

No. 1-11-2825

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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. 10 CR 10257
)	
MARCEL BRITTON,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Evidence was sufficient to prove beyond a reasonable doubt that defendant possessed a gun found in a vehicle; trial court's misstatement of witness testimony was not an error that violated defendant's right to due process and a fair trial; trial counsel's failure to respond to trial court's misstatement of witness testimony did not constitute ineffective assistance of counsel; defendant was not subject to DNA Analysis Fee, Court System Fee, or Electronic Citation Fee; conviction affirmed and fees vacated.

¶ 2 Following a bench trial, defendant Marcel Britton was convicted of being an armed habitual criminal and sentenced to six years in prison. On appeal, defendant contends (1) his conviction should be reversed because the evidence was insufficient to prove that he possessed a

gun, (2) his constitutional rights to due process and a fair trial were violated because the trial court incorrectly recalled testimony that was crucial to his defense, and (3) his constitutional right to effective assistance of counsel was violated because his trial counsel failed to take action when the trial judge misstated a defense witness's testimony. Defendant also contends, and the State concedes, that the trial court erred in imposing a \$200 DNA ID System Fee, \$5 Court System Fee, and \$5 Electronic Citation Fee. We affirm defendant's conviction and vacate the fees.

¶ 3 At trial, Officer Spiegel testified that on May 25, 2010 at approximately 10:00 to 10:20 p.m., he was working in a team of five officers split among two unmarked police vehicles. Officer Spiegel's automobile pulled into a vacant lot at 3532 West Ogden in Chicago, where a group of 8 to 12 men were standing and open alcohol bottles were on the ground. Artificial lighting and the police vehicle's headlights illuminated the area. Other parked vehicles were scattered throughout the lot, including a Range Rover that was parked approximately in the middle of the lot, directly in front of the police vehicle's headlights. After Officer Spiegel announced his office and asked everyone to step over to the police vehicle, he noticed defendant walking away from the rest of the group, and began to follow him. When defendant approached the Range Rover, he removed what Officer Spiegel believed was a dark-colored handgun from his waistband and threw it into the rear driver's side window. After defendant returned to the group and was detained, Officer Spiegel recovered a loaded Sig Sauer P-6, 9 millimeter semiautomatic gun from the Range Rover's back seat. Officer Spiegel had not heard music coming from the Range Rover as he approached it. He denied searching each of the other vehicles in the lot, and said officers conducted protective pat-downs for safety.

¶ 4 Officer Michna testified to a sequence of events that led to the recovery of a weapon from a vehicle belonging to another individual who is not the subject of this appeal.

¶ 5 The State entered into evidence certified copies of two of defendant's prior convictions—a 2001 conviction for unlawful use of a weapon by a felon and a 1998 conviction for manufacture and delivery of a controlled substance.

¶ 6 Three witnesses testified for the defense—defendant, William Unger, and Jovantae Poole. Defendant testified that as the police approached the lot, he went to the Range Rover, reached through the window, and turned the volume down on the radio using a button on the steering wheel. When the police arrived, an officer thanked him for turning the volume down. The police asked everyone to step to the police vehicle, and began to search the individuals at the party, using keys found in pockets to search vehicles in the lot. However, the keys to the Range Rover were in the ignition so that the radio could be played. Defendant denied having a weapon or putting a handgun in the vehicle.

¶ 7 Unger, who had known defendant for a couple of years, testified that he was part of a small party in the vacant lot on May 25. Around seven or eight other individuals, including defendant, were there and five or six vehicles were in the lot. Defendant had arrived in his own automobile, a white Suburban. When the group saw the police arrive, defendant went to the Range Rover to turn down loud music. The police vehicle's headlights assisted in illuminating the area, which allowed Unger to see defendant's activities at the Range Rover. Police officers then directed everyone to get on the police vehicle and commenced searching the group, pulling out keys from individuals' pockets and using them to open and search automobiles in the lot. Unger did not see a weapon in defendant's waistband.

¶ 8 Poole, who had known defendant for about a year, testified that he arrived in the lot around 10:30 p.m. Music was playing from a Range Rover which belonged to defendant's cousin, Tony Britton. Shortly after Poole arrived, he and Tony went to a residence three blocks away, where Tony retrieved a weapon, and then Poole went to Tony's backyard behind the

vacant lot. Thirty minutes to an hour after first arriving, Poole headed back to the lot, where he saw police officers, but continued on to the lot because he was not doing anything wrong. Poole saw defendant go to the Range Rover to turn the music down, though he admitted he was not paying attention to defendant at this point. Police officers then placed everyone on a vehicle, and pushed the button on someone's keyless entry car remote. Poole did not see defendant with a handgun that night and stated the weapon in question belonged to Tony.

¶ 9 In closing, defendant argued that the evidence showed he did not possess a gun. The Range Rover belonged to defendant's cousin and defendant went to the Range Rover to turn the music down. The State's only evidence was the testimony of Officer Spiegel, who claimed it was light enough for him to see a dark metal object thrown by defendant into the front window, while the gun was actually found in the back seat. In rebuttal, the State argued that the defense witnesses were not credible. Poole's testimony was an hour to two hours off from the actual events. The artificial lighting and lights from the police vehicles assisted in illuminating the area, and even Unger said he could clearly see defendant. The State noted that because the keys to the Range Rover were already in the ignition, the defense witnesses' description of the search would not have led the police to connect the gun to defendant.

¶ 10 The trial court found defendant guilty of being an armed habitual criminal and unlawful use of a weapon by a felon. The trial court summarized the police officers' testimony and contrasted it to that of the defense witnesses:

"[U]nger and Poole give—as far as time is concerned—pretty different versions of the events. Unger and Poole—Poole said that all of this happened—I'm sorry—Unger said all of this happened pretty close to the time when he arrived at about 10:25, 10:20. Unger said that there was a point in time—he arrived at 10:30, he

named the people he saw in the lot, and at some point about an hour before the police arrived. Which if you take his timing, if he arrives when he said at about 10:30, and he says the police arrive about an hour later because he's got this whole thing where he walks from the lot to a house that he thinks might have been Tony's girlfriend's house, and that is where Tony Britton got the gun and brought it back to the location***And then they both tell the same story about everybody being put on the car immediately, on the police car, and everybody's pockets being searched, and then the police going and clicking all the automatic door openers, and then searching the vehicles."

The trial court further stated, "I believe Spiegel. What I don't believe is Poole and Unger." The trial court did not believe that someone who had seen the officers in the lot would have willingly walked into it, as Poole testified he did, and subject himself to possible arrest. In addition, the trial court said it "[had] the benefit of looking at and watching the demeanor of Mr. Poole and Mr. Unger when they testified, and their demeanor was such that I don't believe their testimony."

¶ 11 The trial court also found the testimony regarding the car keys significant, where the keys that would have led to the recovery of the weapon from the Range Rover were in the ignition, and not in anyone's possession. Weighing the defense witnesses' testimony against "what I believe to be the credible testimony of the police officers," the trial court found that the State proved defendant guilty beyond a reasonable doubt of being an armed habitual criminal.

Defendant was sentenced to the minimum term of six years in prison.

¶ 12 On appeal, defendant contends the State failed to prove beyond a reasonable doubt that he possessed the handgun discovered in the Range Rover. In particular, defendant argues that

due to the lighting conditions and because Officer Spiegel's line of sight was obstructed by the group of men in the lot, it is improbable that he could have seen what defendant was doing at the Range Rover. In contrast, the defense witnesses cast doubt on Officer Spiegel's testimony by explaining that defendant went to the Range Rover to turn the music down.

¶ 13 When a defendant challenges the sufficiency of the evidence, the relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not the reviewing court's function to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). In a bench trial, the trial judge determines the credibility of witnesses, weighs and draws reasonable inferences from the evidence, and resolves any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). A defendant's conviction will not be reversed simply because the evidence is contradictory or because the defendant claims that a witness was not credible. *Id.* Testimony may be found insufficient only where the evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A defendant's conviction will not be reversed unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 14 To sustain a conviction for being an armed habitual criminal, the State must prove the defendant possessed a firearm after being convicted of two or more enumerated offenses, including unlawful use of a weapon by a felon and a violation of the Illinois Controlled Substances Act. 720 ILCS 5/24-1.7(a) (West 2010). Possession can be actual or constructive. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Actual possession is proven by testimony that

shows the defendant exercised some form of dominion over the contraband, such as trying to conceal it or throwing it away. *Id.*

¶ 15 Here, the evidence sufficiently supports the trial court's finding that defendant possessed the weapon. Officer Spiegel testified that he saw defendant walk away from the group in the lot, approach a Range Rover parked directly in front of the police vehicle's headlights, and throw a handgun into the Range Rover's rear driver's side window. Officer Spiegel later recovered the weapon from the Range Rover's back seat. Officer Spiegel had not heard music coming from the Range Rover and denied searching other vehicles in the lot. In contrast, defendant, Unger, and Poole testified that defendant went to the Range Rover to turn down music that was playing, and that the police used keys to search other vehicles in the lot. In its ruling, the trial court specifically found Officer Spiegel credible and did not believe Unger or Poole. The trial court was in a much better position to determine credibility and the weight afforded to the witnesses' testimony. *Siguenza-Brito*, 235 Ill. 2d at 229. We will not substitute our judgment for that of the trier of fact on these issues. *People v. Baugh*, 358 Ill. App. 3d 718, 736-37 (2005). Further, the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant. *Siguenza-Brito*, 235 Ill. 2d at 228. There are conflicts in the evidence, but it is for the trier of fact to resolve them (*People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21). The conflicts here relate to the timing of the events and whether music emanated from the Range Rover. We also note that defense counsel misstated the evidence in his closing argument, when he argued that Officer Spiegel testified he saw a handgun being thrown into the front window, even though Officer Spiegel's actual testimony was that he saw the weapon thrown in the rear driver's side window. Here, viewing the evidence in the light most favorable to the prosecution, Officer Spiegel's testimony that defendant threw the weapon into the Range Rover was not so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of

defendant's guilt.

¶ 16 Defendant next argues that his constitutional rights to due process and a fair trial were violated because the trial court failed to correctly recall testimony that was crucial to his defense. When the trial court confused Poole's and Unger's testimony, it attributed statements made by defendant's least reliable witness, Poole, to defendant's most reliable witness, Unger. Defendant asserts that if the trial court had not confused the testimony, its credibility determination would have been different, and the outcome may have been different as well. We disagree.

¶ 17 Defendant acknowledges that he failed to object at trial and did not include the issue in a posttrial motion, and urges this court to review his claim nonetheless. Defendant first posits that we should review his claim because the trial judge's conduct is at issue. We note that this exception to forfeiture applies only in extraordinary situations that do not apply here. See *People v. McLaurin*, 235 Ill. 2d 478, 487-88 (2009) (noting that judicial misconduct can relax the forfeiture rule under "extraordinary circumstances," such as when a trial judge makes inappropriate remarks to a jury or relies on social commentary, rather than evidence, in sentencing a defendant to death, or where an objection would have fallen on deaf ears). Defendant also contends we should review his claim for plain error. The plain error doctrine allows 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, 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. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step, however, is to determine whether an error occurred. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 66.

¶ 18 As a general matter, where the record affirmatively indicates that the trial judge did not remember or consider the crux of the defense when entering judgment, the defendant did not

receive a fair trial. *Id.* at ¶ 91; *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992); *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976). Here, however, we do not find that the trial court failed to consider the crux of the defense. Defendant observes that the trial court incorrectly recalled that Unger, instead of Poole, testified he arrived at the lot at 10:30 p.m. and went with Tony to retrieve a gun. However, the trial court separately stated that neither Poole nor Unger were credible based on their demeanor. The trial court did not solely rely on its misstatement in determining credibility, but merely temporarily confused the names of the two defense witnesses, neither of whom was found to be credible. The trial court also considered other parts of the defense witnesses' testimony, including their description of the officers' search of vehicles in the lot, and did not believe this version of the events. Under these circumstances, no reversible error occurred. See *People ex rel. Reynolds v. Myers*, 58 Ill. App. 3d 373, 377 (1978) (where the trial court incorrectly recalled the number of people involved in an incident, the reviewing court found that the trial court was merely confused, and no reversal was warranted because the trial court correctly recounted other pertinent details and recounted inconsistencies between the witnesses' accounts).

¶ 19 We reject defendant's contention that his counsel's failure to take action in response to the trial court's misstatement violated his right to effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland*). To prove prejudice, the defendant must show there is a reasonable possibility that but for counsel's errors, the result would have been different. *People v. Enoch*, 122 Ill. 2d 201, 202 (1988). In weighing the impact of counsel's errors, the reviewing court considers the totality of the evidence before the finder of fact. *People v. McCarter*, 385 Ill. App,

3d 919, 935-36 (2008). If a court finds that defendant was not prejudiced, it may dismiss the claim on that basis alone, without further analysis. *People v. Land*, 2011 IL App (1st) 101048, ¶ 116. Here, we find that defendant was not prejudiced by his counsel's failure to take action when the trial court confused Poole's and Unger's testimony. As noted above, the trial court separately found that Unger was not credible because of his demeanor. Further, the trial court cited additional reasons for finding defendant guilty that were unrelated to Poole's testimony about his first hour at the party, including finding that Officer Spiegel's testimony was credible, and that the defense witnesses' testimony regarding the car keys did not support defendant's position. As defendant was not prejudiced by his counsel's inaction, we find his right to effective assistance of counsel was not violated.

¶ 20 Finally, defendant asserts, and the State correctly concedes, that we must vacate three fees. First, a trial court may order the taking, analysis, and indexing of a defendant's DNA, and payment of the analysis fee, only if the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). As defendant was already registered at sentencing and at present, we vacate the \$200 DNA fee (730 ILCS 5/5-4-3(j) (West 2010)). Second, the \$5 Court System Fee applies to violations of the Illinois Vehicle Code or similar provisions in county or municipal ordinances. 55 ILCS 5/5-1101(a) (West 2010). Defendant's offense is not covered by section 5-1101(a), and so we vacate this fee as well. Third, the \$5 Electronic Citation Fee is to be paid by defendants in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision. 705 ILCS 105/27.3e (West 2010, eff. Jan. 1, 2011). Defendant's offense does not fall into any of those categories, and so this fee is also vacated.

¶ 21 For all the foregoing reasons, we affirm the judgment of the circuit court and correct the fines and fees as indicated.

1-11-2825

¶ 22 Affirmed as modified.