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2014 IL App (3d) 120682-U

Order filed December 11, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-0682
)	Circuit No. 10-CF-891
TIMOTHY THOMAS,)	
Defendant-Appellant.)	The Honorable Stephen Kouri, Judge, presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The defendant's armed violence conviction was affirmed because there was sufficient evidence for the jury to find that the defendant, an admitted drug user, was predisposed to commit the armed violence offence. The defendant's conviction for possession of heroin was vacated because convictions for both that and armed violence violated one-act, one-crime principles.
- ¶ 2 The defendant, Timothy Thomas, was convicted of armed violence and possession of a controlled substance, and sentenced to 15 years and 4 1/2 years in prison, respectively. The defendant appealed.

¶ 3

FACTS

¶ 4

The defendant, Timothy Thomas, was charged by indictment with one count of armed violence (720 ILCS 5/33A-2(a) (West 2010), one count of unlawful possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2010), two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1) (West 2010), one count of unlawful possession of a controlled substance (heroin) with intent to deliver (720 ILCS 570/401(d)(1) (West 2010), and two counts of unlawful possession of a control substance (one for heroin, one for cocaine) (720 ILCS 570/402(c) (West 2010). The charges arose out of a traffic stop that took place on August 26, 2010, after a confidential informant told police that the defendant was in possession of contraband. The defendant's motion to quash arrest and suppress evidence was denied.

¶ 5

A jury trial commenced on September 13, 2011. Prior to trial, the State dismissed one of the AUUW counts and the count alleging unlawful possession of a controlled substance with intent to deliver. At the end of the trial, the jury informed the court that it had reached guilty verdicts on both counts of unlawful possession, but was deadlocked on the remaining three counts. The trial court accepted the verdicts on the possession counts and declared a mistrial on the other counts. The trial court entered judgment as to one of the possession counts, heroin, and sentenced the defendant to 4 ½ years in prison.

¶ 6

A retrial on the remaining three counts, armed violence, UUWF and AUUW, commenced on March 6, 2012. Officer Steven Cover, a sergeant for the Peoria Police Department, testified for the State that around 8 p.m. on August 26, 2010, he received a call from Peoria police officer Erin Barisch, relaying that a male in possession of a handgun and heroin would be leaving a house soon in a gray car. Cover was in the area, and he saw a silver-gray car pulling away from the curb. Cover followed the vehicle and called for backup. After activating his emergency lights, he saw the male front passenger making furtive movements. Cover pulled the car over

and approached the driver, while assisting officers approached the passenger side. Cover signaled to the other officers to remove the male passenger based on the information from Barisch. Cover testified that he secured the driver's consent to search the car, and recovered the handgun. A patdown of the defendant revealed suspected drugs, two bullets, and cash. Cover testified that, when questioned at the police station, the defendant said that the drugs and gun were his, and that he was planning to sell the heroin. On cross-examination, Cover testified that the defendant said that someone named Victor Johnson told the defendant that he better take the gun with him.

¶ 7 Officer Sean Johnston testified that he assisted Cover in the traffic stop. Upon Cover's instruction, Johnston removed the defendant from the car and patted him down. Johnston found the following in the defendant's pockets: two .38 caliber bullets, several bindles of heroin, about \$900 in cash, cigarettes, and a small amount of crack cocaine. Officer Michael Featherstone, the other officer that assisted with the traffic stop, testified that he heard the driver (the defendant's wife) give consent for the search of the automobile, and he found the gun under the front passenger seat.

¶ 8 Officer Brett Lawrence questioned the defendant at the police station. Lawrence testified that the defendant stated that he had 12-13 bags of heroin on him, and he was planning on using some of them. The defendant told Lawrence that he used 15-20 bags of heroin a day. The defendant had previously sold 11 bags, and \$100 of the money in his pocket was from those sales. The defendant stated that someone gave him the cocaine to try. The defendant also stated that Johnson told him to take the handgun, but the defendant did not say that Johnson gave him the gun or drugs. Lawrence testified that the defendant said that, on previous occasions, he sometimes was armed when he was in that area because he feared he would be robbed.

¶ 9 Barisch testified that he got a telephone call from Johnson on August 26, 2010. At the time, Johnson was acting as a confidential informant. Johnson told Barisch that he was with a person in possession of heroin and a firearm. Barisch was out of town on another case, but he relayed the information to Cover. Johnson had been arrested in early August 2010, and he agreed to provide information implicating three individuals in three separate felony drug cases within 15 days in exchange for dismissal of the charges against him. The informant contract agreement was entered into on August 12, 2010. According to Barisch, Johnson had fulfilled his part of the contract prior to providing the tip on the defendant. By that time, Johnson had entered into a modified agreement, memorialized in a “Memo of Understanding,” by which he agreed to provide information to the police in exchange for cash. Johnson did not actually get paid for the information that he provided about the defendant because Barisch was never able to locate Johnson after the incident.

¶ 10 Johnson testified that the defendant, who he had known a couple of months, had been staying with him at the same house for a few months. Johnson denied making a call to Barisch on August 26, 2010, and denied working as a police informant before that. He did acknowledge his signature on the informant contract agreement, but claimed he did not recall signing it because he was intoxicated. He also did not remember doing any work under the contract, but he may have given police information about the criminal activities of others. Johnson denied giving the defendant drugs or a gun, and testified that he never suggested that the defendant take the gun or drugs from the house. Johnson testified that he saw the defendant around noon on August 26, but never saw him again that day. He denied giving the defendant 15-20 bags of heroin. He denied receiving any money from Barisch for information about the defendant or any other case.

¶ 11 The parties stipulated that the two substances recovered from the defendant were 0.1 grams of heroin and 0.3 grams of cocaine.

¶ 12 The defendant's wife, Angela, testified that she picked up her husband at Johnson's house on August 26. Johnson came to the door and told her that the defendant would be out in a few minutes. Soon after the defendant got in the car, they were pulled over by police, and the police immediately pulled the defendant out of the car. She did not know there was any contraband in the car, and she did not see the defendant drop the gun under the passenger seat. She did not remember giving consent to search the car.

¶ 13 The defendant testified that in late August 2010, he was staying for a few weeks with Johnson at a house in Peoria. On the night in question, August 26, 2010, he had plans to meet with his estranged wife. The defendant testified that Johnson asked the defendant to hold something for Johnson, and gave the defendant three dime bags of heroin in exchange. The defendant opened one of the bags and started snorting the heroin, but then his wife pulled up and was honking. According to the defendant, when he was going out to meet his wife, Johnson stopped him and asked if he was going to get the items that Johnson had asked the defendant to hold. Johnson then gave the defendant more bags of heroin and a gun. The defendant unloaded the gun and put it in his waistband. The defendant admitted to having a habit of about 15 to 20 dime bags of heroin a day, and he was getting his heroin from Johnson. Shortly after getting in his wife's car, they were pulled over by the police. He denied selling any drugs that day.

¶ 14 During closing arguments, the prosecutor argued that the defendant lacked credibility and was predisposed to commit the crime. The prosecutor argued that the average person would not take heroin and a gun in exchange for three free bindles of heroin. The prosecutor then argued: "Who would do it? Somebody already predisposed to commit the offense. Heck, yeah, I'll take the heroin. Give me that gun and those drugs. I'm on parole. Who cares. I'm a convicted felon. Whatever." In rebuttal, the prosecutor stated: "What do drug addicts do? They rob. They steal.

Murder. I'm an addict. It's not a defense. It's a reason. It's a predisposition to commit a crime.”

¶ 15 The jury returned guilty verdicts for armed violence, UUWF, and AUUW. The defendant was sentenced to the statutory minimum of 15 years for armed violence, concurrent with his 4½ year sentence for possession. The defendant appealed.

¶ 16 ANALYSIS

¶ 17 The defendant argues that the evidence adduced at trial established that he was entrapped to commit armed violence as a matter of law. He asserts that the evidence showed that he was induced to do that which he was not otherwise predisposed to do, specifically, take possession of the gun. The defendant admits that he was a heroin addict, so he was predisposed to commit the offense of possessing heroin. But, he was not predisposed to illegally possessing a firearm. He contends that Johnson coaxed him to hold onto the gun, in exchange for three bags of heroin, and immediately called Barisch with the information to incriminate the defendant. Thus, the defendant asserts that the State failed to prove beyond a reasonable doubt that he was predisposed to commit the armed violence offence. The State argues that the defendant was proved guilty of armed violence beyond a reasonable doubt, and the defendant applied the wrong standard by not looking at the evidence in a light most favorable to the prosecution.

¶ 18 In determining whether the State met its burden of proving that a defendant was not entrapped, we must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements essential to the criminal conviction beyond a reasonable doubt. *People v. Salazar*, 284 Ill. App. 3d 794, 800 (1996).

¶ 19 The statute on the defense of entrapment provides:

“A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of

obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offence and the public officer or employee, or agent of either merely affords to that person the opportunity or facility for committing an offense. 720 ILCS 5/7-12 (West 2010).

¶ 20 Thus, a defendant asserting entrapment as a defense must present evidence that: (1) the State induced or incited him to commit the crimes and (2) he lacked the predisposition to commit the crimes. *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 60. There is no inducement when the government “merely affords to [the defendant] the opportunity or facility for committing an offense.” (720 ILCS 5/7–12 (West 2004); *People v. Bonner*, 385 Ill. App. 3d 141, 145 (2008). But, there is inducement when the course of criminal conduct originated in the mind of a government agent who arbitrarily engaged in a relationship with the defendant and purposely encouraged its growth. *Bonner*, 385 Ill. App. 3d at 145. Predisposition is established by proof that the defendant was willing and able to commit the offense without persuasion before his initial exposure to government agents. *People v. Anderson*, 2013 IL App (2d) 111183, *appeal denied*, 996 N.E.2d 16 (2013). Illinois courts have identified a number of factors to consider in determining predisposition, including: (1) the character of the defendant, (2) whether the government initiated the alleged criminal activity; (3) whether the defendant had a history of similar crimes; (4) whether the defendant showed hesitation in committing the crime, which was only overcome by repeated persuasion; (5) the type of inducement; and (6) the defendant’s prior criminal record. See *People v. Ramirez*, 2012 IL App (1st) 09304, ¶ 38 (applying the factors to a bribery case). If the defendant presents some evidence to support the entrapment defense, the burden shifts to the State to rebut that defense beyond a reasonable doubt. *Id.*

¶ 21 The defendant argues that there was ample evidence to show that Johnson, a police informant, induced the defendant to take possession of the gun by offering him free heroin,

knowing the defendant to be an addict. The defendant contends that Johnson, as a confidential informant, was an agent of the State for purposes of the entrapment statute. The State does not challenge that point, and we agree that Johnson could be considered such under the entrapment statute. See *People v. Salazar*, 284 Ill. App. 3d 794, 800 (1996). In this case, the evidence indicates that Johnson did not have to work very hard to get the defendant to take the drugs, or the gun. The evidence indicated that the defendant took both as soon as they were offered to him. Also, there was evidence that the defendant was an admitted drug user, and had been armed in the same area in the past. See *contra People v. Bonner*, 385 Ill. App. 3d at 145 (inducement found when informant constantly solicited the defendant to sell drugs, and the defendant repeatedly refused, only agreeing after the informant offered sexual favors). Since there was sufficient evidence for the jury to find that the defendant was predisposed to commit the armed violence offence, that conviction should be affirmed.

¶ 22 The defendant argues that the prosecutor made improper arguments in closing and rebuttal that suggested that the defendant was inclined to commit crime in general because he was a felon and a heroin addict. The defendant acknowledges that defense counsel did not object at trial, so the issue was not properly preserved for appeal. However, the defendant argues that the improper argument was plain error. Whether improper statements made at closing argument are so egregious as to warrant a new trial is a legal issue that is subject to *de novo* review. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 23 The plain error doctrine allows a reviewing court to considered unpreserved error when either the evidence is close, regardless of the seriousness of the error, or the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-187 (2005). When applying plain error, it must first be determined whether any error occurred at all. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 24 The defendant argues that the evidence was closely balanced, particularly on the issue of predisposition. The State did not present any evidence to the jury indicating that the defendant had any prior weapons-related offenses. The defendant testified that Johnson told him to take the gun. Johnson testified that he did not give the defendant the drugs or the gun. The defendant argues that Johnson was discredited and his testimony was not worthy of belief. However, at trial, the defendant argued that he was entrapped as to both the gun and the drugs. A prosecutor's arguments must be examined in their entirety and any complained of comments read in context. *People v. Cisewski*, 118 Ill. 2d 163, 176 (1987). Thus, when the prosecutor commented on predisposition in his closing, and his references to the defendant's admitted drug use, it appears that the prosecutor was making proper argument based upon the facts adduced at trial and the reasonable inferences from those facts. As the defendant points out, though, the possession offenses were not the subject of the second trial. However, unlike *People v. Placek*, 184 Ill. 2d 370 (1998), where the trial court abused its discretion in admitting unrelated other-crimes evidence of dealing in stolen auto parts to establish propensity to commit a drug offense, the defendant in this case possessed the drugs and the gun as part of the same transaction, and the prosecutor simply argued that it was reasonable to infer that a person carrying several hundred dollars' worth of drugs would also have the propensity to carry a gun. There was no error.

¶ 25 As a final matter, the defendant argues that he was convicted of unlawful possession of heroin and armed violence based on the unlawful possession of heroin, so his possession conviction must be vacated on one-act, one-crime principles. The State agrees that, as long as the defendant's conviction for armed violence is upheld, his conviction for unlawful possession of heroin must be vacated. However, the State argues that the case should be remanded to the trial court for entry of judgment on the other possession charge – unlawful possession of cocaine.

¶ 26 Multiple convictions of both armed violence and the underlying felony cannot stand when there is a single act as the basis for both charges. *People v. Donaldson*, 91 Ill. 2d 164, 170 (1982). Whether multiple convictions based on one act or crime is a question of law that is reviewed *de novo*. *People v. Span*, 2011 IL App (1st) 083037, ¶ 79. Since the defendant's act of possessing heroin provided the basis for both charges, the unlawful possession of heroin conviction must be vacated.

¶ 27 The State argues that if the unlawful possession heroin conviction is vacated as the predicate for the armed violence conviction, then the unlawful possession of cocaine conviction could be reinstated. The defendant agrees that this is true. Thus, we remand for entry of judgment on the conviction for unlawful possession of cocaine and sentencing as appropriate.

¶ 28 CONCLUSION

¶ 29 The armed violence conviction is affirmed, the possession of heroin conviction is vacated, and we remand for the entry of judgment on the verdict finding the defendant guilty of possession of cocaine.

¶ 30 Affirmed in part, vacated in part, and remanded.