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No. 3--08--1044

Order filed March 17, 2011

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of the 21st Judicial Circuit, |
| |) | Kankakee County, Illinois, |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 08--CF--311 |
| |) | |
| JAMES F. SCHOEBERL II, |) | Honorable |
| |) | Clark E. Erickson, |
| Defendant-Appellant. |) | Judge, Presiding. |

PRESIDING JUSTICE CARTER delivered the judgment of the court.

Justice McDade and Justice Wright concurred in the judgment.

ORDER

Held: The defendant's convictions were affirmed because trial counsel was not ineffective for failing to submit an accomplice witness instruction to the jury and comments made by the prosecutor during closing argument did not constitute reversible error. The trial court did not consider an element inherent in the offense as an aggravating sentencing factor.

The defendant, James F. Schoeberl II, was convicted by a jury of aggravated possession of stolen firearms (720 ILCS 5/16--16.1(a)(4) (West 2008)), two counts of residential burglary (720 ILCS 5/19--3(a)(West 2008)), and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)). The trial court sentenced the defendant to concurrent terms of imprisonment of 18 years for aggravated possession of stolen firearms, 10 years for each residential burglary, and 2 years for unlawful possession of a controlled substance. The defendant appealed his convictions and his sentence for aggravated possession of stolen firearms. We affirm.

FACTS

The charges against the defendant arose out of two residential burglaries that occurred on May 19, 2008, at the Trimby residence and the Sealoock residence in Bonfield.

John Evans, Sr., and Everett Evans testified that they both lived on the same street as James Trimby. On May 19, 2008, at approximately 10:45 a.m., John saw an unfamiliar black Ford Explorer drive past his house, driven by a woman. Around the same time, Everett heard pounding coming from the Trimby residence and saw an unfamiliar vehicle parked in the driveway. Everett walked over, but when he got close the woman driving the

vehicle yelled that she was in the wrong place and left. When Everett still heard pounding about 15 minutes later, he went to the back door and noticed part of the door casing was on the ground. He yelled into the house, and someone responded, "there's a robbery in progress. Get the hell out of here." Everett called the police, and gave them a description of the vehicle and the license plate number.

Mary Brown lived with Trimby, and she was notified at work by the police after the robbery occurred. Trimby was out of the country. When she arrived home, Brown noticed that the door to the garage was kicked in and the back door frame was on the ground. Inside the house, Trimby's gun cabinet had been forced open, and a number of guns were missing. Also missing were a digital camera, a video camera, some old coins, and a black bag. Brown later identified the items among the items recovered by the police.

Trimby testified that he had a federal firearms license. When he left the country earlier in the month, all of his guns and gun cases were locked up in a gun safe. Trimby identified, by serial number, 29 of the guns recovered by the police. He also identified a pair of handcuffs by its serial number and a camera recovered by police as belonging to him. Trimby

identified a black canvas bag recovered by police as one belonging to Brown.

Diane Sealock testified that she left her home in Bonfield around 8:15 a.m. on May 19. When she returned home around 6:20 p.m., she noticed the door leading into the house from the garage was open. The house was in disarray. She provided the police with a list of missing items, and later identified at the police station various items of recovered jewelry as belonging to her.

Nicole Graniczny testified for the State. She was the defendant's ex-girlfriend, and the mother of his child, with whom she was pregnant at the time of the offenses at issue. Graniczny testified that she had broken up with the defendant a month before the morning of May 19, when the defendant called and asked her to give him and his friend Marcus Phelan a ride to Phelan's girlfriend's house. Graniczny testified that she picked up the defendant and Phelan around 10 a.m. in her 2000 Ford Explorer. She drove them to a two-story peach house in the Bonfield area that Graniczny was told belonged to a relative of the girlfriend. Phelan went up to the door, and then waved for the defendant to join him. The two of them walked around the back of the house while Graniczny waited in the car. Graniczny testified that they were gone about 5 or 10 minutes and then they came back to the

car.

Graniczny then followed Phelan's instructions to another house. Again, Graniczny waited in the car while the defendant and Phelan went around to the back of the house. After about 5 or 10 minutes, an old man walked up and asked her what she was doing. Graniczny testified that after the old man gave her a weird look, she drove away. After she left, she called the defendant's cellular phone, and then returned to pick them up. Detective Kraig Horstman, with the Kankakee County sheriff's department, confirmed a call was received on the defendant's cellular phone from Graniczny at 11:45 a.m. on May 19.

Graniczny testified that Phelan was carrying a black bag when she picked up him and the defendant at the second house. At their request, Graniczny took the defendant and Phelan to a Super 8 motel in Bourbonnais. Phelan rented a motel room, and all three of them entered the room, Phelan carrying the black bag. Graniczny used the bathroom, and when she came out of the bathroom there were a number of guns laid out on the bed. Graniczny left the motel for an appointment.

After her appointment, Graniczny picked up the defendant and Phelan at the Super 8 motel and took them to Ultra Foods because the defendant wanted to cash in some change. While they were in

Ultra Foods, Graniczny got a call from her father, who told her that three detectives had been at their house. Graniczny proceeded to drop off the defendant and Phelan, and then she met David Douglas, a sheriff's deputy with the Kankakee County sheriff's department. Graniczny was arrested and charged with two counts of residential burglary. She agreed to plead guilty to burglary, and was placed on 36 months probation, in exchange for her testimony against the defendant.

Douglas testified that he ran the license plate reported by Everett, and found that Graniczny's father was the owner of the vehicle reported at the Trimby house. Douglas met with Graniczny in the parking lot of a Motel 6; she was driving the black Ford Explorer. After Graniczny was arrested, Douglas and other members of the major crimes task force set up surveillance at the Super 8 motel. Douglas had information that the guns were in room 110 of the motel. Douglas testified that he saw one woman and two men exit the motel and get into a blue car. Douglas approached on foot, and the car started to drive away, but a police car blocked the entrance. Phelan exited the car and ran, but he was apprehended.

Special Agents Russell Belcher and Joseph Powers were also involved in the surveillance at the Super 8 motel. They both

testified that Phelan and the defendant exited the motel together, Phelan carrying a black bag, and Phelan placed the bag in the truck of the blue car. A search of the defendant's pockets revealed cameras, coins, a .22 caliber bullet, and four baggies containing a substance that field tested for cocaine. A search of the trunk of the blue car revealed a black bag containing 29 pistols. The defendant was placed in a squad car, and Belcher observed the defendant trying to hide some rings between the seats of the car.

Chantell Young testified that she knew the defendant from work. The defendant asked her to pick him up at the Super 8 motel. Young drove her blue car to the Super 8 motel, and the defendant and another man came out of the motel. The defendant asked for her keys to open the trunk, and the defendant and the other man placed a bag in the trunk. The defendant and the other man got in the car, and Young started to drive away, but she was blocked by police. The other man jumped out of the car and ran.

The jury found the defendant guilty of aggravated possession of stolen firearms, two counts of residential burglary, and unlawful possession of a controlled substance. At sentencing, after hearing evidence and argument, the trial court acknowledged that the legislature had declared possession of 20 to 30 stolen

firearms to be a serious offense. The trial court cited the defendant's criminal history, and the fact he was on bond when the instant crimes were committed, for the reasons it did not feel that a minimum sentence was appropriate. The trial court did note the hardship on the defendant's young daughter and the defendant's own rough childhood as mitigating factors. The trial court sentenced the defendant to concurrent terms of imprisonment of 18 years for aggravated possession of stolen firearms, 10 years for each residential burglary, and 2 years for unlawful possession of a controlled substance. The defendant appealed his convictions and his 18-year sentence for aggravated possession of stolen firearms.

ANALYSIS

The defendant contends that his trial counsel rendered ineffective assistance of counsel by failing to submit an accomplice witness instruction to the jury. The defendant also contends that he was substantially prejudiced by arguments made by the prosecutor during closing and rebuttal arguments. Lastly, the defendant contends that the trial court abused its discretion in considering as an aggravating sentencing factor an element inherent in the offense of aggravated possession of stolen firearms.

I. Assistance of Counsel

The defendant argues that Graniczny was an accomplice witness and that his trial counsel rendered ineffective assistance in failing to give the jury an accomplice witness instruction. The State responds that the decision not to tender the instruction was a strategic one, in that the defense theory was that the defendant and Graniczny were not accomplices.

Claims of ineffective assistance of counsel are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the defendant to show that his counsel's representation was deficient and that the deficient performance resulted in prejudice. *People v. Houston*, 226 Ill. 2d 135 (2007). To establish his counsel's deficient performance, the defendant must overcome the strong presumption that his counsel's actions were the result of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83 (1999). The reviewing court must give deference to the trial court's factual findings, but is free to make its own findings on the ultimate legal issue. *People v. Crane*, 195 Ill. 2d 42 (2001).

Here, the failure to seek an accomplice instruction was consistent with defense counsel's strategy. Defense counsel argued that the defendant did not participate in either

residential burglary and that Graniczny was setting up the defendant out of anger. Defense counsel also argued that the defendant was at the motel with Phelan, but that the defendant was there simply to sell look-alike drugs to Phelan. Graniczny confessed to her participation in the crimes, and she placed the defendant at the scenes with her. Defense counsel extensively cross-examined several witnesses in an attempt to establish that the defendant was not present at either burglary. Defense counsel also extensively cross-examined Graniczny regarding her motives for testifying against the defendant. Clearly, separating the actions of the defendant from those of Graniczny was part of defense counsel's trial strategy. See *People v. Lewis*, 55 Ill. App. 3d 1022 (1977) (withdrawal of accomplice witness instruction might not have been best course, but within trial counsel's discretion on trial tactics). We find that the defendant has not overcome the strong presumption that defense counsel's actions were the result of objectively sound trial strategy.

Even if we assume that defense counsel's performance was deficient, we find that the defendant has failed to establish that he was prejudiced. The jury was given the general instruction on witness credibility. Defense counsel extensively

cross-examined Graniczny regarding her bias against the defendant, and the evidence against the defendant was overwhelming. The defendant was seen walking out of the motel with Phelan, who was carrying the black bag of guns. The defendant's fingerprints were found on some of the guns. Two cameras taken in one of the burglaries were found in the defendant's pockets. The defendant also had other items from both burglaries on his person.

Since the defendant did not overcome the strong presumption that his trial counsel's failure to tender the accomplice witness instruction to the jury was the result of sound trial strategy, nor shown any prejudice resulting from counsel's failure to tender the instruction, the defendant cannot prevail on his claim of ineffective assistance of counsel.

II. Closing Arguments

The defendant contends that the prosecutor committed reversible error during closing and rebuttal arguments by misstating the law, denigrating defense counsel, and disparaging the defendant's credibility and character. The State argues that the issue is waived because defense counsel only objected to two of the challenged remarks and did not challenge any in his

posttrial motion. Even if the issue is not waived, the State argues that there was no error.

Although defense counsel objected to the remarks that allegedly misstated the law, he did not object to any of the other challenged remarks, and he did not address any of them in a posttrial motion. Thus, this issue is forfeited. See *People v. Enoch*, 122 Ill. 2d 176 (1988). The defendant asks this court to review the issue as plain error.

The plain-error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and: (1) the evidence is close, regardless of the nature of the error; or (2) the error is so serious that the defendant was denied a substantial right and a fair trial, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). The first step, then, is to determine whether an error occurred. *People v. Hanson*, 238 Ill. 2d 74 (2010).

Prosecutors are given wide latitude in making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92 (2007). The question of whether comments made by the prosecution in closing argument are so egregious as to amount to reversible error is a question of law that is reviewed de novo. *Wheeler*, 226 Ill. 2d 92. In reviewing comments made during closing argument, the

reviewing court asks whether the comments engender substantial prejudice against a defendant such that it is impossible to say whether a verdict of guilt resulted from the comments. *Wheeler*, 226 Ill. 2d 92. The critical question on review is whether the jury could have reached a contrary verdict had the improper comments not have been made. *Wheeler*, 226 Ill. 2d 92.

The defendant argues that the prosecutor made two comments that denigrated defense counsel: (1) the defense wanted the jury to believe that fingerprints are not reliable; and (2) defense counsel was compared to Will Rogers. The defendant also argues that the prosecutor's remarks about the defendant's relationship with Graniczny, whose character was attacked repeatedly by defense counsel, disparaged the defendant. Finally, the defendant contends that the prosecutor misstated the law by suggesting that the jury had to find that the defendant was the unluckiest man in the world and that defendants routinely cooperated to testify against each other.

We conclude that there was no error. All of the prosecutor's remarks were invited by defense counsel and were not misstatements of the law or facts. *People v. Glasper*, 234 Ill. 2d 173 (2009). The argument that statements made by the State that allegedly disparaged the defendant because of his

relationship with Graniczny is without merit. Defense counsel fully cross-examined Graniczny to reveal her bias against the defendant, and defense counsel repeatedly argued Graniczny's faults. The State's comments, which focused on the defendant's longstanding relationship with Graniczny, did not suggest the defendant's poor character for associating with one of its key witnesses, but were an attack on the defendant's claims of bias. Finally, the State did not misstate the law or suggest an alternate standard of proof by suggesting that the defendant had to be the unluckiest man in the world. Rather, the State was pointing out the strength of its case. Also, the State's comment that the jury could rely on its own experiences in life and consider how often codefendants cooperate against each other was not a misstatement of law, but spoke to the general knowledge of jurors. See *People v. Beard*, 356 Ill. App. 3d 236 (2005) (prosecutors are permitted to discuss subjects of general knowledge or common sense in closing argument). Finding no error, our plain error analysis ends.

III. Sentencing

The defendant argues that the trial court abused its discretion in considering as an aggravating factor at sentencing the number of guns and the fact that they would have found their

way onto the street, a factor that the defendant argues is inherent in the offense. The State points out, and the defendant concedes, that the issue is forfeited because the defendant did not object at trial nor file a posttrial motion raising the issue. See *Enoch*, 122 Ill. 2d 176. The defendant argues that we should review the issue as plain error. As stated above, the first step in the plain error analysis is to determine whether any error occurred.

Again, we find no error. Considering the trial court's sentencing comments in context, we find that the trial court did not use the number of guns or the fact that they would end up on the black market as aggravating factors. The trial court's comments make it clear that it acknowledged that the legislature had taken the amount of guns and threat to the community into account when creating the different classes of crimes for the offense of possession of stolen firearms. The sentencing range for 21-30 stolen firearms was 6 to 50 years' imprisonment. 720 ILCS 5/16--16.1(c)(4) (West 2008). Defendant's sentence of 18 years was more than the minimum, which the trial court specifically found was not appropriate considering the defendant's criminal history, but was well within the sentencing range. Finding no error, much less plain error, we uphold the

defendant's 18-year sentence for aggravated possession of stolen firearms.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

Affirmed.