

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).

2014 IL App (4th) 120216-UB

NO. 4-12-0216

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 5, 2014

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

J.W. GAYFIELD,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) Champaign County

) No. 11CF1816

) Honorable

) Thomas J. Difanis,

) Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.

Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Finding of unconstitutionality specifically limited to the Class 4 form of aggravated unlawful use of a weapon (AUUW) and (2) the prosecutor's closing argument was not improper.

¶ 2 On January 11, 2012, a jury convicted defendant, J.W. Gayfield, of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2010)), a Class 2 offense based on a prior felony conviction. The trial court sentenced defendant to seven years in prison. Defendant appealed, arguing the prosecutor made improper remarks in his closing argument, thereby denying defendant a fair trial. On August 19, 2013, this court issued an order finding the prosecutor's closing argument was not improper and affirming the trial court's judgment. *People v. Gayfield*, 2013 IL App (4th) 120216-U (unpublished order under Supreme Court Rule 23).

¶ 3 On August 26, 2013, defendant filed a petition for rehearing pursuant to Supreme Court Rule 367 (Ill. S. Ct. R. 367 (eff. Dec.29, 2009)). For the first time, defendant asked this court to consider whether defendant's conviction should be reversed, asserting the aggravated unlawful use of a weapon statute (AUUW) was unconstitutional. On September 9, 2013, this court denied defendant's petition for rehearing.

¶ 4 On October 9, 2013, defendant filed a motion for supervisory order in the Illinois Supreme Court, which the supreme court granted on November 6, 2013. *People v. Gayfield*, Nos. 116726, 116728 (Nov. 6, 2013) (nonprecedential supervisory order directing *vacatur* of judgment and denial of petition for rehearing and reconsideration in light of *Aguilar*, and denying leave to appeal as moot). As a result, the supreme court directed this court to vacate our judgment in *Gayfield*, and our order denying the petition for rehearing, and to reconsider our judgment in light of *People v. Aguilar*, 2013 IL 112116, 2 N.E.3d 321, to determine whether a different result is warranted.

¶ 5 In accordance with the supreme court's direction, we vacate our prior judgment and our order denying the petition for rehearing, and reconsider our prior judgment in light of *Aguilar*. Because *Aguilar* does not change the result in this case, we again affirm.

¶ 6 I. BACKGROUND

¶ 7 On November 3, 2011, the State charged defendant by information as an armed habitual criminal (720 ILCS 5/24-1.7(a)(1) (West 2010)) (count I). On January 4, 2012, the State charged defendant by information with aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2010)) (count II), a Class 2 offense based on a prior felony conviction. The State later dismissed count I.

¶ 8 At defendant's January 2012 jury trial, Officer Dieter Rene Wissel of the Rantoul police department testified that, on November 2, 2011, at approximately 2 a.m., he was "running license plates" on Route 136 in Rantoul. Wissel testified he had "cause for concern" upon checking the license plate on a gray Honda Accord that he observed traveling approximately five miles per hour over the posted speed limit. Wissel initiated a traffic stop, contacting a sergeant regarding "officer safety concerns." Wissel found defendant driving the vehicle, and Walter Cunningham in the front passenger seat. According to Wissel, both defendant and Cunningham appeared "extremely nervous." Upon request, defendant provided identification and Cunningham stated his name. Wissel returned to his squad car and ran a law-enforcement-agencies data system (LEADS) inquiry on both names. Wissel remained in his squad car until Officer Kyle Gregg and Sergeant Richard Welch, both of the Rantoul police department, arrived at the scene. Welch instructed Wissel and Gregg to secure the vehicle and check the occupants for weapons. Wissel performed a pat-down search of defendant, revealing a fully loaded semiautomatic pistol in his left chest pocket and 20 rounds of ammunition in a right front pants pocket.

¶ 9 Welch testified that he saw Wissel remove the gun from "an inner pocket somewhere[,] I believe it was the jacket pocket or the shirt pocket."

¶ 10 Gregg testified that he was tasked with watching defendant's passenger on November 2, 2011. He assisted Wissel in placing handcuffs on defendant. Gregg observed the semiautomatic handgun after it had been removed from defendant and placed in the trunk of Wissel's squad car.

¶ 11 Cunningham testified on defendant's behalf. Defendant is his nephew. Cunningham did not see defendant with a gun that night and did not see a gun in the vehicle.

¶ 12 The jury found defendant guilty of aggravated unlawful use of a weapon. On January 24, 2012, defendant filed his posttrial motion arguing, in part, that the trial court erred "in overruling the Defendant's objection to the State's closing remarks." On February 29, 2012, the trial court denied defendant's posttrial motion and sentenced defendant to seven years in prison.

¶ 13 As stated, defendant appealed and this court affirmed. *Gayfield*, 2013 IL App (4th) 120216-U (unpublished order under Supreme Court Rule 23). On September 12, 2013, our supreme court determined section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute was unconstitutional on its face. *Aguilar*, 2013 IL 112116, ¶ 22, 2 N.E.3d 321. On November 6, 2013, the supreme court issued a supervisory order directing this court to vacate our judgment in *Gayfield*, and our order denying the petition for rehearing, and to reconsider our judgment in light of *Aguilar*. On December 19, 2013, our supreme court entered a modified opinion upon denial of the State's petition for rehearing in *Aguilar*. *Aguilar*, 2013 IL 112116, 2 N.E.3d 321 (*reh'g denied*, Dec. 19, 2013). In the modified opinion, the court noted:

"In response to the State's petition for rehearing in this case, we reiterate and emphasize that our finding of unconstitutionality in this decision is specifically limited to the Class 4 form of AUUW, as set forth in section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute. We make no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute." *Aguilar*, 2013 IL 112116, ¶ 22 n. 3, 2 N.E.3d 321.

¶ 14

II. ANALYSIS

¶ 15 We first consider whether our supreme court's modified opinion in *Aguilar* renders defendant's conviction for AUUW void. In this case, the State charged defendant by information with aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2010)), a Class 2 offense based on a prior felony conviction. Section 24-1.6 of the AUUW statute provides in part:

"(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, *** any pistol, revolver, stun gun or taser or other firearm; or

(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own abode, legal dwelling, or fixed place of business, *** any pistol, revolver, stun gun or taser or other firearm; and

(3) One of the following factors is present:

(A) the firearm possessed
was uncased, loaded, and
immediately accessible at the time of
the offense[.]

* * *

(d) Sentence.

(1) Aggravated unlawful use of a weapon is a Class
4 felony; a second or subsequent offense is a Class
2 felony for which the person shall be sentenced to
a term of imprisonment of not less than 3 years and
not more than 7 years.

* * *

(3) Aggravated unlawful use of a weapon by a
person who has been previously convicted of a
felony in this State or another jurisdiction is a Class
2 felony for which the person shall be sentenced to
a term of imprisonment of not less than 3 years and
not more than 7 years." 720 ILCS 5/24-1.6 (West
2010).

¶ 16 In *Aguilar*, the defendant was found guilty of the Class 4 form of the offense of the AAUW statute and sentenced to 24 months' probation. See *Aguilar*, 2013 IL 112116, ¶ 7, 2 N.E.3d 321. The decision in *Aguilar* relies on the Seventh Circuit Court of Appeals' decision in

Moore v. Madigan, 702 F. 3d 933 (7th Cir. 2012), which our supreme court has interpreted as applying to the Class 4 form of the offense. *Aguilar*, 2013 IL 112116, ¶¶ 19-22, 2 N.E.3d 321. In contrast, the record on appeal in this case establishes defendant was found guilty of the Class 2 form of the offense and sentenced to seven years in prison.

¶ 17 The modified opinion in *Aguilar* specifies the decision "is specifically limited to the Class 4 form of AUUW." *Aguilar*, 2013 IL 112116, ¶ 22 n. 3, 2 N.E.3d 321. Our supreme court observed that the right to keep and bear arms is subject to meaningful regulation. *Aguilar*, 2013 IL 112116, ¶ 21, 2 N.E.3d 321. Such regulations may include, but are not limited to " 'longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' " (Emphases added.) *Aguilar*, 2013 IL 112116, ¶ 26, 2 N.E.3d 321 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008)). Accordingly, we find *Aguilar* inapplicable to the instant case where the supreme court in *Aguilar* specifically limited its modified opinion to the Class 4 form of AUUW.

¶ 18 We next consider defendant's argument that the prosecutor made improper remarks in his closing argument, thereby denying defendant a fair trial. The State argues the issue is forfeited because defendant did not object to the specific remarks he now alleges were improper and did not present the issue in his posttrial motion. The record shows defendant failed to make a timely objection to the specific remarks he now alleges were improper. Defendant asks this court to review the issue as a matter of plain error. For the reasons discussed below, we find no error occurred.

¶ 19 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(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, 940 N.E.2d 1045, 1058 (2010).

¶ 20 Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). As the first step in the analysis, we must determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

¶ 21 Defendant argued that the prosecutor impermissibly drew attention to defendant's failure to testify, including a single reference to the evidence as "uncontroverted." We find no error.

¶ 22 "Every defendant is entitled to fair trial free from prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924, 807 N.E.2d 1125, 1137 (2004). "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009). A reviewing court "will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that

the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142, 917 N.E.2d 940, 982 (2009).

¶ 23 Defendant takes issue with the following statements made by the prosecutor during rebuttal argument:

"What the officers say happened and is uncontroverted is we caught this guy, we had officer safety concerns, he was going 25 in a 20 and we stopped him. And counsel wants to suggest from what you saw in that video somehow in the space of time of stopping that car, walking up and first identifying the driver as this J.W. Gayfield, somehow Officer Wissel, Officer Gregg and Sergeant Welch managed to come up with a complicated conspiracy plot where everybody had a role to play and they put on essentially a sketch, a theater production in front of *** I mean that's what she's saying that they came up with this plot."

¶ 24 Defendant also complains of the following argument:

"What you don't hear on that audio is one other important thing. They never say hey what are you doing. What are you doing with that gun? Why are you putting that gun on me? What's going on? Where did that gun come from? There's nothing like that. What you hear them say on the audio at one point is ask him hey has your partner got a gun. He says no. He ain't got a gun. That's what's on the audio. It took 9 minutes, 30 seconds. You don't hear him say what are you doing with that gun."

¶ 25 "A criminal defendant has a fifth[-]amendment right not to testify as a witness in his or her own behalf, and the prosecutor is forbidden to make direct or indirect comment on the exercise of that right." *People v. Bannister*, 232 Ill. 2d 52, 88, 902 N.E.2d 571, 593 (2008); U.S. Const., amend. V. However, "the State may comment that evidence is uncontradicted and may do so even if the defendant was the only person who could have provided contrary proof." *People v. Johnson*, 208 Ill. 2d 53, 112, 803 N.E.2d 405, 439 (2003) (quoting *People v. Keene*, 169 Ill. 2d 1, 21, 660 N.E.2d 901, 912 (1995)) ("the State is free to point out what evidence was uncontradicted so long as it expresses no thought about who specifically—meaning the defendant—could have done the contradicting").

¶ 26 Further, "[a] prosecutor may respond to comments made by defense counsel in closing argument that clearly invite a response." *Johnson*, 208 Ill. 2d at 113, 803 N.E.2d at 439. "Such comments must be considered in the proper context by examining the entire closing argument of the parties." *Johnson*, 208 Ill. 2d at 113, 803 N.E.2d at 439.

¶ 27 Here, the prosecutor's comments were tied to the lack of evidence supporting defendant's theory that officers planted the gun on defendant (a theory that was flatly refuted by the evidence presented). A prosecutor, of course, may comment that his case is uncontradicted. See *People v. Johnson*, 208 Ill. 2d at 112, 803 N.E.2d at 439. Further, during her closing argument, defense counsel suggested that the officers' testimony was a fabrication and that officers planted the gun on defendant. The prosecutor made the comments of which defendant complains in response to defense counsel's argument that (1) the officers' testimony was a fabrication and (2) the officers planted the gun on defendant. Defense counsel's argument clearly invited a response. Because we find no error occurred, we need not address either prong of the plain-error analysis.

¶ 28

III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 30 Affirmed.