2016 IL App (3d) 130668-U

Order filed September 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0668
v.	)	Circuit No. 13-CF-278
	)	
ANTOINE D. SIMS,	)	Honorable
	)	Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice O'Brien and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Prosecutor's improper comments in opening statements warranted *vacatur* of defendant's conviction for unlawful possession of a weapon by a felon because the evidence related to that charge was closely balanced; (2) because evidence relating to the charge of domestic battery was *not* closely balanced, that conviction is affirmed; (3) unlawful possession of a weapon by a felon conviction was not undermined by unconstitutionality of statute under which defendant originally became a felon.

¶ 2 Defendant, Antoine D. Sims, contests his convictions for unlawful possession of a weapon by a felon (UPWF) and domestic battery. He argues that he is entitled to a new trial

because the prosecutor referenced evidence in opening statements that was not ultimately presented to the jury. Defendant also argues that his conviction for UPWF must be vacated outright where the statute upon which his status as a felon was premised was declared facially unconstitutional by the Illinois Supreme Court. For the reasons set forth below, we vacate defendant's conviction for UPWF and remand the matter for retrial on that charge, but affirm his conviction for domestic battery.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with UPWF (720 ILCS 5/24-1.1(a) (West 2012)) and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)). The UPWF count alleged that defendant possessed a firearm "having been previously convicted of a felony violation of article 24 of the Illinois Compiled Statutes, being aggravated unlawful use of a weapon [(AUUW)] in Peoria County case 11 CF 817." The domestic battery charge alleged that defendant struck Audrey Wren and that defendant had previously been convicted of domestic battery.

¶ 5 Defendant's jury trial commenced on July 16, 2013. In his opening statement, the prosecutor told the jury that it would hear testimony from Wren, the alleged victim of the domestic battery. The prosecutor described Wren's injuries, as well as the events leading up to them. He explained that some time after defendant struck Wren, they took a taxi to a motel. When they took a taxi home the next day, the driver was the same person as the night before. The prosecutor declared the evidence would show defendant was at that time carrying a shotgun in his pants, such that he had to keep his leg straight. The prosecutor explained:

> "Now they get in the cab, and [defendant] actually has to keep his leg stiff. And [Wren will] tell you that when the cab driver sees that he cracks a joke about

> how maybe she got revenge from the night before, as if she hurt his knee or something along those lines because he was walking awkwardly."

In her opening statement, defense counsel emphasized that "the only person saying that [defendant] allegedly battered Ms. Wren is Ms. Wren."

¶ 6 Wren testified that she had known defendant for eight years, and the two had a five-year-old child together. They began dating again in early 2013, when Wren was living in a home with her four children. Defendant frequently spent time there, but did not live there, and his name was not on the lease.

¶ 7 On March 29, 2013, Wren had an altercation with defendant in the middle of the night. Wren testified that she was asleep in bed when defendant kicked her, making her fall out of the bed. Defendant told Wren that her cellular phone had received a call from a private number. Wren explained that it was her sister's boyfriend that had called, but defendant "didn't care." Defendant then punched Wren in the face. Wren tried to cover her face, and eventually ran to the bathroom and closed the door. Defendant then "tore the bathroom door down."

¶ 8 Wren then ran to her children's room, locking the door behind her. Defendant, however, "punched their door down" and came through. Wren testified:

> "And he told me to get out [*sic*] the kids' room. I was scared. I told him no because I was scared. I was scared of what he was going to do. I kept telling him to stop because what he doing [*sic*] is—he was hitting me for no reason and he constantly [*sic*] doing it."

Wren went with defendant back to her bedroom, where he struck her again. Defendant then told Wren he was leaving and went downstairs.

¶ 9 Wren got dressed with the intent to go next door to her mother's house. However, when Wren proceeded to the ground floor, defendant emerged from a bathroom and told Wren she could not leave. He told her to go back upstairs so they could talk. Once upstairs, defendant cleaned the blood from Wren's mouth with a wet towel and apologized for striking her. Wren eventually fell asleep.

¶ 10 Wren testified that defendant woke her around 6 or 7 a.m. and told her to take the children to her mother's house. Defendant called a taxi so that he and Wren could go to a motel. He wanted to go to a motel so Wren's mother would not see her face.

¶ 11 Wren and defendant arrived at the motel between 9:30 and 10 a.m. Wren lay in the bed, while defendant called for the taxi to return. Defendant intended to bring Wren's mother some money for babysitting and to purchase a new cellular phone for Wren, because he had destroyed her phone the previous night. When defendant returned, he and Wren went to the mall. While at the mall, defendant received four to six phone calls, and he and Wren went back to the motel at approximately 7 p.m.

¶ 12 Wren and defendant watched movies in the motel room. While in the motel room, defendant received "a phone call that somebody was going to meet him." A man that Wren was unfamiliar with arrived at the motel room. Defendant and the man talked in the room while Wren listened outside the door. Wren testified that the two men were talking in the room for approximately 30 to 45 minutes.

¶ 13 The man eventually left, and Wren reentered the room. When she did so, Wren noticed a gun leaning against the wall. It had not been there when she and defendant first entered the room. Wren described the gun as long and black or brown. Defendant put the gun under the mattress. Wren and defendant then went to sleep.

¶ 14 Defendant called a taxi the following morning to take Wren and himself home. He stuck the gun in his pants leg. Wren testified that the gun affected how defendant walked: "He was acting like his leg was broken or his knee, something was wrong with his knee." Defendant kept his leg straight while in the taxi. When they arrived back home defendant took the gun to the basement. Wren then asked defendant to go to the store to purchase Tylenol and Easter baskets for the children. When defendant left, Wren called her mother and told her what happened the previous night. Wren's sister—who was at their mother's house—contacted the police. When the police arrived, Wren showed them where the gun was.

¶ 15 On cross-examination, Wren explained that she did not call the police when she was alone in the motel room because her mouth was too sore to talk. When she was outside of the motel room—while defendant was talking to the unknown man—she did not call the police because her phone was still in the room. She did not attempt to use the phone in the lobby because she was already planning "to get him at [her] house." She agreed that she had told police officers the unknown man was actually named Little Junior. Though she did not follow defendant when he took the gun to the basement, she knew he had placed it in the ceiling because of the metallic sounds that she heard when he was in the basement.

¶ 16 Peoria police officer Matt Legaspi testified that he responded to the call at Wren's house on March 30, 2013. He was accompanied by Officer Nicholas Russell. When they arrived, another officer had already detained defendant on the porch of the home. Legaspi went inside to speak with Wren. She showed him a bag of shotgun shells, then took him to the basement, where he observed a shotgun atop the air duct. Legaspi did not touch the shells or the shotgun. Peoria police officer John Williams arrived later, and Legaspi directed him to the shotgun.

¶ 17 Williams testified that he collected the shotgun and shells for evidence. Williams also took a number of photographs at the scene. Two photographs show the shotgun sitting atop the heating duct, in a small space between the duct and the ceiling. Other photographs show two broken doors, which Williams testified were inside Wren's home. One door is completely off its hinges, while the other has had a large chunk—just less than half of the door, above the knob—taken out. Williams testified that the second door was to the children's room. Two pictures show Wren with wounds on the inside of her upper lip and the outside of her lower lip. On cross-examination, Williams agreed that he did not know how the doors came to be in that condition, nor did he have personal knowledge of the cause of Wren's injuries.

¶ 18 Russell testified that he spoke to defendant at the scene after reading him his *Miranda* rights. Defendant told Russell that he "didn't know anything about" a broken door. Defendant told Russell that he had taken Wren to the motel because Wren was arguing with "Big Baby," the father of another of Wren's children. Wren told Russell that the man defendant met at the motel was named "Little J."

¶ 19 On cross-examination, Russell testified that Wren told Russell that defendant had taken the three kids in a taxi to the motel on the morning of March 29. She told him defendant had held her at the motel against her will. She told him that she had asked defendant to go to the store to purchase cigarettes.

¶ 20 Defendant stipulated to the fact that he had a prior felony conviction in case No. 11-CF-817. The record shows that the conviction in that case was for the offense of AUUW, a Class 2 felony, in violation of section 24-1.6(a)(1) of the Criminal Code of 1961. 720 ILCS 5/24-1.6(a)(1) (West 2010).

¶ 21 The only evidence presented by the defense was demonstrative in nature. Specifically, the shotgun was held at defendant's side, presumably to determine how high on his body the gun would reach. The record does not indicate what the results of the demonstration showed. In closing arguments, defense counsel stated that "[t]he gun comes up to him waist-high or so."

¶ 22 The jury found defendant guilty of UPWF and domestic battery. The trial court sentenced defendant to a term of eight years' imprisonment on the UPWF charge and a concurrent term of six years' imprisonment on the domestic battery charge.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant argues that the prosecutor's reference in his opening statement to comments made by the taxi driver was improper, as that evidence was never presented at trial. Defendant maintains that the evidence in the case was closely balanced, and that the prosecutor's comments therefore amounted to plain error. On this ground, defendant argues his convictions should be vacated and the matter remanded for a new trial. Defendant also argues that the statute underlying his AUUW conviction was declared facially unconstitutional, and that the State could thus not use that conviction to prove his status as a felon, an element of UPWF. Upon review, we find that the evidence presented at trial relating to the UPWF charge was closely balanced and vacate that conviction pursuant to the plain error doctrine. We find that the evidence at trial relating to the domestic battery charge, however, was *not* closely balanced, and affirm that conviction. Further, pursuant to our supreme court's recent decision in *People v. McFadden*, 2016 IL 117424, we reject defendant's constitutional argument on the grounds that defendant's AUUW had not been affirmatively vacated when it was used as a basis for his UPWF conviction. Accordingly, defendant may be retried on the UPWF charge on remand.

¶ 25 I. Opening Statements

¶ 26 Defendant concedes that he did not properly preserve for appeal the issue of the prosecutor's purportedly improper opening statements regarding comments made by the taxi driver. Thus, defendant asks that we review the issue under the doctrine of plain error.

¶ 27 The first step in plain error analysis is the determination whether clear or obvious error was committed. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In the present case, it is undisputed that the prosecutor committed clear error by referencing in his opening statement evidence that would never be presented. See *People v. Kliner*, 185 Ill. 2d 81, 127 (1998) ("[I]t is improper for counsel to make opening statements about testimony to be introduced at trial and then fail to produce that evidence."). The State implicitly concedes that the prosecutor committed error, arguing only that such error was not prejudicial.

¶ 28 Having determined that a clear error was committed, we must next decide whether that error was prejudicial to defendant. See *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). When an error has been properly preserved, the State bears the burden of proving that the error was harmless; however, under plain error review, it is the defendant who bears the burden of demonstrating that the error was prejudicial. *People v. Herron*, 215 Ill. 2d 167, 181, 187 (2005). A prejudicial effect upon a defendant may be demonstrated in either of two ways. Under the first prong of plain error, a defendant may prove prejudice by demonstrating that the evidence in the case was so closely balanced that the error in question "threatened to tip the scales of justice against him." *Id.* at 187; see also *id*. at 185 (describing first prong plain errors as "prejudicial errors—errors that may have affected the outcome."). Under the second prong of plain error, a defendant may show that the error committed was so serious that it creates a nonrebuttable presumption of prejudice. *Id*. at 185. In the present case, defendant makes no argument that the prosecutor's improper opening statements constituted a second-prong error. Thus, we must

consider whether the evidence introduced at defendant's trial was so closely balanced that the improper opening statements threatened to tip the scales of justice against defendant.

¶ 29 A. UPWF Conviction

¶ 30 In order to sustain a conviction for UPWF, the State must prove, *inter alia*, that a defendant possessed a firearm, either actually or constructively. 720 ILCS 5/24-1.1(a) (West 2012); *People v. Ingram*, 389 Ill. App. 3d 897, 899 (2009). In the present case, the only evidence indicating that defendant possessed the weapon later found at Wren's home was Wren's testimony that defendant received the gun at the motel and carried it with him in the taxi.

¶ 31 To be sure, the testimony of a single witness is sufficient to sustain a conviction. *E.g.*, *People v. Hampton*, 44 Ill. 2d 41, 45 (1969). However, the "closely balanced" standard is necessarily less exacting from defendant's perspective; it " 'errs on the side of fairness and grants a new trial even if the evidence was otherwise sufficient to sustain a conviction.' " *In re M.W.*, 232 Ill. 2d 408, 441 (2009) (quoting *Herron*, 215 Ill. 2d at 193). Because the only evidence implicating defendant of UPWF was Wren's testimony, Wren's "credibility was the only basis upon which defendant's innocence or guilt could be decided." *People v. Naylor*, 229 Ill. 2d 584, 608 (2008).

¶ 32 In *Naylor*, our supreme court addressed a situation in which conviction turned solely upon witness credibility, and concluded that the evidence was sufficiently closely balanced as to warrant relief under plain error. *Id*. In *Naylor*, however, the court also explicitly noted that it did not mean to create a bright-line rule by which all trials involving credibility contests could be classified as closely balanced. *Id*. at 609. This admonishment was exemplified five years later in *People v. Belknap*, 2014 IL 117094. In that case, the court noted that any analysis of evidence should be qualitative and contextual in nature. *Id*. ¶ 53. In conducting its analysis, the *Belknap*

court looked to the credibility of witnesses and the circumstantial evidence implicating the defendant. *Id*. ¶¶ 56-61. Following its qualitative analysis of the evidence, the court found that the evidence was not sufficiently closely balanced. *Id*. ¶ 62.

¶ 33 Following a similarly qualitative analysis in the present case, we conclude that the evidence presented at trial relating to the charge of UPWF was so closely balanced that the prosecutor's improper opening statements were likely prejudicial to defendant. See *Herron*, 215 Ill. 2d at 193 (noting that a reviewing court, in analyzing prejudice for plain error purposes, "deal[s] with probabilities, not certainties; [and] with risks and threats to the defendant's rights"). In this case, unlike in *Belknap*, there is no other evidence aside from Wren's testimony—circumstantial or otherwise—that would support a finding of guilt as to the UPWF charge. While a gun was found, it was found in Wren's home, where defendant did not live. The mere presence of a weapon in Wren's home is not probative of whether defendant ever possessed the weapon, and does not serve to corroborate Wren's testimony.

¶ 34 While the State's case on the UPWF charge turned on Wren's credibility, that credibility was impeached by numerous prior inconsistent statements. Namely: she testified that she did not know the name of the man defendant had met at the motel, though she told officers his name was Little Junior; she testified that only she and defendant had gone to the motel, though she told Russell that defendant had taken the children to the motel; finally, she testified that she asked defendant to go to the store for Tylenol and Easter baskets, though she told Russell that she told defendant to go to the store for cigarettes.

¶ 35 The potential for a prejudicial effect on defendant is increased given that the improper opening statement in question went directly to the weaknesses in the State's case. In other words: while Wren's testimony that defendant possessed the shotgun lacked any corroboration, the

prosecutor's improper statement provided that lacking corroboration. The taxi driver's alleged reference to defendant's limp would have supported an inference that defendant was carrying the gun in his pants leg.

¶ 36 B. Domestic Battery Conviction

¶ 37 The result of our analysis, however, differs with respect to the domestic battery charge. On that charge, like the UPWF charge, the State's only of defendant's guilt was Wren's testimony. However, the State also presented corroborating evidence on this charge, in the photographs of both Wren's injuries and the damage to Wren's home. While Wren's testimony about the gun stood alone, her testimony concerning defendant's physical attack was supported by tangible evidence. The photographs of her injuries provided irrefutable evidence of the attack, while the photographs of the damage to her home tracked precisely with her version of events.

¶ 38 In summary, the State's evidence concerning defendant's commission of UPWF was closely balanced. Accordingly, we find that the State's improper comments in opening statements amounted to plain error, vacate defendant's UPWF conviction, and remand for retrial on that charge. The State's evidence concerning defendant's commission of domestic battery, however, was significantly stronger. We thus find that the evidence on that charge was not closely balanced, and affirm defendant's conviction.

¶ 39 II. Constitutional Argument

¶ 40 Defendant contends that his conviction for UPWF must be reversed outright because the State failed to prove that he had a prior felony conviction, a necessary element of UPWF. Specifically, defendant points out that his AUUW conviction was based on a statute that was later declared facially unconstitutional by our supreme court in *People v. Burns*, 2015 IL 117387.

Thus, defendant argues that because his AUUW conviction introduced at the present trial was void, the State failed to prove that he committed UPWF. Though we have already found defendant entitled to plain error relief in the form of retrial on that charge, because the relief for the error alleged here would be outright reversal—such that retrial would be barred—we must address defendant's argument.

¶ 41 We held defendant's present appeal in abeyance awaiting our supreme court's decision in *McFadden*, 2016 IL 117424. In that case, the court addressed the precise argument made here by defendant, namely, that a void conviction used to prove felon status for a UPWF conviction mandated *vacatur* of that later conviction. The court rejected that argument, holding that a defendant must take affirmative steps to remove a void conviction from his record to undo his felon status. *Id.* ¶ 24. In line with that decision, we reject defendant's argument here.

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of Peoria County is affirmed in part and vacated in part, and the matter is remanded with directions.

¶ 44 Affirmed in part and vacated in part.

¶ 45 Remanded with directions.