2019 IL App (3d) 170244-U

Order filed October 18, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0244
v.	)	Circuit No. 15-CF-569
	)	
DARRELL M. BROWN,	)	Honorable Paul P. Gilfillan, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial counsel was not ineffective. (2) The State failed to prove defendant guilty beyond a reasonable doubt.

¶ 2 Defendant, Darrell M. Brown, appeals his convictions for first degree murder and unlawful possession of a firearm, arguing (1) trial counsel was ineffective for failing to object to the State's impeachment of its own witnesses, stipulate to his prior adjudication, and move to sever the charges, and (2) the evidence was insufficient to find defendant was under the age of

21, an element of the offense of unlawful possession of a firearm. Affirmed in part and reversed in part.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2014)) and unlawful possession of a firearm (*id.* § 24-3.1(a)(2)). The unlawful possession of a firearm charge stated that defendant committed the offense, "in that he, a person under 21 years of age, knowingly had in his possession a firearm, being a handgun, and the defendant has been previously adjudicated a delinquent for the offense of robbery and unlawful possession of a firearm in Peoria County Case 11 JD 477."

¶ 5 The case proceeded to a jury trial. During *voir dire*, the court read the bill of indictment to all potential jury members, stating, in part:

> "In Count 3, charged with the offense of unlawful possession of a firearm in which it's alleged that on or about August 18 of 2015 he, a person under 21 years of age, knowingly had in his possession a firearm, being a handgun, and that the defendant has been previously adjudicated for the offense of robbery and unlawful possession of a firearm in an earlier Peoria County case."

¶ 6 The evidence established that on August 18, 2015, at approximately 12 p.m., defendant, Quinton Lowe, Dontarius Bell, and Draneol Hall were playing craps at the apartment where Ambria Giles and Bell resided. Giles was in the bedroom at the time. At one point, an argument started. Bell told them to calm down. The argument continued, and defendant struck Lowe. Bell attempted to break the fight up, and during the struggle, a television was knocked over. Bell testified that he walked defendant outside and told defendant to calm down. Bell then went back inside and told the others to leave. Hall left, and Lowe left shortly thereafter. Before Lowe made

it down the last step exiting the apartment, "shots rang out." Giles heard the gunshots and shut herself in the closet. She heard knocks on the door. Lowe stumbled back into the apartment. Bell saw that Lowe had bullet wounds in his chest and arm. Bell looked out the door and saw defendant with the gun. "He [was] still pointin' [the gun] like he wanted to finish [Lowe] off." Bell told defendant to leave, and he did. Bell stated that the gun was a nine-millimeter Hi-Point.

¶ 7 Bell called 911, but had Giles speak to them. She told the 911 operator "somebody has been shot outside my apartment, and they knocked on my door." She told the operator that she did not know what had happened, she had just heard Lowe knock on the door. Giles did not tell the operator that Lowe had been present at her apartment earlier, but instead said, "I guess he came over because he knows us." Both Bell and Giles gave videotaped statements to the police, which were played in court. Bell and Giles picked defendant out of a lineup. Giles did not see defendant with a weapon or see him shoot anyone. She stated that she lived in public housing and could get evicted if anything illegal happened there. Bell lied to the police and said that he looked out the window and did not see the shooter.

¶ 8 Hall testified that after the argument, he went out to defendant's vehicle since they rode together. He heard a gunshot and yelling, and then defendant came to the vehicle. Hall gave a videotaped statement to the police. The State asked, "do you remember saying [to the police] that you saw the defendant with a gun?" Defense counsel objected, and the State said, "I'm laying the ground for impeachment, [Y]our Honor." Defense counsel replied, "Judge, it's her witness. She's impeaching her own witness. He hasn't done anything to be impeached for." The court overruled the objection. The State asked Hall if he remembered telling the police that he saw defendant shoot Lowe two or three times with a black semi-automatic handgun. Hall stated that he did not remember saying that. Hall gave an affidavit to defendant's aunt on September 23,

2016, which stated, "On August 19, I made a false accusation when asked by Peoria police did [defendant] shoot Quinton Lowe. I, in fact, did not see [defendant] shoot and kill Quinton Lowe August 18, 2015, approximately around 12:00 p.m."

¶ 9 Bobby Jones testified that he was at his home in Romeoville on the evening of August 18. Defendant was his brother's grandson and visited him with a friend at approximately 9 or 10 p.m. He had not been expecting defendant. The State asked, "did [defendant] tell you that he had had trouble in Peoria, that's why he was there?" Defense counsel objected to the question, but the court overruled the objection. Jones stated that defendant did not tell him that. The State then asked if defendant told him "that he had a fight with someone and had to pull a gun out and shoot him?" Jones said, "No." Jones encouraged defendant to return to Peoria and accompanied him there and to the police station the next day. Jones gave a statement to the police. The State asked, "At that time, did you tell him that [defendant] had told you that he had a fight with someone and he had to pull out a gun where he shot him, and that he, that you had spent some time convincing him to come back to Peoria?" Jones answered, "No." On cross-examination, Jones said that defendant told him, "I ain't goin' to Peoria because they lookin' for me for a shooting that I didn't do" and "they tryin' to give me a lot of time, but I didn't do anything." Jones stated that defendant never made an admission to him.

¶ 10 Aaron Legaspi testified that he was a Peoria police officer and was dispatched to the apartment at approximately 12:38 p.m. Lowe was lying on the kitchen floor on his back and was not breathing. Paramedics arrived with Legaspi and began treating Lowe, but Lowe was already deceased. Lowe was pronounced dead at the scene.

¶ 11 John Williams testified that he was a Peoria police officer. He found three shell casings on the ground outside of the apartment. A bullet was found inside the apartment and another was recovered from inside Lowe's chest cavity.

¶ 12 Matt Ray testified that he was a police officer with the city of Peoria. He spoke with Jones and Hall on August 19. When the State asked whether Jones told him something that defendant said, defense counsel objected on the grounds of double hearsay. The State said that it was perfecting impeachment, and the court overruled the objection. The State asked, "Did Mr. Jones tell you that the defendant *** told him that he had gotten into a fight with someone, and had to pull a gun, and shoot him?" Ray agreed that Jones had told him that. Ray also stated that Hall told him that he saw defendant shoot Lowe twice. Hall described the gun that defendant was holding and stated that defendant said "he had messed up." Hall's videotaped statement was played for the jury.

¶ 13 Jennifer Sher testified that she was a forensic scientist for the Illinois State Police and specialized in firearms examination. She was tendered as an expert. She examined the casings and determined that they were fired from the same gun. She also examined the two bullets and determined that they came from the same gun. However, without the gun, she could not determine whether the casings and bullets came from the same gun.

¶ 14 Verlencyia Green testified that defendant was the father of her son. On the day of the shooting, she heard that defendant had been involved in an incident at the apartment complex. At approximately 2 a.m. on August 19, defendant called Green and said, "I'm turning myself in." The State asked Green, "Did he tell you that he had shot [Lowe]? That he had shot him and that he didn't mean to, it was an accident?" Green answered, "No." The State asked, "Did you tell Mike Hirsch, an investigator for the State's Attorney's Office, that that's what he said at 2:00 in

the morning, when he finally called you back?" Green answered, "No." Green said that defendant never said that he shot Lowe.

¶ 15 Hirsch testified that he interviewed Green, and she stated that when she talked to defendant, defendant "admitted to her that he did the shooting but that it was an accident."

¶ 16 Dr. Amanda Youmans testified that she specialized in forensic pathology. She was tendered as an expert in forensic pathology. She performed an autopsy on Lowe. One bullet entered Lowe's neck and exited his shoulder. A second bullet went through his elbow. A third bullet struck his abdomen, hit his heart and lung, and lodged in his chest. A fourth bullet hit his hip and exited out of his right flank. She determined that his cause of death was multiple gunshot wounds that passed through his heart, lung, and liver and caused "massive internal bleeding." She estimated that he only survived a few minutes after receiving the injuries.

¶ 17 The State moved to admit a certified copy of defendant's prior adjudication, stating, "I'll ask the Court to take judicial notice that the defendant had previously been adjudicated a delinquent for a felony offense prior to this incident." Defense counsel did not object, and the court admitted it. The parties determined that the certified copy would not be given to the jury.

¶ 18 During closing arguments, the State said,

> "You will also receive a separate verdict form as far as unlawful possession of a firearm. And, as to that count, the Judge, I believe, will instruct you that a person commits that offense when he knowingly possesses a firearm and he previously had been adjudicated for a felony offense. And you heard and saw that an exhibit had been admitted with a certified record showing that he had, in fact, been adjudicated for a felony offense before the murder in this case."

Moreover, the State mentioned that Jones told "the police that [defendant] admitted to him that he got into a fight and shot somebody" and that Green told the investigator that defendant admitted to shooting Lowe, but said it was an accident. During defense counsel's closing arguments, he challenged the credibility of the State's witnesses.

¶ 19 When instructing the jury on the offense of unlawful possession of a firearm, the court said,

> "A person commits the offense of unlawful possession of a firearm when he knowingly possesses a firearm and has been previously adjudicated a delinquent for a felony offense.
>
> To sustain the charge of unlawful possession of a firearm, the State must prove the following propositions:
>
> First proposition, that the defendant knowingly possessed a firearm.
>
> And, second proposition, that when the defendant did so, he had previously been adjudicated a delinquent for a felony offense."

The court also instructed the jury that the actual charges against defendant were not evidence.

¶ 20 While the jury was deliberating, they asked, "can we have the previous felony conviction of [defendant] presented?" The court responded, "No. Rely on the evidence that was presented." The jury found defendant guilty of all counts. The court merged the murder convictions and sentenced defendant to 58 years' imprisonment, which included a 25-year add-on for personally discharging a firearm, and one year imprisonment for unlawful possession of a firearm, to be served consecutively.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant first argues that trial counsel was ineffective. Specifically, defendant contends that counsel failed to object to the State's impeachment of its own witnesses, failed to stipulate to his prior adjudication, and failed to move to sever the charges. Second, defendant argues the evidence was insufficient to find defendant was under the age of 21, which was an element of the offense of unlawful possession of a firearm.

¶ 23 Upon review, we find that defendant has not shown that he was prejudiced and his ineffective assistance of counsel claims, therefore, lack merit. However, we do find that the State failed to prove defendant guilty of unlawful possession of a firearm where they presented no evidence that defendant was under the age of 21 to the jury.

¶ 24 1. Ineffective Assistance of Counsel

¶ 25 To challenge the effectiveness of counsel, a defendant must show: (1) counsel's performance fell below and objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

> "To satisfy the deficient performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate 'that counsel was not functioning as the "counsel" guaranteed by the sixth amendment' and, also, must overcome the strong presumption that any challenged action or inaction may have been the product of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999); [citation.] This is a high bar to clear since matters of trial strategy are generally immune from claims of ineffective assistance of counsel. [Citations.] In addition, even when a defendant can show deficient performance, the second

> prong requires the defendant to show that he was prejudiced as a result. That is, a defendant must show that counsel's deficiency was so serious that it deprived him of a fair trial." *People v. Dupree*, 2018 IL 122307, ¶ 44.

"[W]e may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance." *People v. Hale*, 2013 IL 113140, ¶ 17.

¶ 26 a. Failure to Object to State's Impeachment

¶ 27 Defendant first contends that counsel was ineffective for failing to object to the State's impeachment of its own witnesses. Specifically, defendant points to the State's questioning of Jones and Green and subsequent impeachment with the officer's and investigator's testimony. Not objecting did not prejudice defendant. The impeachment of Jones and Green cast doubt on the credibility of the State's witnesses. We cannot say that defendant was prejudiced by the State impugning the credibility of its own witnesses. Had counsel objected, we cannot say that the result of the proceedings would have been different.

¶ 28 b. Failure to Stipulate to Defendant's Prior Adjudication

¶ 29 Next, defendant contends that counsel was ineffective for failing to stipulate to his prior adjudication. The amount of prejudice to defendant was minimal. The only mention of what defendant had been previously adjudicated was when the court read the indictment to all potential jury members prior to *voir dire*. During jury instructions, the court informed the jury that the charging instrument was not evidence against defendant and should not be taken as such. When the certified copy of defendant's adjudication was entered into evidence, it was not published to the jury. The State did not read the names of defendant's prior offenses to the jury, but solely stated that he was previously adjudicated delinquent for a felony offense. While it was

not necessary for the State to say the word "felony," we do not believe that, if the State had not done so, the result of the proceedings would have been different. Little danger exists that the jury convicted defendant of these crimes based on an improper propensity inference. See *People v. Meyer*, 402 Ill. App. 3d 1089, 1095 (2010).

¶ 30 c. Failure to Move to Sever

¶ 31 Defendant's last point of ineffective assistance of counsel is that counsel was ineffective for failing to move to sever the two charges. Again, we do not believe that defendant was prejudiced by counsel's failure. The jury did not receive information listing the prior criminal history. There was significant testimony linking defendant to the crime. Bell heard the shots and said he saw defendant holding a gun. Hall told the police that he saw defendant shoot Lowe, though he recanted via affidavit after the fact. Jones and Green each told the police that defendant had made a statement to them regarding the shooting. All of this evidence would have been presented at both trials, even if defense counsel had moved to sever. While there were some credibility issues with some of the witnesses, we cannot say that, but for defense counsel's failure to move to sever, the result of the trial would have been different. Thus, we cannot say that counsel was ineffective.

¶ 32 In coming to this conclusion, we note that while this appeal was pending, we granted defendant's motion to cite the recently decided case of *People v. Utley*, 2019 IL App (1st) 152112. In *Utley*, the First District held that counsel was ineffective for failing to move to sever the defendant's unlawful use of a weapon by a felon charge and drug charges. *Id.* ¶ 53. The evidence at trial established that officers went to the defendant's home for a parole violation and searched the defendant's bedroom. *Id.* ¶ 4. In the bedroom, they found cocaine, cannabis, a box of baggies, and a scale. *Id.* One of the officers asked the defendant's wife if there was anything

else in the house that they should know about, and she directed him to a bag in a closet that contained two guns with ammunition. *Id.* ¶ 5. On appeal, the defendant argued that counsel should have moved to sever the charges because "to prove the gun charges, the State was required to introduce evidence of defendant's prior convictions for aggravated battery with a firearm and delivery of a controlled substance, neither of which would have been admissible to prove the possession of a controlled substance offense." *Id.* ¶ 39. The court found, "that there existed a significant risk that the jury's knowledge that defendant had previously been convicted of aggravated battery with a firearm and unlawful delivery of a controlled substance would be used in determining his guilt or innocence of the instant, unrelated, offense." *Id.* ¶ 42. The court distinguished *People v. Fields*, 2017 IL App (1st) 110311-B, finding that counsel's failure to move to sever did not amount to trial strategy, since the names of the predicate offenses were provided to the jury and counsel made no attempt to minimize the prejudice. *Utley*, 2019 IL App (1st) 152112, ¶ 48. The court found the prejudice prong was satisfied "[b]ecause the jury heard that defendant had been previously convicted of *** crimes that involved the same type items of contraband ***, the jury may have inferred that the contraband at issue *** also belonged to defendant." *Id.* ¶ 52. Moreover, the discrepancies in the State's case and "significant questions surrounding the circumstances of defendant's statement to police," further aided the prejudice determination. *Id.* ¶ 53.

¶ 33 We find *Utley* distinguishable from the instant case for multiple reasons. First, in *Utley* the predicate offenses [were] identified by name. Here, as stated above, the State did not present the names of the offenses for which defendant had previously been adjudicated. Here, the jury only heard that it was a felony offense. Second, there were other issues with the evidence presented in the State's case in *Utley*.

¶ 34 2. Insufficient Evidence

¶ 35 Defendant argues that the evidence was insufficient to find him guilty of unlawful possession of a firearm where the State did not prove that he was under the age of 21. We consider whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 36 We find our decision in *In re S.M.*, 2015 IL App (3d) 140687, instructive. In *S.M.*, the respondent was charged with unlawful possession of a concealable handgun under section 24-3.1(a)(1) of the Criminal Code of 2012 (720 ILCS 5/24-3.1(a)(1) (West 2012)), which provided that it was an offense for anyone under the age of 18 to possess a concealable firearm. *S.M.*, 2015 IL App (3d) 140687, ¶¶ 1, 14. During arraignment, the court asked the respondent his age. *Id.* ¶ 4. During the adjudicatory hearing, the State presented no evidence of the respondent's age, but during closing arguments, asked the court to take judicial notice of the court file, which included the respondent's age. *Id.* ¶ 5. The court did so and found the respondent delinquent. *Id.* ¶ 6. On appeal, the respondent argued that the State failed to prove every element of the offense beyond a reasonable doubt because they failed to provide any evidence that the respondent was under the age of 18. *Id.* ¶ 11. This court stated that the age of the respondent was an element of the offense that the State had to prove beyond a reasonable doubt. *Id.* ¶ 15. This court said,

> "A person's age may be established, beyond a reasonable doubt, as an element of a given offense in several ways. In some cases, the State introduces a certified birth record or offers the testimony of a close relative during a trial in order to establish the age of either an offender or a victim. In other cases, a police officer

testifies before the court about an offender's response to inquiries from law enforcement officers regarding his age." (Emphasis omitted.) *Id.* ¶ 16.

However, we noted that the State failed to offer any such evidence regarding the respondent's age. *Id.* ¶ 17. We found that the evidence was insufficient to establish all elements of the offense beyond a reasonable doubt. *Id.* ¶ 32.

¶ 37 *S.M.* is factually different because S.M. concerned a juvenile adjudication and this case involves an adult conviction. Here, the statute defendant was convicted under stated that a person committed the offense of unlawful possession of firearms when he or she "is under 21 years of age, has been convicted of a misdemeanor other than a traffic offense or adjudged delinquent and has any firearms *** in his possession." 720 ILCS 5/24-3.1(a)(2) (West 2014). Stated another way, the offense had three elements, the offender (1) was under 21 years of age, (2) had a misdemeanor conviction or adjudication, and (3) had any firearms. Thus, the State had to prove that defendant was under the age of 21 at the time he committed the offense. Like S.M., defendant argues the State provided no evidence to the jury to establish defendant was 21 at the time he committed the offense. While the State seems to believe the certified copy of defendant's adjudication that stated his birth date was shown to the jury, the record establishes that this was not the case. Moreover, the State notes that defendant said at a previous suppression hearing that he was 20 years old and that his age appears in the presentence investigation report. However, this evidence was not presented to the jury. In other words, this jury did not receive *any* evidence for a jury to have found that defendant was under 21 years of age at the time the offense was committed. Lacking any proof on this element of the offense, the State failed to prove defendant guilty beyond a reasonable doubt for unlawful possession of a firearm.

¶ 38 III. CONCLUSION

¶ 39 The judgment of the circuit court of Peoria County is affirmed in part and reversed in part.

¶ 40 Affirmed in part and reversed in part.