

No. 1-08-2533

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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. 04 CR 5008
)	
DANIEL NICHOLS,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

QUINN, P.J., delivered the judgment of the court.
Neville and Steele, JJ., concurred in the judgment.

ORDER

- ¶1 *HELD:* Where defendant was not prejudiced when trial counsel opened the door to questioning about a defaced serial number on a gun, counsel did not render ineffective assistance and defendant's conviction for unlawful use of a weapon by a felon is affirmed.
- ¶2 Following a jury trial, defendant Daniel Nichols was convicted of unlawful use of a weapon by a felon and sentenced to five and a half years' imprisonment. On appeal, defendant contends that his trial counsel rendered ineffective assistance because he opened the door to prejudicial other crimes evidence that the gun recovered from defendant's car had a defaced serial number. Defendant also contends, and the State agrees, that his mittimus must be amended to reflect the correct offense of which he was convicted. We affirm and correct the mittimus.
- ¶3 Defendant's first trial in this case resulted in a mistrial due to a hung jury. During that trial, the court sustained defense counsel's objection when the State elicited testimony from a

forensic scientist that the serial number on the gun recovered from defendant's car was obliterated. During a sidebar, the court explained that such testimony implied that there was something wrong with the gun and that defendant may have defaced it. The court, however, denied defense counsel's motion for a mistrial explaining that the jury was not able to glean from the testimony that there was another crime, and the testimony did not indicate any wrongdoing on anyone's part. The court then instructed the jury to disregard the testimony about the serial number.

¶4 After five hours of deliberations, the jury sent the court a note stating "[t]wo jurors honestly believe the State has not provided enough evidence." Following continued deliberations, the jury indicated that it was deadlocked at 11 to 1. After further deliberations, the jurors issued a note stating that they could not come to an agreement. The court then granted defense counsel's motion for a mistrial and scheduled a second trial.

¶5 At the second trial, Chicago police officer George Gass testified that he and his partner, Officer Christopher Hoffman, were members of the Special Operations Unit which focused on gangs, guns, and public violence. About 9:30 p.m. on February 12, 2004, the officers were driving on Wells Street and saw a red Pontiac with Michigan license plates disobey a red light while turning from Wells Street to Garfield Boulevard. They stopped the Pontiac and approached the vehicle. Officer Gass shined his flashlight into the interior of the car and saw the driver, defendant, lean towards the glove compartment on the passenger's side of the car. Defendant was the only person inside the car. Officer Gass asked defendant for his driver's license and insurance card, and asked him to exit the vehicle.

¶6 Officer Gass asked defendant if he had any firearms or drugs inside the car. Defendant admitted that he had a loaded gun inside the glove compartment. Officer Gass relayed that information to Officer Hoffman, who recovered a silver revolver, fully loaded with five live rounds, from the glove compartment. Officer Gass arrested defendant and read him his *Miranda* rights. After verbally waiving his rights, defendant told the officers that he purchased the gun in

1-08-2533

Michigan for \$100 and carried it for protection while driving in Chicago with Michigan license plates.

¶7 At the police station, Officer Gass asked Officer Roberts, a beat officer, to write defendant's traffic ticket because Officer Gass did not have a ticket book as a member of the special unit. Officer Gass gave Officer Roberts the information to write the ticket. Officer Gass again advised defendant of his *Miranda* rights and defendant repeated the same information he told the officers while standing next to his car. Officer Gass then inspected the gun and learned that it was a .357 revolver.

¶8 Officer Gass acknowledged that at a preliminary hearing, he testified that the gun was a .38-caliber. He explained that he made a mistake at the prior hearing, that the two guns are very similar, and that a person cannot tell the difference from a few feet away. Officer Gass further acknowledged that he could not see defendant reach his arm toward the glove compartment because the car seats blocked his view. However, in his police report, the officer wrote that he saw defendant reaching, rather than leaning, toward the glove compartment. Officer Gass also acknowledged that the traffic ticket said defendant disobeyed the light on Wentworth Avenue rather than Wells Street.

¶9 Officer Gass testified that he did not check to verify if the gun actually came from Michigan. Defense counsel then asked the officer if the gun had a serial number on it. Officer Gass said he believed it did. On redirect examination, Officer Gass testified that every gun has a serial number, but that it was illegible on this gun because it had been defaced. When the prosecutor asked what "defaced" meant, Officer Gass testified that "the serial number has been obliterated in order to prevent the weapon being tracked or traced in case it's used in a crime."

¶10 Outside the presence of the jury, defense counsel objected to the State revealing that the serial number on the gun had been defaced. Counsel stated that he did not believe he asked a question about the serial number. He argued that it was prejudicial for the jury to hear that the

1-08-2533

serial number had been defaced because that is what people do if they are going to commit a crime with the gun, and he moved for a mistrial. The court noted that on cross-examination, counsel asked the officer if the gun had a serial number, and the officer replied "yes."

¶11 The State argued that by asking about the serial number, defense counsel opened the door to the prosecutor's questions. The court found that the State's questions were invited by defense counsel's question and denied his motion for a mistrial.

¶12 Chicago police officer Christopher Hoffman testified substantially the same as Officer Gass, explaining that after Officer Gass spoke with defendant, Officer Hoffman removed a silver revolver in a brown holster from inside defendant's glove compartment. The officer then removed five bullets from the gun. Officer Hoffman also testified that, at the police station, defendant told the officers that he purchased the gun in Michigan for \$100 and brought it to Chicago because he needed protection due to the fact that he had Michigan license plates on his car.

¶13 Officer Hoffman acknowledged that he did not see defendant lean towards the glove compartment. The officer explained that it was his responsibility to watch the area around the officers while Officer Gass concentrated on the front seat. Officer Hoffman also acknowledged that he could not hear Officer Gass' conversation with defendant and did not hear defendant say that there was a gun inside the car. Officer Hoffman testified that Wentworth Avenue and Wells Street are the same street, but it has different names on opposite sides of the Dan Ryan expressway.

¶14 Forensic scientist Kurt Zielinski, a firearms identification expert, testified that the gun recovered from defendant's glove compartment was in working condition. He further testified that from a distance of 20 feet, he could not tell if the gun was a .357 magnum or a .38-caliber revolver.

¶15 The parties stipulated that defendant was a convicted felon. They further stipulated that Officer Roberts would testify that she issued defendant a traffic citation for disobeying a red light

at Wentworth Avenue and 55th Street.

¶16 The jury found defendant guilty of unlawful use of a weapon by a felon. The trial court subsequently sentenced defendant to a term of five and a half years' imprisonment.

¶17 On appeal, defendant first contends that his trial counsel rendered ineffective assistance because he opened the door to prejudicial other crimes evidence that the gun recovered from defendant's car had a defaced serial number. Defendant argues that counsel had no strategic reason for questioning Officer Gass about the serial number because counsel knew the number had been defaced, and he objected to the State eliciting the same evidence at the first trial.

Defendant claims that it cannot be found that the defacement evidence did not affect the jury's verdict because the police officers' testimony contained inconsistencies, and at the first trial, when the jury was told to disregard the defacement evidence, the trial resulted in a hung jury.

¶18 The State argues that defendant was not prejudiced by the defacement evidence, and therefore, counsel was not ineffective. The State claims that the evidence against defendant was overwhelming and there is no reasonable probability that the outcome of the trial would have been different without that testimony. The State also asserts that defendant cannot rely on what happened at the first trial to claim prejudice here because we do not know why the first trial resulted in a hung jury, and what occurred then is irrelevant to this trial.

¶19 Claims of ineffective assistance of counsel are evaluated under the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687; *Givens*, 237 Ill. 2d at 331. If defendant cannot prove that he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331.

¶20 Here, we find that defendant was not prejudiced when counsel opened the door to the defacement testimony from Officer Gass. The officer testified that the serial number on the

weapon was illegible because it had been defaced, and he then explained that "defaced" meant that the number had been obliterated to prevent the weapon from being tracked or traced if it was used in a crime. The record shows that this was the only reference made to the defaced serial number during the trial. None of the other witnesses testified about the defacement, nor was it mentioned by the State or the defense during closing arguments. There was no implication that defendant had defaced the serial number, or that he was involved in any other criminal activity.

¶21 Moreover, the record reveals that the evidence against defendant was overwhelming. To prove defendant guilty of unlawful use of a weapon by a felon, the State merely needed to show that defendant knowingly possessed the firearm, and that he had a prior felony conviction. 720 ILCS 5/24-1.1(a) (West 2004); *People v. Gonzalez*, 151 Ill. 2d 79, 85 (1992). In this case, the parties stipulated that defendant had a prior felony conviction. Officer Gass testified that when he asked defendant if he had any firearms or drugs inside the car, defendant admitted that he had a loaded gun inside his glove compartment. Officers Gass and Hoffman both testified that defendant told them that he purchased the gun in Michigan for \$100 and carried it for protection while driving in Chicago with Michigan license plates. The officers' testimony clearly established that defendant knowingly possessed the gun. Consequently, we find that even if the testimony about the defaced serial number had not been admitted, the result of the trial would not have been any different.

¶22 In addition, we reject defendant's argument that the outcome of the first trial shows that the defacement testimony affected the outcome of the second trial. What occurred at the first trial is not relevant to what occurred at the second trial. There were two separate trials before two different juries and two different trial court judges. Nothing in the record supports defendant's argument that the first trial resulted in a hung jury because the jury was advised to disregard the defacement evidence. In fact, a note from the first jury stated that two jurors believed the State had "not provided enough evidence" to prove defendant guilty.

¶23 Similarly, we reject defendant's claim that the defacement testimony had an affect on the

outcome of the trial because the police officers' testimony contained inconsistencies. The minor discrepancies regarding whether the gun was a .357 magnum or a .38-caliber revolver, and whether the traffic offense occurred on Wells Street or Wentworth Avenue, were sufficiently explained by the officers and were of no import to proving the elements of the offense.

Furthermore, it is well established that the jury is responsible for determining the credibility of the witnesses, weighing the testimony, resolving conflicts in the evidence, and drawing reasonable inferences therefrom. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). Here, the jury apparently found the officers' testimony and explanations credible. Accordingly, we find that because defendant was not prejudiced by the defacement evidence, counsel did not render ineffective assistance when he opened the door to that testimony.

¶24 Defendant next contends, and the State agrees, that his mittimus should be amended to reflect the correct offense of which he was convicted. The mittimus incorrectly indicates that defendant's conviction was for aggravated unlawful use of a weapon when, in fact, he was convicted of unlawful use of a weapon by a felon. Pursuant to our authority (134 Ill. 2d R. 615(b)(1); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we direct the clerk of the circuit court to amend the mittimus to reflect that defendant was convicted of the offense of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)), which was Count 5 of the charging instrument.

¶25 For these reasons, we affirm the judgment of the circuit court of Cook County and amend the mittimus.

¶26 Affirmed; mittimus amended.