told Vallow that Jordan and another person came to defendant's home and engaged in an argument through the screen door. At one point, defendant went upstairs to his mother's room, retrieved a shotgun from the closet, went back downstairs and held the shotgun at a downward angle while telling the people outside that if they came into the house, he had something for them or something to that effect. After Jordan left, defendant went to her home to apologize. He carried a big stick on the walk to ward off raccoons. He spoke to Jordan and everything was fine. Defendant "refused" to provide a written statement.

¶ 9 The parties stipulated that defendant was convicted of a felony in Florida under case number 092CF-000269 on May 4, 2009.

¶ 10 The defense then presented the testimony of Laura Dawkins, defendant's 71-year old mother. Dawkins testified that in October 2012, defendant did not live with her; rather, he lived in Indiana. On October 3, 2012, Dawkins was ill and called defendant to take her to the hospital. She left the hospital in the late afternoon. Defendant took her to the grocery store before driving her home. Defendant helped to put away the groceries and she went upstairs to change. Defendant did not go upstairs; rather, he went to the basement. She then made dinner.

¶ 11 At one point, her neighbor rang the doorbell and asked for defendant. There was another young lady behind the neighbor. Dawkins later learned that the neighbor's name was Jordan. Jordan was "talking in a high voice *** like arguing." Defendant came upstairs and participated in the argument as well. Defendant then slammed the door. Dawkins never observed defendant

with a gun and defendant never went upstairs. After Jordan left, defendant went outside to smoke on the patio. After "[n]o more than five minutes," defendant came inside. After they ate, defendant prepared to go home. Dawkins asked him to take the garbage out on his way. When Dawkins opened the door, the house was surrounded by police officers.

¶ 12 Dawkins admitted that she had a gun in the house. She received it after her father passed away. She kept the gun in her upstairs closet and had not told defendant about it. Defendant did not live with her and she did not see him go upstairs.

¶ 13 During cross-examination, Dawkins testified that she spoke with someone on the morning of October 4 at her home, but that she did not know who. She thought that Detective Vallow asked her about what happened the prior day, but was "not sure." She "really" did not know what they discussed, "but whatever he asked [I] told him." Dawkins did not know how she answered Detective Vallow's questions because she did not know him and did not know what he asked. However, she answered any questions that he asked. Dawkins denied that she told Detective Vallow that she was upstairs when she observed defendant arguing with Jordon, that defendant had been drinking and that defendant left her home. To her knowledge, defendant did not use her address as his home address. She denied telling the detective that defendant lived with her.

¶ 14 During redirect examination, Dawkins testified that she did not observe defendant go upstairs or with a gun and did not observe him confront Jordon with a gun. She did not know if defendant used her address but he has never lived at that house.

¶ 15 The State then called Detective Vallow in rebuttal. He testified that during a conversation with Dawkins on October 4, 2012, she stated that defendant lived at her residence, that she walked upstairs and observed defendant arguing with Jordan, and that she heard defendant leave

the house. Dawkins did not say that defendant took her to the hospital or that he slammed the door in Jordan's face, but did say that defendant had been drinking and told Jordan to leave the house.

¶ 16 During closing argument, the State argued that defendant lived at an address on Westwood based upon "the fact that the defendant told Detective Vallow that's where he lives, and as well as the defendant's mother's initial statements to the police." The State then discussed Dawkins "prior inconsistent statement.

> "The instruction is as follows: 'The believability of a witness may be challenged by evidence that at on some former occasion, he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for limited purpose of deciding the weight to be given to the testimony.'
>
> You heard from the witness in this courtroom. The witness testifies. You can decide whether to give it great deference or little deference. How important is it? Is it accurate from what you are observing?
>
> However, the second part of the instruction, 'you may consider a witness' earlier inconsistent statement as evidence, without limitation when the statement narrates, describes or explains an event or condition the witness had personal knowledge of.'
>
> 'It is for you to determine whether the witness made the earlier statement and, if so, what weight should be given to that statement. In determining the weight to be given to the earlier statement, you should consider all of the circumstances under which it was made.'
>
> It is long. It is a little confusing. When a witness testifies, simply put, you can judge whether it is truthful or not, if it is partially truthful or not.

> What is important on the second paragraph is that you may consider a prior statement as evidence. You see, this is the law recognizing that people change their stories. Laws don't dictate to us why the story has changed, but it acknowledges that stories change over time.
>
> But what it allows you to do is take a prior statement offered by someone as evidence. As evidence, what does that mean? That means that the prior statement is as if you heard it coming from the stand. And then you judge the weight, which one do you believe, which one makes sense. And that's where the common sense comes in, viewing which statement to follow."

¶ 17 The defense argued that this was a dispute between neighbors that escalated and that Jordan "exaggerated what occurred." The defense then argued that whether or not Dawkins was impeached, she was 71 years old and testified to the best as of her ability as to what she remembered.

¶ 18 In rebuttal, the State argued that Jordan's testimony established that defendant possessed a firearm, that is, a shotgun, when he came to her home. The State noted that Jordan did not "just" identify the firearm in court; rather, she also identified it when she reported the incident to the police "before they even went to the defendant's home." The defense objected and the trial court instructed the jury that "what the lawyers say is not evidence."

¶ 19 The State then argued that the fact that Jordon described the gun defendant possessed as a "long gun," a type of firearm that is unusual in an urban environment and that matched the type of firearm recovered from defendant's home established Jordan's truthfulness. The State also argued that Dawkins told Detective Vallow that the Westwood address was defendant's address, and that the jury must consider Dawkins's potential bias as she was defendant's mother. The

State finally told the jury to compare Dawkins' testimony and her statement to the police, "[t]hat's why you have the instruction about the prior inconsistent statement." In other words, weigh what she told Detective Vallow on October 4th as though "she said it from the witness stand" because the jury had "an instruction that permits you to do that."

¶ 20 The trial court then instructed the jury, including that:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case.
>
> Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given to the testimony that you hear from the witness in this courtroom.
>
> However, you may consider a witness' earlier inconsistent statement as evidence, without this limitation, when the statement narrates, describes, or explains an event or condition the witness has personal knowledge of.
>
> It is for you to determine whether the witness made the earlier statement and, if so, what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all the circumstances under which it was made."

¶ 21 The jury found defendant guilty of the unlawful use of a weapon by a felon. He was sentenced to six years in prison.

¶ 22 On appeal, defendant first contends that the trial court gave an incomplete version of Illinois Pattern Instruction 3.11 (IPI Criminal 4th No. 3.11) (Illinois Pattern Jury Instructions, Criminal, No 3.11 (4th ed. 2000)), to the jury when the instruction did not include all the

requirements that must be met before a prior inconsistent statement may be admitted as substantive evidence. Defendant further contends that the State then relied upon this "misstated" law during its closing argument when it argued that Dawkins' statement could be used as substantive evidence. In the alternative, defendant contends that he was denied the effective assistance of trial counsel when counsel failed to object to the inaccurate jury instruction and the improper closing argument.

¶ 23 Defendant acknowledges that he failed to object to the jury instruction and the complained of argument. He asks this court to review this issue pursuant to the plain error doctrine because the incomplete jury instruction constituted error and the evidence at trial was closely balanced.

¶ 24 The plain error doctrine permits "a reviewing court to consider unpreserved error 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under either prong, the defendant bears the burden of persuasion. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 25 "The function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so that it can reach a correct conclusion." *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). "In a criminal case, fundamental fairness requires that the trial court fully and properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence." *Id.* The decision whether to give a certain jury instruction rests

within the trial court's discretion and will not be reversed absent an abuse of that discretion. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 44. An abuse of discretion occurs when the instructions are unclear, mislead the jury, or are not justified by the evidence and the law. *Id.* However, the issue of whether the jury instruction accurately conveyed to the jury the applicable law is reviewed *de novo*. *Pierce*, 226 Ill. 2d at 475.

¶ 26 IPI Criminal 4th No. 3.11 provides:

> "The believability of a witness may be challenged by evidence that on some former occasion he [(made a statement) (acted in a manner)] that was not consistent with his testimony in this case. Evidence of this kind [ordinarily] may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.
>
> [However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when
>
> [1] the statement was made under oath at a [(trial) (hearing) (proceeding)].
>
> [or]
>
> [2] the statement narrates, describes, or explains an event or condition the witness had personal knowledge of;
>
> and
>
> [a] the statement was written or signed by the witness.
>
> [or]
>
> [b] the witness acknowledged under oath that he made the statement.
>
> [or]

> [c] the statement was accurately recorded by a tape recorder, videotape recording, or a similar electronic means of sound recording.]
>
> It is for you to determine [whether the witness made the earlier statement, and, if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made." Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000).

¶ 27 Here, defendant contends that because Dawkins denied making an oral statement to Detective Vallow, the statement did not meet the statutory requirements for admission as substantive evidence (see 725 ILCS 5/115-10.1(c) (West 2012)); rather, it could only be used for impeachment purposes. He argues that the incomplete instruction "erroneously omitted the very statutory requirement that prohibited the substantive admissibility" of the statement and that the State relied on the incomplete instruction during closing argument when it argued that the statement was admissible as substantive evidence.

¶ 28 The State acknowledges that the trial court erred when it did not instruct the jury as to any of the requirements that must be met in order to consider a prior inconsistent statement as substantive evidence. However, the State argues that defendant fails to establish that this error affected the outcome of his trial, and, therefore, defendant cannot establish plain error.

¶ 29 The general rule is that when reviewing the adequacy of jury instructions, this court must consider all of the instructions as a unit to ascertain whether they fully and fairly cover the law. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 110. The " '[f]ailure to instruct the jury regarding the use of prior inconsistent statements as substantive evidence does not require reversal unless there is a reasonable probability that the outcome of the trial would have been changed had the jury been properly instructed.' " *Id.* (quoting *People v. Fierer*, 260 Ill. App. 3d 136, 148 (1994)).

¶ 30 Here, the trial court erred when it failed to instruct the jury with the second paragraph of IPI Criminal 4th No. 3.11, and, therefore the jury was improperly instructed that it could consider Dawkins' statement as substantive evidence. However, defendant cannot establish plain error because he has failed to establish that the evidence at trial was so closely balanced that the result at trial resulted from this error rather than the evidence properly adduced at trial. Further defendant cannot establish that he was prejudiced by the error because he cannot show that the outcome would have been different.

¶ 31 In the case at bar, we are not persuaded that the outcome of defendant's trial would have been different if the jury had been properly instructed regarding the use of Dawkins' prior inconsistent statement, *i.e.*, that it could be used to impeach Dawkins, but not as substantive evidence. Here, Dawkins' trial testimony that defendant lived in Indiana and only left the house for a few minutes to smoke on the patio was rebutted by Detective Vallow's testimony that she stated that defendant lived with her and left the house. However, defendant has not persuaded this court that the fact that the jury was able to consider, as substantive evidence, the fact that defendant lived at the Westwood address and that he left the house, resulted in a finding of guilt. In the case at bar, the evidence at trial established, through Jordan's testimony and defendant's oral statement, that defendant left the Westwood address and went to Jordan's home. Furthermore, the record reveals that Dawkins never left the house and was not present at Jordan's home during the confrontation, thus, her testimony did not address the issue of whether defendant actually possessed a firearm when he went to Jordan's home. Jordan, on the other hand, testified that defendant had a "long barrel shotgun."

¶ 32 Defendant has therefore failed to persuade this court (*Herron*, 215 Ill. 2d at 187), that the evidence at trial was so closely balanced that the failure of the trial court to instruct the jury with

the second paragraph of IPI Criminal 4th No. 3.11 resulted in the verdict against him rather than the evidence properly adduced at trial (see *Piatkowski*, 225 Ill. 2d at 565). Accordingly, we must honor his procedural default.

¶ 33 Defendant next contends that the State improperly argued during closing argument that the jury could consider Dawkins' statement as substantive evidence.

¶ 34 The State is allowed considerable latitude during closing arguments, including the option to respond to comments from defense counsel that invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000); see also *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 108 (Jan. 31, 2017) (the State may comment on the evidence and all reasonable inferences from the evidence). This court reviews closing arguments in their entirety, with the challenged portions placed in context. See *People v. Cisewski*, 118 Ill. 2d 163, 176 (1987). The State's "comments in closing argument will result in reversible error only when they engender 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence." *People v. Macri*, 185 Ill. 2d 1, 62 (1998). In other words, even if the State's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993).

¶ 35 Due to an apparent conflict between two supreme court cases, it is unclear what the proper standard of review is when reviewing improper closing arguments. Compare *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (*de novo*), with *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (abuse of discretion). We need not resolve this apparent conflict, as defendant's claim fails under either standard.

¶ 36 During closing argument, the State argued that the discrepancies between Dawkins' testimony and her statement to Detective Vallow were due to the fact that defendant was her son and asked the jury to consider her bias as defendant's mother. Although the State did argue, in pertinent part, that the jury could evaluate what Dawkins told Detective Vallow as though "she said it on the witness stand" because the jury had "an instruction" which permitted the jury to do so, we cannot conclude that the State's argument regarding how to characterize Dawkins' prior inconsistent statement, that is, whether it merely impeached her testimony as opposed to whether it might be considered as substantive evidence, was of such a magnitude that absent this argument, the outcome of defendant's trial would have been different considering the fact that Dawkins did not leave the house and could not speak to whether or not defendant had a firearm at Jordan's home. See *Hudson*, 157 Ill. 2d at 441. Having concluded that the remarks do not constitute reversible error (*id.*), defendant has not established plain error. See *People v. Smith*, 2016 IL 119659, ¶ 39 (Dec. 30, 2016) ("absent reversible error, there can be no plain error"). We must therefore honor his procedural default.

¶ 37 Defendant's ineffective assistance claim similarly fails. A defendant proves ineffective assistance of counsel when he shows that both (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the proceeding would have been different absent counsel's errors. *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 38 It is clear in this case, having reviewed the record that defendant cannot establish prejudice. First, defendant cannot establish prejudice based upon the fact that the jury considered Dawkins' prior inconsistent statement as substantive evidence rather than merely as impeachment, when, at most the prior statement serves only to prove or disprove whether or not

defendant lived at the Westwood address and whether or not he left the house for more than a few minutes to smoke. Regardless of defendant's official residence and how long he was gone from the house, Jordan testified that defendant came to her home with a firearm and later identified the firearm recovered from the Westwood address as the same one that defendant pointed at her. Accordingly, defendant cannot show that there is a reasonable probability that the outcome of trial would have different had counsel ensured that the jury was properly instructed. See *Id.* Similarly, with regard to the State's closing argument, defendant cannot establish prejudice because he cannot show how, absent the complained of argument regarding how to use Dawkins' statement, the result of his trial would have been different. *Id*. Therefore, because defendant cannot establish a reasonable probability that the result of his trial would have been different absent the complained of errors (*id.*), his claim of ineffective assistance of counsel must fail. See *People v. Henderson*, 2013 IL 114040, ¶ 11 ("A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel.")

¶ 39 Defendant finally contends that the State improperly argued during its rebuttal argument that Jordan had described the firearm at issue to police prior to the arrival of officers at the Westwood address. Defendant argues that this was improper because the trial court had sustained two objections during Piszczor's testimony regarding information about the firearm that he received prior to arriving at the Westwood address. Defendant acknowledges that although he immediately objected, he failed to preserve this issue for appeal by including it in a posttrial motion. He asks this court to review it pursuant to the plain error doctrine.

¶ 40 The State responds that although the trial court precluded Piszczor from testifying as to what he was told before arriving at the Westwood address, there was no such restriction on Jordan's testimony. Specifically, the State notes that Jordan testified that defendant put a "long

barrel shotgun" in her face, that she told police officers what happened, and that a police station she later identified the "long barrel shotgun" that defendant put in her face. The State contends that this argument was proper based upon the evidence presented at trial and that even if the argument was improper, any impropriety was cured by defendant's objection and the trial court's admonishment to the jury that what the attorneys said during closing argument was not evidence.

¶ 41 As discussed above, the State is permitted considerable latitude during closing argument including the ability to respond to comments from the defense that invite a response (see *Hall*, 194 Ill. 2d at 346), and may comment on the evidence and all reasonable inferences from that evidence (see *Anderson*, 2017 IL App (1st) 122640, ¶ 108).

¶ 42 In its closing argument, the defense argued that this was a dispute between neighbors that escalated and that Jordan "exaggerated what occurred." In rebuttal, the State argued that Jordan's testimony established that defendant possessed a shotgun and that her description of the firearm was corroborated by the fact that this was an unusual firearm for a city. The State further argued that Jordan provided a description of the firearm to the police "before they even went to the defendant's home." The record reveals that the defense objected to this argument and that the trial court then instructed the jury that "what the lawyers say is not evidence."

¶ 43 Therefore, even if we were to agree with defendant that the State's comment was improper, the record reveals that the defense objected and the trial court instructed the jury that what attorneys say is not evidence. Thus, any error that may have occurred can be considered cured. See *People v. Garcia*, 231 Ill. App. 3d 460, 469 (1992) (instructing the jury that closing arguments are not evidence and that any statement during closing argument that is not based on the evidence should be disregarded tends to cure any prejudice from improper remarks).

¶ 44 Ultimately, because the complained of remarks did not amount to reversible error, there can be no plain error (see *Smith*, 2016 IL 119659, ¶ 39 ("absent reversible error, there can be no plain error")), and we must therefore honor defendant's procedural default. Further, even if we found error, that error would not rise to the level of plain error because defendant cannot show that the result of his conviction would not have occurred but for that error. See *Herron*, 215 Ill. 2d at 187 (under the second-prong of plain error review, a "defendant must prove that there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process").

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.