

No. 1-11-1398

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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. 08 CR 13537 (02)
)	
JOSEPH THOMAS,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE STERBA delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant did not receive ineffective assistance of counsel where, whether or not it was objectively unreasonable for defense counsel not to object to the handgun being sent back to the jury room, defendant was not prejudiced because the evidence against him was overwhelming. Moreover, the trial court did not abuse its discretion in allowing the handgun to be sent to the jury room where defendant did not suffer any prejudice. Finally, the 15-year enhancement to the armed robbery statute is not unconstitutional where it was revived by Public Act 95-688.

¶ 2 Following a jury trial, defendant Joseph Thomas was convicted of armed robbery and sentenced to 35 years in prison. On appeal, defendant contends that defense counsel was

ineffective for failing to object when the trial court allowed the handgun to be sent back to the jury room. In the alternative, defendant contends that the trial court abused its discretion in sending the handgun to the jury room. Defendant further contends that the 15-year firearm enhancement to the armed robbery statute remains void where the legislature amended the armed violence statute but has not reenacted or amended the armed robbery statute. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On July 7, 2008, Rodney Batts was robbed at gunpoint in the area of 47th Street and Vincennes Avenue in Chicago. Police officers apprehended defendant a short time later and he was arrested and taken into custody. Defendant was charged by indictment with armed robbery, defacing identification marks of a firearm, aggravated unlawful restraint, and aggravated unlawful use of a weapon. A jury trial proceeded on the charge of armed robbery.

¶ 5 At trial, Batts testified that he had walked from his house to a currency exchange on July 7 around noon to cash a check for his wife. As Batts approached the currency exchange, he noticed a young lady and two young men standing outside the building. He passed within two or three feet of them and entered the currency exchange. Batts presented a check made payable to his wife to the teller, together with his wife's identification card and a note she had written giving Batts authorization to cash the check. The teller gave Batts a blue envelope containing \$622 in cash and also returned his wife's identification card and the note she had written.

¶ 6 Batts left the currency exchange, crossed 47th Street, and began walking through a vacant lot toward Vincennes Avenue. A man approached him from behind on the right side, pointed a

gun at his side, and said, "Give me them hundreds." Batts identified the man as one of the two men he had seen standing outside the currency exchange. When Batts turned toward him, the man told him not to look at him so Batts looked away. Batts said, "Young man, please, you don't have to do this, I will give you some money, you don't have to do this." The man said he did not want to hear it and told him to "lay down or stay down." Batts said he got down on the ground and testified that if he had not, he believed he would have been shot. While he was lying in a spread eagle position on the ground, Batts saw the other man who had been standing outside the currency exchange approaching from the direction of Vincennes. He identified the second man as defendant.

¶ 7 Defendant told the first man to give him "the banger." The man gave defendant the gun and defendant pointed it at Batts' head and told him to lie still. Defendant told the other man to go through Batts' pockets. The first man went through Batts' pockets and removed his cell phone, his wallet, and the envelope containing the money. Defendant told Batts to stay down and the two men walked slowly toward Vincennes. When they reached Vincennes, they started running and ran around behind a multi-unit residential building. Batts stood up and flagged down a police car that was approaching Vincennes from 47th Street.

¶ 8 The police car went in pursuit of the men and a second police car pulled up. Batts got in the back of the second police car. Batts subsequently identified a man the police had taken into custody as the first man who approached him in the vacant lot. The police recovered Batts' cell phone and wallet from the first individual and returned them to Batts. A short time later, the police took Batts to a location behind a building and he saw a gun on the ground against the wall

of the building near the envelope containing the money that was taken from him. Batts was taken to the police station where he identified defendant and the other offender in a lineup. Batts was shown a photograph of the gun the police recovered and testified that it appeared to be the same gun that was held against his side. Batts denied telling a detective that the second man was wearing a gray, sleeveless shirt. On cross-examination, Batts testified that he initially told police that defendant was wearing an orange shirt and blue jean cut-off shorts with orange on the seams.

¶ 9 Sergeant Thomas Lamb testified that he responded to a call of a robbery in progress at 47th and Vincennes on July 7, 2008, at approximately 12:20 p.m. Sergeant Lamb parked his vehicle, exited, and began to walk across the vacant lot. He observed an individual climb over a wooden fence and run in his direction. When this individual saw Sergeant Lamb, he turned and ran in another direction. The individual fit the description that had been given over the radio. Sergeant Lamb pursued him on foot into a yard, where he met up with some other officers and they took the individual, who he later learned was Willie Mack, into custody.

¶ 10 Officer Anthony Brown testified that he and his partner, Officer Harris, were assigned to a roaming patrol car in the vicinity of the robbery on July 7, 2008. He received a call of a robbery in progress and, because they were only two blocks away, they arrived on the scene within 10 to 20 seconds. They saw Batts standing near the vacant lot and flagging them down. After speaking with Batts, the officers went behind the building that was separated from the vacant lot by a chain link fence. Officer Brown heard Sergeant Lamb shouting instructions to Mack. Officer Brown performed a custodial search of Mack and recovered a cell phone that belonged to the victim. In the meantime, the officers continued to look for the other offender.

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Approximately 10 minutes later, another officer started shouting instructions to someone she found underneath some plywood. Officer Brown identified defendant as the individual who was under the plywood. Officer Brown testified that the sheet of plywood was next to a garage wall. Approximately 20 feet away, Officer Brown observed a handgun along the back wall of the garage. He also observed an envelope nearby with some money and the victim's wife's identification card. Officer Brown identified photos of the handgun and envelope. He then identified the actual handgun as the one he observed on the ground near the back wall of the garage.

¶ 11 Evidence technician David Scarriot testified that he recovered the handgun from the scene. He observed a white t-shirt in the grass near a blue envelope. He also observed a four-by-eight foot piece of plywood. The envelope was approximately 10 to 15 feet away from the plywood and the gun was approximately 8 to 10 feet from the envelope. Scarriot testified that there was no easy access to the area and that it could only be reached by climbing over a fence. Scarriot identified the handgun in court as the gun he recovered from the scene. Scarriot then held up the handgun and showed it to the jury. The parties stipulated that no latent fingerprints suitable for comparison were found on the handgun.

¶ 12 Detective Gary Wisniewski testified that he conducted a lineup at the police station following the robbery. The lineup consisted of five individuals, including defendant and Mack. Detective Wisniewski and Batts were alone in the viewing room. Batts identified both defendant and Mack, and Detective Wisniewski testified that he did so with certainty. The State rested and the trial court denied defendant's motion for a directed verdict.

¶ 13 The parties stipulated that if Detective James Pera had been called, he would have testified that Batts told him prior to the lineup that when the officers brought Mack for a show-up identification, Mack was hiding his face so Batts thought Mack was the offender but he was not certain. Detective Pera would have further testified that Batts told him that the second offender was wearing a gray tank top.

¶ 14 Defendant testified that he was hanging out and talking with Mack near the currency exchange at 47th Street and Vincennes Avenue at approximately 12 p.m. on July 7, 2008. Mack told defendant that he "was on the move" but did not explain what he was going to do. Defendant told Mack that he was going to go to his mother's house. As defendant turned to walk away, he heard another individual call out to Mack. Defendant told Mack he would talk to him later and started walking south on Vincennes. Defendant was stopped by a police officer at 48th Street and Vincennes. Defendant stated that he was not hiding under a piece of plywood but was standing on the sidewalk when the police stopped him. The police officers asked him a few questions and then arrested him. Defendant testified that he did not see Mack rob anyone, that he had not robbed anyone, that he had not held a gun, and that he had not run behind the building that was adjacent to the vacant lot. Defendant further testified that he did not speak to any detectives at the police station, and that he did not remember making statements to Detective Svec or speaking with an assistant State's Attorney.

¶ 15 In rebuttal, the State called Detective Beth Svec. She testified that she spoke with defendant in an interview room in the police station on July 7, 2008. Detective Svec and Detective Wisniewski went into the interview room together. Defendant stated that he witnessed

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Mack commit a robbery, but he had not taken part in it. He stated that he was lying underneath the plywood because he was tired. When Detective Wisniewski stepped out of the room, Detective Svec continued to speak with defendant. She testified that defendant then told her that he and Mack had robbed someone at 47th and Vincennes. Defendant told Detective Svec that Mack held a gun to the individual's head, went through his pockets and took his money. Defendant then said that he took off running. Detective Svec interviewed defendant again shortly after midnight with an assistant State's Attorney present. Defendant told both of them that he was just standing around while Mack went through the victim's pockets but that he never went near the victim. Defendant said that he just ran because he was nervous. When asked about being found underneath a piece of plywood, defendant said that he was tired so he decided to lie down under the plywood.

¶ 16 Following jury instructions, the trial court informed the jury that it would be receiving almost all of the evidence in the jury room. The trial court explained that, for obvious reasons, the weapon and the ammunition would not be in the jury room at the same time and instructed the jurors to ask the deputies if they wanted to see the ammunition. The trial court explained that, in that case, the deputies would remove the handgun and then bring in the ammunition. The jury found defendant guilty of armed robbery. Defendant's motion for a new trial was denied. The trial court sentenced defendant to 20 years in prison with an additional 15 years based on the statutory firearm enhancement, for a total of 35 years, with 3 years of mandatory supervised release. Defendant timely filed this appeal.

¶ 17

ANALYSIS

¶ 18 Defendant first contends that he received ineffective assistance of counsel where defense counsel failed to object to the handgun being sent to the jury room. Alternatively, defendant contends that the trial court abused its discretion in sending the handgun to the jury room.

¶ 19 Ineffective assistance of counsel claims are measured against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88, 694; see also *People v. Edwards*, 195 Ill. 2d 142, 162-63 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Because a defendant must establish both prongs for a successful ineffective assistance claim, a court considering such a claim need not determine the reasonableness of counsel's performance before considering whether defendant suffered prejudice as a result of the alleged deficiency. *Id.* at 697; *Edwards*, 195 Ill. 2d at 163.

¶ 20 Even if we were to determine that trial counsel's performance was objectively unreasonable for failing to object to the gun going back to the jury room, defendant has not shown that there is a reasonable probability that the outcome would have been different. The cases defendant relies on to establish prejudice are inapposite. In *People v. Blue*, 189 Ill. 2d 99 (2000), our supreme court addressed the issue of whether the prejudicial effect of a police officer's uniform spattered with the actual blood and brain matter of the victim outweighed its probative value for purposes of admission into evidence *and* sending it back to the jury room.

The *Blue* court held that the uniform's prejudicial effect outweighed its probative value and, therefore, it should not have been admitted into evidence. *Id.* at 125. Defendant also relies on *People v. Burrell*, 228 Ill. App. 3d 133, 144 (1992), in which this court held that the error in admitting police officers' bloodstained and bullet riddled clothing was harmless where the evidence of the defendant's guilt was overwhelming.

¶ 21 We note that defendant here does not contest the admission of the gun into evidence, but simply the fact that the exhibit was allowed to go back to the jury room with the other exhibits. We further note that a bloodstained uniform spattered with brain matter or riddled with bullet holes is not comparable to a handgun in terms of prejudicial effect. However, we need not reach a determination of whether the gun itself was more prejudicial than probative in the case *sub judice*. Defendant does not contend that sending an actual handgun to the jury room is prejudicial *per se*, but rather that the outcome would most likely have been different because of the combination of the prejudicial effect of viewing a handgun and the weaknesses in the State's case. We disagree.

¶ 22 The purported weaknesses that defendant identifies in the State's case consist primarily of an inconsistency in the testimony regarding whether Batts originally identified defendant as wearing a gray tank top or an orange shirt, the fact that there was no visible dirt on defendant's clothing in the lineup photo, and defendant's testimony at trial that he was never under the piece of plywood but was walking down the street when the police officers arrested him. The record does not support these arguments. First, the evidence is overwhelming that defendant was found underneath a sheet of plywood in close proximity to a handgun and the stolen items in an area

that was not easily accessible. Officer Brown, one of the first officers on the scene, observed another officer giving orders to someone found underneath a piece of plywood and identified that individual as defendant. Detective Svec testified that defendant gave multiple accounts of his activities to herself, another detective and an assistant State's Attorney, including that he was lying under the plywood because he was tired, that he watched Mack rob Batts but did not participate, and that he participated but did not handle the weapon. Therefore, the jury heard evidence that defendant's testimony at trial was his fourth account of what happened on the date in question. Moreover, when confronted with the inconsistent accounts, defendant testified, incredibly, that he never spoke with any detective or any assistant State's Attorney at the police station, or that he did not remember speaking with anyone.

¶ 23 Second, the lack of visible dirt on defendant's clothing in the lineup photo is not evidence of anything. The photographs of the area where defendant was found do not contain any obvious mud or anything that would otherwise lead to the conclusion that someone hiding under the plywood would necessarily have visible dirt marks all over his clothing. Moreover, the lineup photograph only shows the front of defendant's clothing and no evidence was introduced of a detailed examination of his clothing. Finally, Batts testified that he told the officers defendant was wearing an orange shirt. The officers who responded to the call and participated in the apprehension of the suspects did not testify regarding the description of clothing given by Batts. A stipulation was entered that a certain detective would have testified that Batts told him, at some point prior to the lineup, that the second offender was wearing a gray tank top. There is no evidence regarding whether this particular detective was one of the officers who responded to the

scene, and no evidence regarding the exact timing of the description. Detective Wisniewski testified that Batts identified defendant in the lineup with certainty, and Batts had the opportunity to view defendant as he approached from Vincennes while Batts was lying on the ground facing that direction. Thus, we conclude that the evidence against defendant was so overwhelming that even if the handgun should not have been allowed to go back to the jury, defendant was not prejudiced. Because defendant has not satisfied the prejudice prong of the *Strickland* test, he has not demonstrated that he received ineffective assistance of counsel.

¶ 24 Defendant alternatively contends that the trial court abused its discretion in sending the handgun to the jury room. Defendant acknowledges that he did not object at trial and did not raise this issue in his posttrial motion and has therefore failed to preserve this issue for review. The plain-error doctrine allows a reviewing court to consider unpreserved error if either: (1) 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) the error was so fundamental and of such magnitude that it affected the fairness of the 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); *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). In plain-error review, we must first determine whether an error in fact occurred (*People v. Walker*, 232 Ill. 2d 113, 124-25 (2009), and the burden of persuasion rests with the defendant (*People v. McLaurin*, 235 Ill. 2d 478, 495 (2009)).

¶ 25 We first consider whether it was error for the trial court to send the handgun back to the jury. The decision to allow evidentiary items to be taken to the jury room rests within the

discretion of the trial court, and will not be disturbed on review absent a showing of an abuse of discretion to the prejudice of the defendant. *People v. Shum*, 117 Ill. 2d 317, 353 (1987); *People v. Williams*, 97 Ill. 2d 252, 292 (1983). The handgun was relevant and admissible. A handgun was used in the commission of the robbery, and this particular handgun was found in close proximity to the blue envelope containing the stolen cash and identification card, just feet away from where defendant was found hiding under a piece of plywood. As previously discussed, defendant was not prejudiced by the handgun being sent to the jury room because the evidence against him was overwhelming. Therefore, the trial court did not abuse its discretion and, because no error occurred, it is not necessary to consider whether either prong under the plain error rule has been satisfied.

¶ 26 Defendant next contends that the 15-year enhancement to the crime of armed robbery is void and was not revived by the legislature's amendment to the armed violence statute. The constitutionality of a statute may be challenged at any time. *People v. Guevara*, 216 Ill. 2d 533, 542 (2005). Our review of a challenge to the constitutionality of a statute is *de novo*. *Id.* at 541.

¶ 27 At the time the parties filed their respective briefs in this case, there was an appellate court split on this issue. In *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007), our supreme court held that the 15-year enhancement for being armed with a firearm during a robbery (720 ILCS 5/18-2 (b) (West 2000)) violated the proportionate penalties clause when compared to the penalty for the identical offense of armed violence predicated on robbery with a category I or category II weapon (720 ILCS 5/33A-3(a), (a-5) (West 2000)). Following the *Hauschild* ruling, the legislature amended the armed violence statute to eliminate robbery as a predicate offense. Pub.

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Act 95-688, § 4 (eff. Oct. 23, 2007). A split subsequently developed in the Illinois Appellate Court over the issue of whether Public Act 95-688 revived the 15-year enhancement in the armed robbery statute that was declared unconstitutional in *Hauschild*.

¶ 28 However, our supreme court has now resolved this split in *People v. Blair*, 2013 IL 114122. In *Blair*, the supreme court held that Public Act 95-688 revived the sentencing enhancement in the armed robbery statute by amending the armed violence statute. *Id.* at ¶ 35. The *Blair* court explained that the legislature revived the unconstitutional statute by curing the proportionality violation through amendment of the comparison statute. *Id.* Thus, the trial court properly sentenced defendant to an enhanced term pursuant to section 18-2(b) of the armed robbery statute.

¶ 29 For the reasons stated herein, we conclude that defendant did not receive ineffective assistance of counsel when defense counsel failed to object to the handgun being sent to the jury room, and the trial court did not abuse its discretion in allowing the handgun to go to the jury during deliberations. Moreover, our supreme court has now held that Public Act 95-688 operated to revive the 15-year enhancement in the armed robbery statute that had previously been declared unconstitutional. Therefore, we affirm defendant's conviction and sentence.

¶ 30 Affirmed.