FIFTH DIVISION
September 30, 2016

No. 1-14-1023

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 07 CR 2507 |
| | ) | |
| LAMONT COLEMAN, | ) | Honorable |
| | ) | Thomas M. Davy, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE Reyes delivered the judgment of the court.
Justice Hall concurred in the judgment.
Presiding Justice Gordon specially concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Defendant's conviction for aggravated vehicular hijacking affirmed where victim's testimony that defendant had a gun was sufficient evidence to prove he was armed with a firearm during the commission of the offense. Defendant's trial counsel was not ineffective for failing to object to the State's use of a witness' written statement where defendant suffered no prejudice as a result of counsel's alleged error.

¶ 2 Following a bench trial, defendant Lamont Coleman was found guilty of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(4) (West 2006)) and sentenced to 30 years' imprisonment. On appeal, defendant contends that (1) the State failed to prove beyond a

reasonable doubt that he was armed with a firearm during the commission of the offense and (2) his trial counsel was constitutionally ineffective for failing to object to the substantive admission of a prior inconsistent hand written statement made by a State witness. We affirm.

¶ 3 Defendant was charged with, in relevant part, aggravated vehicular hijacking in that he knowingly took a motor vehicle from the person or immediate presence of Tammy Strickland by the use of force or by threatening the use of force, and that he carried, on or about his person or was otherwise armed with, a firearm.

¶ 4 At trial, the State presented four witnesses: Strickland, Chicago police officer Ricardo Ortega, Chicago police detective Ray Verta and Nicole Whisenton. Both Strickland and Whisenton acknowledged not wanting to testify, but doing so pursuant to a subpoena.

¶ 5 Early in the morning of December 29, 2006, Strickland was sitting in the driver's seat of her white 2003 Chevrolet Malibu on the 5700 block of South Morgan Street with her friend, Larry Latham, who was standing by the driver's side of the vehicle. Strickland testified that a man, who she later identified at trial as defendant, came up to Latham and began talking to him. Defendant had a "gun" in one of his hands, which rested at the side of his body, though Strickland could not remember exactly which hand. Latham gave defendant his cell phone. Defendant then told Strickland "Baby Girl shut the car off" and "[s]tep out." Strickland turned her vehicle off, which was running, and exited, explaining at trial she followed defendant's commands "[b]ecause he had a gun." Strickland acknowledged the gun was never pointed at her, and she could not identify what type or color of gun it was. She further acknowledged that she did not "know guns at all" and agreed that she "watch[ed] everything that the defendant did when he came up to the car because he had a gun in his hand."

¶ 6 Strickland testified that defendant told her and Latham to walk across the street, which they did. Defendant entered Strickland's vehicle and drove away northbound. Latham's van was nearby, so Strickland and Latham entered his van and followed her vehicle. A half a block later, Strickland decided she did not want to chase her vehicle and exited the van. Latham continued to follow defendant. A short time later, Strickland heard gunshots in the distance, though at trial she acknowledged that hearing gunshots in that neighborhood was not uncommon. She called the police, and later that morning, saw her vehicle parked in an alley two or three blocks away. At trial, Strickland identified photographs depicting the area where she had parked her vehicle on the morning in question but could not observe any street lamps in the photographs.

¶ 7 On January 15, 2007, Strickland viewed a lineup and identified defendant as the man who took her vehicle. On May 9, 2007, Strickland received a phone call from a man at a number she did not recognize. However, she could not recall any other details regarding the phone call.

¶ 8 On the morning in question, Officer Ortega responded to a radio call of shots fired on the 5700 block of South Morgan Street, which he stated at trial was "[n]ot uncommon" for that neighborhood. After speaking with Strickland and Latham at that location, Ortega radioed that he was searching for a 2003 Chevrolet Malibu and described the suspect as a black male, 4-feet, 11-inches tall and 125 pounds with braids. Latham had located Strickland's vehicle on the 5600 block of South Peoria Street and alerted Ortega. Ortega and Strickland went to that location, and Strickland identified the vehicle as hers. Strickland never told Ortega that she was scared or feared for her safety. Asked at trial whether Strickland told him that defendant displayed a "blue steel handgun," Ortega responded "[i]f it's in the report."

¶ 9 Detective Ray Verta testified that Strickland identified defendant in a lineup as the man who took her vehicle. At the time of the lineup, defendant's hair was braided, and he was approximately five-feet, two-inches tall and weighed 120 pounds.

¶ 10 Nicole Whisenton testified that defendant was her friend. On May 9, 2007, he called her and asked her to make a three-way phone call to a woman named "Tammy." Whisenton called the number provided by defendant, and a woman answered the phone. Whisenton heard defendant ask the woman "about whatever the situation was going on" and "where her mind was about whatever happened." Whisenton then heard defendant ask "Tammy" "about coming to court" and mentioned "sliding her something" but that was the extent of the conversation Whisenton could recall at trial. Whisenton acknowledged that her memory was exhausted and reviewing her May 16, 2007, statement to the police concerning the conversation would refresh her recollection.

¶ 11 After reviewing the statement, Whisenton testified that her memory had been refreshed. She testified that defendant told Tammy that, on the morning of the crime, she was in the "wrong place at the wrong time." He told Tammy that "he didn't want her to come to court," and he would "slide her something" if she did not appear. At some point, the phone call ended. Defendant called Whisenton back and asked her to call Tammy again. Whisenton called the number, and Tammy initially picked up the phone. However, someone else then picked up the phone, but Whisenton could not recall what defendant said to this person. Whisenton again acknowledged that reviewing her statement to the police would refresh her recollection. After reviewing the statement and stating her memory had been refreshed, Whisenton testified that, after Tammy picked up the phone, it sounded like a man "grabbed the phone from her."

Defendant told the man "it was a mistake" and he received "bad information." Whisenton acknowledged that defendant never threatened Tammy or the man, or raised his voice during either phone call.

¶ 12 Defendant moved for a directed verdict. The trial court granted the motion with respect to multiple offenses not relevant to this appeal, but denied the motion on the aggravated vehicular hijacking charge.

¶ 13 In defendant's case, the parties stipulated that latent fingerprints were recovered from Strickland's vehicle and tested against fingerprint samples from Strickland, Latham and defendant, but the only match was to Strickland. Defendant also entered into evidence photographs of the area where the alleged crime occurred, which defense counsel had used during Strickland's cross-examination.

¶ 14 Following argument, the trial court found defendant guilty of aggravated vehicular hijacking, noting that, although Strickland was a "reluctant witness," she identified defendant in a lineup two weeks after the incident as the individual who took her vehicle. The court found Strickland's "strong identification" of defendant "bolstered" by the evidence of the phone call to Strickland from defendant through Whisenton. It also found that Strickland had an "opportunity" to observe defendant on the street that morning, and, as depicted in one of the defense exhibits, the street was lit by "high intensity" lights a few houses away from where she parked. The court noted Strickland's testimony that defendant came up to her "with a gun" and directed her out of her vehicle with it, but acknowledged Strickland was "unable to describe" the gun.

¶ 15 Defendant filed a motion for new trial, arguing *inter alia*, that his case was "[a]t best" vehicular hijacking. In denying the motion, the court noted that, while Strickland never testified

about the gun being pointed at her, she noticed a gun in defendant's hand. The trial court observed that Strickland watched everything defendant did that morning "because he had a gun in his hand," and "[c]learly she observed the gun." The court after hearing factors in aggravation and mitigation sentenced defendant to 30 years' imprisonment. This appeal followed.

¶ 16 Defendant first contends that his conviction for aggravated vehicular hijacking must be reduced to vehicular hijacking because there was insufficient evidence that he was armed with a firearm.

¶ 17 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, the standard of review is whether, after viewing the evidence in the light most favorable to the State, would any rational trier of fact find all the elements of the crime proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, we must give proper deference to the trier of fact who observed the witnesses testify (*Brown*, 2013 IL 114196, ¶ 48), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 18 To prove defendant committed aggravated vehicular hijacking, the State must establish that defendant took "a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force" while armed with a firearm. 720 ILCS 5/18-3(a), 18-4(a)(4) (West 2006). On appeal, defendant only contests whether the evidence sufficiently established he was armed with a firearm during the commission of the

offense, thereby conceding there was sufficient evidence to establish the other elements of the offense.

¶ 19 Under the Criminal Code of 1961 (Criminal Code), the term "firearm" has the meaning ascribed to it by the Firearm Owners Identification Card Act (FOID Card Act). 720 ILCS 5/2-7.5 (West 2006). Relevant here, the FOID Card Act defines "firearm" as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2006). Excluded from this definition are, *inter alia*, pneumatic guns, spring guns, paint ball guns, certain BB guns and signal guns. *Id.*

¶ 20 The State did not have to prove that defendant possessed a firearm as defined by the FOID Card Act by "direct or physical evidence," because the "unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed [with a firearm] during" the commission of a crime. *People v. Fields*, 2014 IL App (1st) 110311, ¶ 36. Other decisions by our supreme court and this court have echoed this statement. See *People v. Washington*, 2012 IL 107993, ¶ 36 ("[G]iven [the victim's] unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a real gun."); see also *People v. Hunter*, 2016 IL App (1st) 141904, ¶¶ 16-20; *People v. Clark*, 2015 IL App (3d) 140036, ¶¶ 20-29; *People v. Wright*, 2015 IL App (1st) 123496, ¶¶ 74-78, *appeal allowed*, No. 119561 (Nov. 25, 2015); *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 40-52.

¶ 21 In light of our precedent and viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that defendant committed the offense while armed with a firearm. Strickland testified that, while she was sitting in her vehicle, defendant came up to

Latham with a "gun" in one of his hands. In response, Latham gave defendant his cell phone. Defendant then came up to Strickland and demanded she turn her vehicle off and exit it. Strickland testified that she followed his commands because he was armed with a "gun." Strickland acknowledged not knowing "guns at all" and could not recall the color or type of gun, but never vacillated in her testimony that defendant was armed with one. She additionally stated she watched everything defendant did that morning because he had a "gun."

¶ 22 Although the defense's photographic exhibits were not included in the record on appeal, the trial court noted that, based on the photographs of the scene of the crime, there were "high intensity" streetlights near where Strickland had parked. Thus, Strickland had a strong opportunity to view the gun in the hand of defendant, as she was paying close attention to him in a well-lit area. Further, even though the court observed Strickland was a reluctant witness, in finding defendant guilty of the offense, it implicitly found Strickland's testimony credible. As the evidence revealed a sufficient opportunity for Strickland to observe the gun and she was unequivocal at trial that it was a gun, there was sufficient evidence to establish that defendant was armed with a firearm to support his conviction for aggravated vehicular hijacking. See *Hunter*, 2016 IL App (1st) 141904, ¶¶ 16-20; *Clark*, 2015 IL App (3d) 140036, ¶¶ 20-29.

¶ 23 Nevertheless, despite the consistent precedent on this issue, defendant argues that Strickland's testimony was insufficient to prove defendant was armed with a firearm. He asserts that, because the gun was not produced at trial, it was impossible to examine the alleged gun's physical properties to determine if it met the statutory definition of a firearm. However, as discussed, this court has found that sufficient evidence of a firearm can exist based solely on a victim's testimony, even if the alleged gun was not produced at trial. See *Hunter*, 2016 IL App

(1st) 141904, ¶¶ 14-20 (victim's testimony that the defendant possessed a gun was sufficient to prove he was armed despite the gun not being produced at trial and the State not presenting evidence that the gun could have been fired).

¶ 24 Defendant includes a photograph in his brief of a pellet gun to show how "closely" it "can resemble" a real firearm and cites to various decisions from federal and state courts where police officers confused fake guns for real guns. However, we cannot consider this evidence on appeal, as it was not submitted to the trial court first. See *id.* ¶ 20 (to consider a photograph of a pellet gun not submitted to the trial court " 'would amount to a trial *de novo* on an essential element of the charges' ") (quoting *People v. Williams*, 200 Ill. App. 3d 503, 513 (1990)); *Clark*, 2015 IL App (3d) 140036, ¶ 24 (rejecting the defendant's request to consider "federal and [state] cases in which police officers mistook fake guns for real guns" and "a photograph of an air rifle that would not be considered a 'firearm' under the statutory definition" because they were not submitted as evidence at trial and considered by the trier of fact).

¶ 25 Additionally, defendant relies on *People v. Ross*, 229 Ill. 2d 255 (2008) and *People v. Crowder*, 323 Ill. App. 3d 710 (2001), for the proposition that Strickland's testimony was insufficient evidence that he was armed with a firearm during the commission of the offense. In *Ross*, 229 Ill. 2d at 276-77, our supreme court found insufficient evidence that the defendant's gun was a dangerous weapon to support an armed robbery conviction, noting "[t]he trial court incorrectly based its ruling on the subjective feelings of the victim, rather than the objective nature of the gun." However, at the defendant's trial, an officer had testified the gun was a pellet gun. *Id.* at 277. Here, unlike in *Ross*, there was no evidence presented at trial that the gun in defendant's hand was not a firearm. Therefore, *Ross* is inapposite.

¶ 26 *Crowder* is similarly inapposite, as the case did not involve a challenge to the sufficiency of the evidence, but rather whether the trial court properly dismissed the defendant's indictment after the State destroyed the gun that was the basis for the defendant's charges. *Crowder*, 323 Ill. App. 3d at 711.

¶ 27 In sum, as the case law on this matter is clear that the "unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed" (*Fields*, 2014 IL App (1st) 110311, ¶ 36), Strickland's unequivocal testimony that she observed defendant with a gun was sufficient evidence that defendant was armed with a firearm when he committed the aggravated vehicular hijacking.

¶ 28 Defendant next contends that his trial counsel was constitutionally ineffective for failing to object to the State's introduction of Whisenton's written statement regarding the phone conversation between defendant and Strickland, in which defendant tacitly admitted his guilt, as substantive evidence. Defendant argues that, when the State introduced portions of the statement, it did so substantively as a prior inconsistent statement but, based on *People v. Simpson*, 2015 IL 116512, the statement should not have been admitted because Whisenton did not have personal knowledge of the crime that was discussed during the phone call. Defendant therefore argues that Whisenton's written statement did not meet the admissibility requirements for a prior inconsistent statement under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2006)) and should have been objected to by his counsel. Defendant further asserts that this error prejudiced him.

¶ 29 The State responds that Whisenton's written statement was not admitted substantively as a prior inconsistent statement, but rather was used by the State merely to refresh her recollection

during trial when she testified that she could not remember the details of the conversation. The State therefore argues that counsel had no basis on which to object and further that, even if counsel performed deficiently by failing to object, defendant did not suffer prejudice as a result of the alleged error.

¶ 30 We review claims of ineffective assistance of counsel pursuant to the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Domagala*, 2013 IL 113688, ¶ 36. To succeed on such a claim, defendant must demonstrate that (1) his counsel's performance was deficient and (2) the deficiency prejudiced him. *Id.* To prove a deficient performance, he must demonstrate "that counsel's performance was objectively unreasonable under prevailing professional norms." *Id.* To prove prejudice, defendant must demonstrate that there is a reasonable probability that, but for his counsel's alleged errors, the result of his trial would have been different. *Id.* He must satisfy both prongs of the *Strickland* test, otherwise the claim fails. *Simpson*, 2015 IL 116512, ¶ 35. Therefore, if we find defendant was not prejudiced by counsel's alleged error, we need not address counsel's performance (*People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 109), which is how we proceed in the present case.

¶ 31 Assuming *arguendo* that counsel did object, and did so successfully, to the State's use of Whisenton's written statement in any form, there is no reasonable probability that the outcome of defendant's trial would have been any different because the evidence of his guilt was overwhelming. In finding defendant guilty of aggravated vehicular hijacking, the trial court observed that his guilt rested almost exclusively on the testimony of Strickland, who the court implicitly found credible. While the court noted that Strickland's identification of defendant was "bolstered" by the evidence that defendant had called her through Whisenton, it did not mention

the content of the phone call and instead stated: "but again I find this a strong identification, a positive identification in the lineup within a short time afterwards."

¶ 32 It is clear the court's guilty finding was based primarily on Strickland's identification of defendant in a lineup made only two weeks after the crime occurred. The court found Strickland had an opportunity to observe defendant that morning "on the street" and that the area was lit by "high intensity" lights. Further, while the court noted that Strickland could not describe the gun used, it never wavered in its finding that defendant was armed with a firearm when he took Strickland's vehicle. The outcome of the trial would have been no different had counsel successfully objected to the use of Whisenton's written statement. While the more incriminating details about defendant's involvement in this crime were revealed after Whisenton reviewed her written statement, before reviewing the statement, she had already testified that defendant had asked Strickland "about coming to court" and mentioned "sliding her something." Moreover, the fact that defendant called Strickland after the crime occurred is itself inculpatory.

¶ 33 In light of the overwhelming evidence of his guilt, defendant has failed to establish that he suffered prejudice from his trial counsel's allegedly deficient performance in failing to object to the use of Whisenton's written statement. Accordingly, his claim of ineffective assistance of counsel fails.

¶ 34 Defendant's alternative contention that the admission of Whisenton's written statement was plain error under the closely-balanced prong of the plain-error doctrine must also be rejected. Under the closely-balanced prong of the doctrine, there must be a "plain error" and the evidence at trial must have been "so closely balanced that the error alone severely threatened to tip the scales of justice against him." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The

prejudice prong of an ineffective assistance of counsel claim and the closely-balanced prong of the plain-error doctrine are similar as "[b]oth analyses are evidence-dependent and result-oriented." *People v. White*, 2011 IL 109689, ¶ 134. Therefore, "where a defendant fails to show prejudice, a defendant's allegations of ineffective assistance of counsel and plain error under the closely-balanced-evidence prong both fail." *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47 (citing *White*, 2011 IL 109689, ¶ 134). As we have found defendant did not suffer prejudice in his ineffective assistance of counsel claim, we similarly find the evidence at defendant's trial was not so closely-balanced that, had an error occurred, the error alone would have severely threatened to tip the scales of justice against him. Consequently, even if Whisenton's written statement was admitted improperly, the error would not be considered a plain error.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.

¶ 37 PRESIDING JUSTICE GORDON, specially concurring.

¶ 38 I agree with the majority but I must write separately on the issue of the State's introduction of certain portions of Whisenton's handwritten statement where defendant admitted his guilt. I find no error in defense counsel's alleged failure to object and I do not want to leave any impressions that this evidence was improper. When a prior statement is presented to a witness to refresh that witness's recollection and the witness's recollection is not refreshed, the statement is properly admitted as a past recollection recorded. *Horace Mann Ins. Co. v. Brown*, 236 Ill. App. 3d 456, 463 (1992). In order to admit a statement for past recollection recorded, the State needed to show the following: "(1) lack of any independent recollection of the witness regarding the occurrence; (2) failure of the report to refresh the recollection of the witness; (3)

recording of the [pertinent] facts in the report at the time of the occurrence or soon thereafter; and (4) establishment of the truth and accuracy of the report when made." *Kociscak v. Kelly*, 2011 IL App (1st) 102811, ¶ 26. See Ill. R. Evid. 803(5) (eff. Jan. 1, 2011) ("A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly."). The State satisfied the elements of the past recollection recorded and thus the portion of the statement used as substantive evidence was properly admitted into evidence.