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2013 IL App (3d) 110664-U

Order filed April 23, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-11-0664
	)	Circuit No. 11-CM-116
	)	
JEREMY AGUSTER,	)	Honorable
	)	Timothy M. Lucas,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justice Lytton concurred in the judgment.  
Justice Holdridge dissented.

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**ORDER**

- ¶ 1 *Held:* Defendant did not show that trial counsel was ineffective for failing to tender a jury instruction on the affirmative defense of necessity.
- ¶ 2 Following a jury trial, defendant, Jeremy Aguster, was found guilty of unlawful use of a weapon (720 ILCS 5/24-1(a)(4) (West 2010)) and was sentenced to pay a fine of \$200. Defendant appeals, arguing that trial counsel was ineffective for failing to tender a jury instruction on necessity. We affirm.

## FACTS

¶ 3

¶ 4 On January 28, 2011, defendant was charged by indictment with unlawful use of a weapon, alleging that he knowingly possessed a handgun in a motor vehicle, at a time when he was not on his own land or in his own abode or fixed place of business. 720 ILCS 5/24-1(a)(4) (West 2010).

¶ 5 The evidence at defendant's jury trial indicated that on January 2, 2011, defendant and Stephan Hicks drove to a club in Hicks' Tahoe. Defendant, who had a Firearm Owner's Identification Card (FOID Card), brought his nine-millimeter handgun, and Hicks brought his .40-caliber handgun. Both handguns were unloaded and stored in the glove compartment of the Tahoe. Defendant also brought a loaded magazine for his handgun, which he placed behind the backseat of the Tahoe.

¶ 6 While defendant and Hicks were inside the club, they witnessed Hicks' girlfriend, Jennifer Nichols, and her friend, Cecelie Dubose, get into an altercation with several other women. All four were asked to leave the club, and they got into Hicks' Tahoe and drove around the block looking for Dubose's vehicle. Hicks was the driver, Nichols was the front seat passenger, defendant sat directly behind Hicks, and Dubose sat next to defendant. When they returned to the club's parking lot, the women who were involved in the previous altercation approached the Tahoe to continue the dispute.

¶ 7 Nichols opened the glove compartment and Dubose jumped forward to grab the handgun. Dubose took the nine-millimeter handgun without defendant's permission and started waving the handgun at the other women. Defendant immediately took the gun from Dubose and placed it under his seat. Defendant testified that he did not put the weapon back into the glove

compartment, to be transported legally, because he was concerned that Dubose would still have access to it since she had already grabbed the handgun once. See 720 ILCS 5/24-1(a)(4)(iii) (West 2010); *People v. Diggins*, 235 Ill. 2d 48 (2009) (holding that a person can legally carry a firearm in a vehicle if it is unloaded and enclosed in a case or other container, including a center console or glove compartment, by a person who has been issued a valid FOID Card).

¶ 8 Within minutes after Dubose waved the handgun at the women, one of the women reported the incident to Peoria police officer John Rodgers. While the woman was telling Rodgers that a girl in a tan Tahoe pulled a gun on her and her friends, the Tahoe drove by, and the witness identified it as the vehicle in question. Rodgers followed the Tahoe seven or eight blocks before stopping it. Following the stop, Rodgers conducted a search of the Tahoe and found two unloaded weapons, including a nine-millimeter handgun under defendant's seat and a .40-caliber handgun in the glove compartment. Rodgers also found a loaded magazine for the nine-millimeter behind defendant's seat, which was within arm's reach of defendant.

¶ 9 Following the presentation of evidence, defense counsel did not proffer any jury instructions. The jury ultimately found defendant guilty of unlawful use of a weapon, and he was sentenced to pay a fine of \$200. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant argues that his trial counsel was ineffective for failing to tender a jury instruction on the affirmative defense of necessity.

¶ 12 To prevail on a claim of ineffective assistance of trial counsel, defendant must establish that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional

errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Manning*, 241 Ill. 2d 319 (2011). Defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, the reviewing court need not determine whether counsel's performance was deficient. *People v. Graham*, 206 Ill. 2d 465 (2003).

¶ 13 Defendant argues that prejudice exists because, had defense counsel tendered a jury instruction on necessity, there was a reasonable probability that the verdict would have been different. We disagree.

¶ 14 The affirmative defense of necessity provides that conduct which would otherwise be an offense is justified by reason of necessity if defendant establishes that he: (1) is without blame in occasioning the situation; and (2) reasonably believed that his conduct was necessary to avoid a greater public or private injury than that which reasonably may have resulted from his conduct. 720 ILCS 5/7-13 (West 2010); *People v. Kucavik*, 367 Ill. App. 3d 176 (2006). The necessity defense is viewed as involving the choice between two admitted evils where other optional courses of action are unavailable, and the conduct chosen by defendant must promote some higher value than the value of literal compliance with the law. *Id.*

¶ 15 In evaluating the elements of necessity, we find that the evidence presented at defendant's trial was insufficient to show that defendant was without blame in occasioning the situation. See 720 ILCS 5/7-13 (West 2010). Defendant not only brought the handgun into the vehicle and placed it in the glove compartment, but there was no indication that the glove compartment was locked or that the handgun was placed in a locked case to prevent others from accessing it. *Cf. People v. Newbolds*, 204 Ill. App. 3d 952 (1990) (determining that counsel deprived defendant of

a fair trial by failing to tender a necessity instruction, where some evidence indicated that defendant was without blame when his girlfriend threatened him with a gun she was carrying and defendant took the gun away from her in order to protect himself). Defendant was not without blame when his actions created the situation where Dubose could access his handgun and threaten others with it.

¶ 16 Furthermore, the evidence showed that other reasonable and lawful alternatives were available to defendant, including returning the handgun to the glove compartment. See *Kucavik*, 367 Ill. App. 3d 176. Defendant testified he believed Dubose would gain access to the handgun if he returned it to the glove compartment. However, defendant knew that the handgun was unloaded, and by putting it under his seat, it was not only still within reach of Dubose, but it was also only a few feet from the handgun's magazine. Under these circumstances, it is unlikely that the jury would determine that defendant chose between two admitted evils and reasonably believed returning the handgun to the glove compartment was insufficient to avoid a greater injury.

¶ 17 In sum, although it is for the jury to determine the reasonableness of defendant's beliefs, the evidence still indicates that defendant was not without blame in occasioning the situation. See *Kucavik*, 367 Ill. App. 3d 176. Without support for both prongs of the necessity defense, even if the jury instruction was tendered, defendant is unable to show that there was a reasonable probability that the outcome of his trial would have been different. Accordingly, defendant has failed to establish ineffective assistance of counsel.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 20 Affirmed.

¶ 21 JUSTICE HOLDRIDGE, dissenting.

¶ 22 I dissent. The defendant was clearly entitled to have the jury instructed on the defense of necessity. The evidence presented at trial was clearly sufficient to raise a reasonable doubt to establish that the defendant was without blame in occasioning or developing the situation and reasonably believed that his actions were necessary to prevent another from causing greater public or private injury than his own actions might cause. *People v. Newbolds*, 204 Ill. App. 3d 952, 955 (1990). Fundamental fairness required that the defendant was entitled to a jury instruction on necessity, and the error by his counsel in failing to seek such an instruction deprived the defendant of effective representation. *Id.*

¶ 23 The defendant, who had a firearm owner's identification (FOID) card, lawfully possessed a firearm which was unloaded and lawfully stored in the glove compartment of his car. *People v. Diggins*, 235 Ill. 2d 48, 57-58 (2009) (a person holding a valid FOID card can legally carry a firearm in a vehicle if it is unloaded and enclosed in a case, such as a console or glove compartment). Not only was the defendant acting in a completely lawful manner in possessing his firearm, he also acted in a completely reasonable and appropriate manner to prevent Hicks from having access to a firearm. Yet, despite the uncontroverted fact that the defendant was acting in a completely lawful manner, the majority finds that he was somehow to blame for the situation and should not have been able to receive a necessity instruction. I cannot agree.

¶ 24 While the majority is correct in pointing out that the defendant must establish that he is without blame in occasioning the situation that gave rise to a criminal offense (720 ILCS 5/7-13 (West 2010)), there is nothing in this record to establish that the defendant shouldered any blame

for the situation. The majority maintains that the defendant was to blame because: (1) "he brought the handgun into the vehicle and placed it in the glove compartment;" (2) "there was no indication that the glove compartment was locked;" and (3) "there was no indication that the handgun \*\*\* was placed in a locked case to prevent others from accessing it." None of these three reasons has any basis in law.

¶ 25 Our supreme court in *Diggins* clearly held that a console or glove compartment, as part of a car, satisfies the statutory requirement that a firearm be "unloaded and enclosed in a case" for possession or transport. 729 ILCS 5/24-1.6(c)(iii) (West 2010); *Diggins*, 235 Ill. 2d at 58. Here, the defendant, a holder of a valid FOID card, brought a handgun into the vehicle and placed it in the glove compartment. These actions were in total compliance with Illinois law covering the possession and transportation of firearms. *Id.* at 58. The majority's statement that the defendant's complete compliance with Illinois law is evidence that he is somehow to blame for the situation defies logic. Likewise, the majority's requirement that the glove compartment be "locked" so as "to prevent others from accessing it" is not found in the statute. I do not agree with the majority's decision to impose restrictions upon lawful gun possession that have not been constitutionally imposed by the legislature.

¶ 26 For these reasons, I would find that the defendant should have been able to raise a defense of necessity, and his counsel's failure to seek a jury instruction on necessity deprived the defendant of effective assistance of counsel. I would reverse the conviction and remand for a new trial.