

NOTICE

Decision filed 04/12/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 110099-U

NO. 5-11-0099

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

LONNIE J. MOORE,

Defendant-Appellant.

)
)
)
)
)
)
)
)
)
)

Appeal from the
Circuit Court of
Massac County.

No. 10-CF-107

Honorable
Joseph Jackson,
Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.

Presiding Justice Spomer and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction for unlawful possession of a weapon by a felon is affirmed where he was proven guilty beyond a reasonable doubt, any error that resulted from the investigating officer's testimony concerning the defendant invoking his constitutional right to remain silent was harmless, and his trial counsel was not ineffective for his failure to object or request a curative instruction following the investigating officer's testimony concerning the defendant invoking his constitutional right to remain silent and for eliciting detailed information regarding the defendant's previous felony convictions.

¶ 2 The defendant, Lonnie J. Moore, appeals from his conviction for unlawful possession of a weapon by a felon after a jury found him guilty in the circuit court of Massac County. On appeal, the defendant argues (1) that the State failed to prove that he knowingly possessed a firearm beyond a reasonable doubt, (2) that his constitutional right to remain silent was violated where the investigating officer repeatedly testified that he had refused to speak with the police officers following his arrest, and (3) that his counsel was ineffective for failing to move for a mistrial or request a curative instruction following the investigating officer's use

of his right to remain silent against him and for eliciting detailed information regarding his previous felony convictions. For the reasons that follow, we affirm.

¶ 3 On September 21, 2010, the State charged the defendant and his brother, Clifford D. Moore, by information with one count of aggravated discharge of a firearm and one count of unlawful possession of a weapon by a felon. On November 15, 2010, the State filed a motion for joinder, requesting that the trial court join the two cases for trial. Thereafter, the trial court granted the motion.

¶ 4 The following evidence was adduced at the defendant's jury trial. On the afternoon of September 16, 2010, Crystal Riley was visiting a friend who lived at Strickland Apartments in Metropolis, Illinois. They were sitting on the front porch when Crystal observed Clifford Moore and the defendant walking toward Arkita Davis's house. She noted that the defendant was wearing jean shorts and no shirt and Clifford was wearing a red "Dickie outfit" or a red T-shirt and red shorts.

¶ 5 Crystal observed that Clifford and the defendant were walking toward a group of approximately 10 men on the back porch of the Davis residence. It appeared that Clifford and the defendant were making "face gestures" toward the group of men. An argument ensued between the Moore brothers, who were standing in the street, and the men. The group of men then began walking toward the brothers. Crystal observed the defendant lift Clifford's shirt to display a firearm. From her location, she could see the handle of the gun in Clifford's waistband. She described the gun handle as black and rectangular in shape. Crystal estimated that she was approximately 30 feet from the men.

¶ 6 Crystal noticed that Cory Rhodes and Shane Doyle were part of the group arguing with the Moore brothers. She heard Clifford tell Rhodes that "he was going to mark him on sight when he seen [*sic*] him," meaning that he would hurt or kill Rhodes. Rhodes responded that he would not do anything to Clifford. Doyle warned the brothers to stay out of Davis's

front yard.

¶ 7 Crystal then observed the defendant and Clifford running away from Davis's residence and running behind Strickland Apartments. She heard three or four gunshots behind her and concluded that the shots were coming from the direction of the Moore brothers. However, she could not see the Moore brothers because they were outside her line of sight. Crystal started running toward her mother's house. As she was running, she heard gunshots coming from Davis's residence. She testified that she did not see the Moore brothers shooting the gun, and she did not see Doyle with a weapon. She had her back to the scene when she heard the second set of gunshots because she was running toward her mother's house. Crystal was dating Doyle's sister's uncle.

¶ 8 Candace Riley, Crystal's sister, was at Strickland Apartments visiting her mother on the afternoon of September 16. She observed Tara Smith and the defendant standing outside the apartment complex, and she approached them because she wanted to borrow a cigarette. Candace and Smith then went to sit on Candace's mother's porch. While sitting on the porch, Candace observed Clifford and the defendant walking toward 11th Street, in the direction of the Davis residence. She testified that Clifford was wearing red shorts. Smith asked Candace to walk with her toward 11th Street because she believed something was about to happen.

¶ 9 Candace observed the defendant and Clifford standing in the street near the Davis residence, arguing with Cory Rhodes, who was standing in Davis's yard. Candace did not see anyone else in the yard. She testified that she was standing on a sidewalk near 11th Street, approximately 30 to 50 feet from the Moore brothers, when she observed the defendant pull a gun out of Clifford's pants. She explained that the gun was tucked behind Clifford's belt on his left side. When she observed the defendant pull out the gun, she quickly started walking across the street toward her aunt's house because her aunt was "well

known to call the police." She had to run directly past the Moore brothers in order to reach her aunt's house. As she was running, she heard gunshots behind her. She did not see anyone shooting a gun because she did not look back. She estimated that she had heard more than 10 gunshots. She did not see Doyle throughout the entire incident. When asked whether she would be surprised that an officer had determined that she was 88 feet away from where the Moore brothers were standing, she replied that she had not taken any measurements.

¶ 10 Michael Anthony Pass testified that he was walking from a relative's house toward Charlie's Party Hut, located on 10th Street, when he encountered the defendant. According to Pass, the defendant requested that he tell Doyle that the defendant wanted Doyle to come out into the street so they could fight. Pass went to the Davis residence to give Doyle the message. Pass and Doyle were standing on the side of the Davis residence when Pass relayed the message. Pass observed three individuals in the backyard, but explained that he could not see the entire yard. After giving Doyle the message, Pass continued walking to Charlie's Party Hut. He explained that he was inside Charlie's Party Hut for a few minutes and was returning to his relative's house when he heard approximately 10 gunshots. He estimated that there was a 10-minute gap between the time he left the Davis residence and when he heard the gunshots. Pass did not see anyone firing a weapon. He saw the defendant running, but did not see anything in the defendant's hands.

¶ 11 Pass gave the police two contradictory statements approximately one month after the incident. In his second statement to the police, he admitted seeing the defendant with a gun firing in the direction where he initially saw Doyle. He did not mention this during his first interview. At trial, he admitted that he was lying to the officers about seeing the defendant with a gun. Pass testified that he had observed the defendant pointing, but he did not see a gun in the defendant's hand.

¶ 12 Augusta Williams, the defendant and Clifford's aunt, testified that she was visiting a

friend, Margaret Bradford, on the afternoon of September 16. Bradford lived in the area of the incident. Candace Riley and a man named Clyde were also present at Bradford's residence. They were all sitting outside in front of Bradford's carport when Williams observed the defendant and Clifford walking, in the street, toward the Davis residence. Clifford and the defendant stopped in the street before reaching the residence. Williams then observed Michael Pass enter the Davis residence and return outside with Shane Doyle. She heard Doyle ask the defendant if he was "coming up here with a gun." Doyle then went back inside the residence. Shortly thereafter, Williams observed Doyle running around the back of the house toward an alley with a gun in his hand. Williams admitted that there was a tree line between where she was sitting in front of the carport and where the Moore brothers were standing in the street.

¶ 13 As a result of seeing Doyle with a gun, Williams hid behind a refrigerator located in the carport. She subsequently heard gunshots and believed the gunshots were coming from the alley behind the Davis house and from where the defendant was standing. She did not observe who shot first because she could not see anything from her position behind the refrigerator. She left her hiding place when the shots sounded like they were farther away. Williams then observed the defendant shooting a gun. She explained that she saw the defendant's arm extended, heard a boom, and then observed his arm "kick up." She believed that the defendant was shooting at Doyle, who was standing in an alley behind the Davis residence. She heard a total of six or seven gunshots, but she did not see any evidence of the bullets striking anything. After the shooting, she observed Clifford and the defendant retreat behind Strickland Apartments, and she did not see where Doyle went. Williams spoke with the police on two occasions regarding the incident. On the first occasion, she reported that she had observed the defendant pull a pistol out of Clifford's waistband. She did not mention this in her second statement. She testified that she could not recall telling an officer that the

defendant had retrieved the gun from Clifford's waistband.

¶ 14 Scott Deming, a detective with the Metropolis police department, was the crime scene investigator in this case. Deming collected physical evidence from the scene and took photographs of his observations. He recovered two .45-caliber shell casings on the southwest corner of the Davis residence (toward the front of the residence). He explained that it was unlikely, from his observation of the location of the shell casings, that the person shooting the firearm was located behind the home. Instead, he believed that the shooter was standing close to the corner of the front of the residence.

¶ 15 Deming observed three areas in the grass that appeared to be impact points where projectiles had struck the ground. Based on his observation of the impact sites, he concluded that the shots came from the Davis residence. He did not find any impact sites indicating that shots were fired from the Moore brothers' location. The police did not find any bullets or any other shell casings at the scene. No firearms or cap guns were found at the scene. He did not discover any shell casings or any weapons from the area where the Moore brothers were reportedly standing. Deming identified the following reasons as to why a fired gun would not leave a shell casing: the firearm malfunctioned and did not eject the round or it was a revolver. He explained that it was possible for a firearm to be discharged and no impact point or projectile be discovered. He further explained that the discovery of an impact point or a bullet at the scene of a shooting depended on whether the bullet struck an object and on how far the bullet traveled. The officers did not find a cell phone holder at the scene. Although Doyle admitted shooting a firearm, the gun was not recovered because he returned it to its owner and the owner was unidentified.

¶ 16 Deming testified that the distance between the corner of the Strickland Apartments and the corner of the Davis residence was over 100 feet. He further testified that the Bradford property was situated on a slope at a higher elevation than the Strickland

Apartments. He explained that a person standing on the Bradford property would be looking down on the Strickland Apartment complex. As part of his investigation, he had an individual stand in the general vicinity of the impact zone to determine whether he could see that individual from the Bradford property. Deming explained that he had squatted down to determine whether a shorter person's line of sight would be obstructed. He testified that he was able to see the upper torso of the individual while looking around the edge of the refrigerator in the Bradford carport.

¶ 17 Michael Kennedy, a detective with the Metropolis police department, testified that he was dispatched to the vicinity of the Strickland Apartment complex on September 16. He was traveling to the scene when he observed two black males running north approximately 2 to 2½ blocks from Strickland Apartments. He identified the men as Clifford Moore and the defendant. Kennedy observed that the defendant was wearing jean shorts and no shirt and Clifford was wearing a white "do-rag," a red shirt, and gray shorts. Kennedy ordered the brothers to put their hands in the air, and they immediately began yelling that Shane Doyle had been shooting at them. The brothers were taken into custody and transported to the Metropolis police department. The police officers did not recover any firearms or shell casings along the path that the Moore brothers took from the scene of the incident to the place of their apprehension.

¶ 18 Kennedy spoke with Clifford at the police department, and he volunteered to take a gunshot residue (GSR) test. However, a GSR test was not performed because Kennedy did not have the correct kit. The defendant refused to talk with the police officers after being informed of his constitutional rights. However, he subsequently told Kennedy that he wanted to "take the charge" and wanted his brother released. The officers did not ask the defendant to take a GSR test. The police had received a report from Augusta Williams that the defendant had shot a firearm during the incident. Kennedy retrieved a cell phone from

Clifford, but Clifford did not have a cell phone carrying case on him. Neither Clifford nor the defendant mentioned that the defendant had a cap gun in his possession during the incident.

¶ 19 Shane Doyle testified that he was charged with aggravated discharge of a firearm and reckless discharge of a firearm for his involvement in this incident, but he had not been promised any leniency for his testimony. On September 16, he was in Davis's backyard with his brother, Cory Rhodes, a guy named Donte, and Donte's friends. Doyle observed the defendant and Clifford walking down the street toward Charlie's Party Hut, which was located on 10th Street. One of the guys at the Davis residence said hello to the Moore brothers, but they did not respond. Shortly thereafter, Michael Pass approached Doyle and told him that the defendant and Clifford were waiting for him in front of the Davis residence. Pass told him that the Moore brothers wanted to fight. Doyle went to the front of the residence with Rhodes, Donte, and Donte's friends and told the Moore brothers "to get on." The defendant and Clifford were standing in the street, close to the yard.

¶ 20 The defendant threatened to beat Doyle up, and Doyle told the brothers to leave. In response, the defendant lifted Clifford's shirt, revealing a revolver. Doyle explained that he had observed the handle and the cylinder of the revolver sticking out of Clifford's pants. Doyle put his hands in the air and retreated from the situation. Doyle went to the side of the Davis house and encountered one of Donte's friends loading a magazine for a semiautomatic firearm. Doyle had only met the man that day and did not remember his name. Doyle asked to borrow the weapon. Doyle explained that he wanted to make Clifford and the defendant leave and that he would not shoot the gun. He believed that the gun was a 9-millimeter or a .45-caliber semiautomatic. The unidentified man gave Doyle the gun. Doyle engaged the gun's safety device and returned to the Moore brothers, who were standing in the street talking to Rhodes. Doyle pointed the gun at the Moore brothers and told them to leave, and

they ran behind a nearby building. Doyle watched them leave.

¶ 21 Thereafter, Doyle began walking toward the front of the Davis residence. As he was walking, he noticed the defendant pointing a revolver at him. The defendant began shooting at him, and Doyle took off running. Doyle explained that he was running back and forth alongside the Davis residence while attempting to disengage his gun's safety device. He was also attempting to replace the gun's magazine because he had accidentally dropped it while he was running. The defendant continued shooting at Doyle until he had to stop to reload. As the defendant was reloading his firearm, Doyle fired in the air to scare the brothers away. They did not run away, and Doyle began shooting at them because he believed his life was in danger. They retreated, and Doyle returned the borrowed gun to the owner before also leaving the scene. Doyle believed that he had fired his weapon four or five times. Doyle did not talk with the police until the police located him weeks after the incident.

¶ 22 The defendant testified that he was previously convicted of unlawful possession of a weapon by a felon and aggravated battery. He testified that he was at his brother's apartment in Strickland Apartments on September 16. Between 12 p.m. and 1 p.m., he went to his aunt's house, which was across the street, to get a cigarette. Augusta Williams was his aunt. He went to the back door of the residence, but his aunt was not home. Before leaving, he picked up a cap gun sitting on a shelf outside his aunt's home. The defendant explained that he had confiscated the cap gun from his nephew because the nephew was "flashing" it at people and the cap gun appeared realistic. After confiscating the cap gun, he had placed it on a shelf outside his aunt's home. He had planned to return the cap gun to his nephew later that day.

¶ 23 The defendant was walking toward his brother's residence when he encountered Tara Smith. Smith told him that Shane Doyle and his brothers were in the area and were threatening to hurt him. Shortly thereafter, Clifford joined them outside, and they decided

to walk to Charlie's Party Hut to purchase cigarettes. The defendant and Smith walked together while Clifford walked slightly behind them. As they were walking, they encountered Michael Pass near the Davis residence. Smith walked away, but the defendant did not know where she went. He observed approximately 10 men on the back porch of the Davis's house. He asked Pass to tell Doyle that if Doyle and his brothers wanted to fight him, they knew where to find him. After Pass delivered the message to Doyle, the defendant observed Doyle, Doyle's brother, and approximately six unidentified men approach with beer and whiskey bottles in their hands. The defendant got into a verbal argument with the group, and Doyle disappeared. Clifford approached and the defendant explained what was happening. As he was talking to his brother, approximately six or seven of the men crossed the street and walked toward them. Clifford grabbed the defendant and told him to walk away. The defendant did not walk away and instead pulled out the cap gun to scare the group. He pointed the cap gun at the Davis house and pulled the trigger. He did not point it at the group of men because the cap gun had an orange tip, which would reveal that it was not a real gun. The cap gun made a popping noise when he pulled the trigger, and the group of men took off running. When Clifford realized that the defendant had shot a cap gun, they both started laughing.

¶ 24 Shortly thereafter, Doyle approached from the back of the house pointing a pistol at them. They took off running before the defendant could explain that his gun was fake. As they were running, the defendant heard two gunshots. The brothers took shelter at a nearby playground, and he heard two more gunshots. The defendant had dropped the cap gun during the run. They were running toward the police station when they encountered police officers and were arrested.

¶ 25 Initially, the defendant did not tell the officers that he had a cap gun because he was afraid that he would face charges. He admitted telling a police officer that he would take the

"weight" if his brother was released. However, he was told that it was too late for that. He eventually admitted having a cap gun at the scene. The defendant testified that the cap gun was never in Clifford's possession, and he denied lifting Clifford's shirt.

¶ 26 Clifford testified that the defendant's testimony was accurate. He initially believed that the cap gun was real, and he was surprised when the defendant pulled out the gun. The cap gun sounded like a firecracker when the defendant pulled the trigger. As they were running from the scene, he took his cell phone out of its carrying case, which was clipped on his belt, because he intended to call the police. He believed that he had lost the case when they were running because it was not clipped on his belt when they were transported to the police station. He explained that if anyone observed anything underneath his shirt, it would have been the cell phone carrying case.

¶ 27 When the brothers were stopped by Kennedy, Clifford told him that Shane Doyle and his brother had attempted to kill them. Clifford cooperated with the police officers and willingly submitted to a GSR test. He did not mention the cap gun to the officers because he was in shock from the incident and did not believe that it was important.

¶ 28 Clifford testified that he did not have a firearm and that the defendant did not raise his shirt. He admitted that they were running away in the opposite direction of the police station when Kennedy arrested them in the alley, but explained that they had to run in that direction in order to avoid Doyle.

¶ 29 After hearing the evidence, the jury found the defendant not guilty of aggravated discharge of a firearm and guilty of unlawful possession of a weapon by a felon. Thereafter, the trial court sentenced him to six years' imprisonment. The defendant appeals.

¶ 30 The defendant first argues that he was not proven guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon. The defendant argues that the physical evidence indicated that he did not possess a firearm during the incident in question. He

further argues that the witnesses' testimony was unbelievable and should have been discredited by the jury. In particular, the defendant challenges the following inconsistencies and biases in the witnesses' testimony: (1) the witnesses' accounts varied as to the number of people with Doyle during the incident, (2) Candace Riley testified that she never saw Doyle at the scene despite Doyle's admission that he was present, (3) Doyle's testimony was self-serving because he was facing charges himself, (4) the witnesses' testimony was not consistent with the physical evidence, (5) the distance between the incident and Crystal Riley's vantage point was over 100 feet and Candace was more than 88 feet from the incident, (6) the defendant and Clifford were outside the Riley sisters' line of sight for part of the altercation, (7) Candace testified that she had escaped the situation by running directly past the defendant, who was armed, and Clifford, and such testimony was unbelievable, (8) Williams's view of the incident was obstructed, and (9) Crystal was dating Doyle's sister's uncle.

¶ 31 Section 24-1.1 of the Criminal Code of 1961 (720 ILCS 5/24-1.1 (West 2010)) makes it a felony for a person to knowingly possess a firearm if the person has been convicted of a felony under the laws of this state or any other jurisdiction. "To convict under this section, the State must prove that the defendant possessed a prohibited firearm and that the defendant had received a prior felony conviction." *People v. Lesure*, 271 Ill. App. 3d 679, 682 (1995). Here, the parties stipulated as to the defendant's prior felony conviction. Therefore, the sole issue before the jury was whether the defendant knowingly possessed a prohibited firearm.

¶ 32 When considering a challenge to the sufficiency of the evidence, the relevant question for the reviewing court 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 beyond a reasonable doubt. *People v. Minniweather*, 301 Ill. App. 3d 574, 577 (1998). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to

create a reasonable doubt of the defendant's guilt. *People v. Jimerson*, 127 Ill. 2d 12, 43 (1989). Circumstantial evidence is sufficient to sustain a criminal conviction, provided that the circumstantial evidence satisfies proof beyond a reasonable doubt of the elements of the charged offense. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). It is not the function of the reviewing court to retry the defendant. *Jimerson*, 127 Ill. 2d at 43. Instead, determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are the responsibilities of the trier of fact. *Id.*

¶ 33 Applying those principles to the case before us, we conclude that there was sufficient evidence to support the defendant's conviction. The jury heard the defendant and Clifford testify that the defendant did not possess a firearm and instead had a cap gun that he had confiscated from his nephew the previous evening. The jury was free to disregard such testimony as not credible. Additionally, the jury heard the witnesses' descriptions of the incident and heard the defense attorneys question the witnesses regarding the accuracy of their descriptions and any obstacles that might have prevented them from accurately observing the incident from their various vantage points. The jury was aware that Doyle was charged with aggravated discharge of a firearm and reckless discharge of a firearm as a result of his actions in this incident and that Crystal Riley dated Shane Doyle's sister's uncle. Williams testified that she had observed the defendant shooting a gun toward an alley. She explained that she heard a boom and observed the defendant's arm "kick up." Crystal and Candace testified that they had observed the defendant lift Clifford's shirt to reveal a firearm. The defense attorney challenged this testimony by questioning Crystal and Candace on their exact location when they observed the weapon in Clifford's waistband. Doyle corroborated the testimony of Crystal and Candace by testifying that he had observed the handle and cylinder of a revolver in the defendant's waistband. Further, the jury heard Deming's conclusions on the area where the shooting originated based on the locations of the shell

casings and impact points. Deming also testified as to the possible explanations for why no physical evidence was discovered, supporting the State's position that the defendant had possessed and shot a gun. As stated above, the determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are the responsibilities of the jury. Accordingly, we conclude that a reasonable jury could have concluded that the State proved the defendant guilty of unlawful possession of a weapon by a felon beyond a reasonable doubt.

¶ 34 The defendant next argues that his constitutional right to remain silent was violated where the investigating officer repeatedly testified that he had refused to speak with the police officers following his arrest. Specifically, the defendant argues that Kennedy repeatedly referred to his postarrest silence as justification for the police department's failure to perform a GSR test on him. Consequently, the defendant argues that a violation pursuant to *Doyle v. Ohio*, 426 U.S. 610 (1976), had occurred and that he was prejudiced because his silence could have been viewed by the jury as an admission.

¶ 35 The defendant points to the following exchanges between Kennedy and the State and Kennedy and his attorney to support his position that a *Doyle* violation had occurred. In the first exchange, the prosecution asked Kennedy why a GSR test had not been performed on the defendant. In response, Kennedy stated that after he had advised the defendant of his constitutional rights under *Miranda*, the defendant had said that he did not want to speak to Kennedy. Thereafter, the defendant explained that he wanted to take the charge and wanted his brother released. The State subsequently asked Kennedy whether he had inquired as to whether the defendant would be willing to take the GSR test, and Kennedy responded no.

¶ 36 In the next exchange, the defendant's attorney questioned Kennedy about how much time the officers had to complete a GSR test and why the defendant was not tested. Kennedy explained that a GSR test must be performed within six hours of a shooting pursuant to the

Illinois State Police crime laboratory. Because the defendant was in custody approximately 1½ hours following the incident, the defendant's attorney questioned why a GSR test was not performed since the officers still had 4½ hours to complete the test. Kennedy responded that he had interviewed Clifford before speaking with the defendant, which took approximately 30 to 40 minutes. Kennedy testified that he then spoke with the defendant, and the defendant was not interested in speaking with him. The defendant's attorney asked whether the defendant had invoked his right to counsel and whether he was asked to take the GSR test, and Kennedy responded no to both questions. The defendant's attorney then pointed out that had the GSR test been performed, the officers would have known whether the defendant had shot a gun on that date.

¶ 37 The third exchange regarding the defendant's silence occurred immediately following the second exchange. The defendant's attorney questioned Kennedy as to why the officers attempted to perform a GSR test on Clifford (it was later discovered that the officers had the wrong GSR test kit) and not the defendant when they had information that the defendant had shot a gun that day. Kennedy explained that when he had attempted to interview the defendant, the defendant did not want to talk. Therefore, the defendant was taken to the jail without any attempt by the officers to perform a GSR test. During redirect examination, Kennedy clarified that he had made no attempt to contact the Illinois State Police for another GSR test kit (the only available kit was used on Clifford) because it was his experience that it would take approximately two to three hours before they could arrive with a kit and that would be "close to outside" the six-hour time window.

¶ 38 The due process clause of the fourteenth amendment prohibits a defendant from being impeached on the basis of his silence following his invocation of his right to remain silent. *Doyle*, 426 U.S. at 618-19. In *Doyle*, 426 U.S. at 611, the State attempted to impeach the defendant's exculpatory story, told for the first time at trial, by cross-examining him about

his failure to have told the story after receiving *Miranda* warnings at the time of his arrest. The Supreme Court concluded that it would be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 617.

¶ 39 After carefully reviewing the record, we conclude that we need not decide whether Kennedy's testimony concerning the defendant initially asserting his right to remain silent constituted a *Doyle* violation because the error, if any, is harmless. *Doyle* violations are subject to harmless error analysis. *People v. Hart*, 214 Ill. 2d 490, 517 (2005). Our supreme court has recognized the following five factors for courts to consider when determining whether a *Doyle* violation is harmless beyond a reasonable doubt: (1) the party who elicited the testimony concerning the defendant's silence, (2) the intensity and frequency of the references to the defendant's silence, (3) the prosecution's use of the defendant's silence, (4) the trial court's opportunity to grant a mistrial motion or to give a curative jury instruction, and (5) the other evidence establishing the defendant's guilt. *Id.* at 517-18.

¶ 40 In the present case, the prosecution *did* elicit the testimony in question. With regard to the second factor, the intensity and frequency of the references to the defendant's silence, we note that the defendant's silence was mentioned by Kennedy and the defendant at various times during the trial. As noted, the prosecution was the first to elicit such testimony. However, we note that the defendant's attorney also elicited testimony concerning the defendant's initial invocation of his right to remain silent by continuing to question Kennedy about the GSR test. The defendant argues that Kennedy, in his testimony, insinuated that the GSR test was not conducted because the defendant invoked his constitutional right to remain silent and that likely led the jury to conclude that the defendant had refused to clear his name "with a simple swab of his hands." Although Kennedy revealed in his testimony that the defendant had invoked his right to remain silent, his testimony also revealed that the

officers did not ask the defendant to take a GSR test and that the officers believed that time constraints prevented them from performing a GSR test on the defendant. Therefore, any misunderstanding on the part of the jury was clarified by the testimony regarding the six-hour time window for performing a GSR test and the officers having to contact the Illinois State Police to obtain a GSR testing kit.

¶ 41 With regard to the third factor, the use the prosecution made of the defendant's silence, the State did not comment on the defendant's initial invocation of his right to remain silent during closing arguments or argue that the mere fact that the defendant remained silent was an indication of his guilt. As for the fourth factor, the trial court's opportunity to grant a mistrial motion or to give a curative instruction, the trial court had no such opportunity because the defendant's counsel did not object to Kennedy's testimony nor did the defendant's counsel request a curative instruction. Last, with regard to the fifth factor, the other evidence establishing the defendant's guilt, we conclude, as noted above, that the evidence presented at trial indicated that the defendant was guilty beyond a reasonable doubt. The defendant's aunt testified that she had observed the defendant with a firearm and explained that she had heard a boom and observed the defendant's arm "kick up." Doyle also testified that the defendant had a gun. Crystal and Candace testified that they had observed the defendant lift Clifford's shirt to reveal a firearm. Further, an explanation was offered as to why no physical evidence, which would indicate that the defendant had possessed a gun, was discovered at the scene. Accordingly, we conclude that the *Doyle* violation, if any, was harmless beyond a reasonable doubt.

¶ 42 Last, the defendant argues that his counsel was ineffective for the following reasons: (1) his counsel failed to move for a mistrial, request a curative instruction, or move the court to strike nonresponsive answers following the investigating officer testifying that the defendant had invoked his right to remain silent as a reason for why a GSR test was not

performed on the defendant, and (2) his counsel elicited detailed information regarding his previous felony convictions.

¶ 43 Ineffective-assistance-of-counsel claims are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To establish that the defendant's trial counsel provided ineffective assistance, the defendant must show that his counsel's performance was so deficient that his representation fell below an objective standard of reasonableness, and counsel's deficient performance created a reasonable probability that the outcome of the proceeding would have been different absent counsel's deficient performance. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). "A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim." *Id.*

¶ 44 First, the defendant argues that his counsel failed to move for a mistrial, request a curative instruction, or move the court to strike nonresponsive answers following the investigating officer testifying that the defendant had invoked his right to remain silent as a reason for why a GSR test was not performed on the defendant. As noted above, any *Doyle* violation resulting from Kennedy's testimony concerning the defendant's invocation of his right to remain silent was harmless error. Accordingly, we conclude that the defendant suffered no prejudice from such testimony.

¶ 45 Next, the defendant argues that his trial counsel was ineffective for eliciting detailed information regarding his previous felony convictions. Specifically, the defendant notes that his trial counsel questioned him regarding the details surrounding his previous convictions for unlawful possession of a weapon by a felon and aggravated battery. The defendant argues that the jury would have viewed this information as proof of the defendant's propensity to commit the present offense.

¶ 46 Before trial, the defendant's counsel filed a motion *in limine* to preclude the admission

of the defendant's prior felony convictions (criminal damage to government-supported property, aggravated battery, criminal damage to property, and unlawful possession of a weapon by a felon) should the defendant choose to testify. The State conceded that it should not be permitted to impeach the defendant with his conviction for unlawful possession of a weapon by a felon, but urged that the other prior convictions were admissible. The trial court agreed with the State and determined that the defendant's aggravated-battery conviction and the two convictions for criminal damage to property were admissible for impeachment purposes. During trial, the defendant's counsel asked the defendant to describe the circumstances surrounding his prior conviction for unlawful possession of a weapon by a felon. The defendant explained as follows:

"I was sitting on my mother's porch. And I had like a pocketknife in my hand, and I was cleaning my fingernails. And the music was loud on the inside, so when the police got called, they came and told us to cut the music down. Well, they took my knife. And later on when I was at the store, they told me I could go back and get the knife. And when I went back and got it, they booked me right there because I was a felon, and the knife was too long."

The defendant's counsel then requested the details surrounding his conviction for aggravated battery. The defendant explained that he was in a "mutual fight" with another man and that the man was repeatedly hitting him. In defense, he grabbed a bottle and swung it at the man.

¶ 47 With regard to the defendant's prior conviction for unlawful possession of a weapon by a felon, we conclude that the defendant's counsel was not ineffective because his decision to bring out the details surrounding this prior conviction was a matter of trial strategy. "Judicial scrutiny of an attorney's performance must be highly deferential, and a reviewing court will not inquire into areas involving the exercise of discretion, judgment or trial strategy." *People v. Valentine*, 299 Ill. App. 3d 1, 3 (1998). Defense counsel sought to

provide an innocuous explanation for why the defendant was previously convicted of unlawful possession of a weapon by a felon. With regard to the aggravated-battery conviction, the defense counsel's strategy was to show that the defendant was forthcoming about his record and allow the defendant an opportunity to describe the circumstances surrounding the conviction before the prosecution could use the conviction for impeachment purposes. Accordingly, we conclude that the defendant was not prejudiced by his trial counsel eliciting information concerning the nature of his prior convictions.

¶ 48 For the foregoing reasons, the judgment of the circuit court of Massac County is hereby affirmed.

¶ 49 Affirmed.