2017 IL App (1st) 142087-U

FIRST DIVISION
June 26, 2017

No. 1-14-2087

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 6348
	)	
JOHN BRITTAIN,	)	Honorable
	)	Angela M. Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Although the evidence was sufficient to support the defendant's conviction for aggravated unlawful use of a weapon, we reverse and remand for a new trial. The admission into evidence of the State's certified letter establishing that the defendant had never been issued a FOID card violated his sixth amendment right to confront adverse witnesses and was plain error where it was the only evidence presented to establish an essential element of the charge.

¶ 2 Defendant John Brittain was charged with aggravated unlawful use of a weapon (AUUW) for possessing a firearm without a valid Firearm Owner's Identification (FOID) card while not on his own property. 720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2010). A jury found Mr.

Brittain guilty and he was sentenced to 14 months of imprisonment. Mr. Brittain makes two arguments on direct appeal: (1) the evidence was insufficient to prove that he had actual or constructive possession of the recovered firearm, and (2) the admission into evidence of a certified letter in lieu of live testimony to establish that he did not possess a valid FOID card violated his sixth amendment right to confront adverse witnesses and, despite his failure to object, requires reversal because it was plain error. For the reasons that follow, we vacate Mr. Brittain's conviction and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 A jury trial was held on April 21-24, 2014, and the following evidence was presented.

¶ 5 A. Officer Dennis Huberts

¶ 6 Chicago police officer Dennis Huberts testified that, at approximately 4 a.m. on April 10, 2011, he was on uniformed patrol with his partner, Officer Brandon Smith, when he saw a group of individuals in the middle of 101st Street at Halsted Street in Chicago. Concerned that they were obstructing traffic, the two officers approached the individuals in their squad car at about 20 miles per hour to disperse them. Officer Smith was driving while Officer Huberts was in the front passenger seat. Officer Huberts testified that, from a distance of approximately three feet, he saw Mr. Brittain, separated from the group and standing between two parked cars, "holding a large, dark object."

¶ 7 According to Officer Huberts, Mr. Brittain then turned his body and moved abruptly toward the curb, taking three steps before he "lowered his body and placed the dark object on the ground." Officer Huberts testified that he saw the object go from Mr. Brittain's hands to the ground and heard "a loud thud" like "a heavy object hitting grass." Believing the object might be "a firearm or some type of weapon," Officer Huberts exited his vehicle and approached the

object while his partner detained Mr. Brittain. Officer Huberts testified that only seconds passed from when he witnessed Mr. Brittain place the object on the curb until he went to see what it was. Officer Huberts discovered the object to be a "Tec-9 millimeter handgun with an extended clip" and called backup units to the scene. He testified that he stood between the weapon and the other individuals at the scene and did not recover it until the other units arrived three to five minutes later. Officer Huberts made the weapon safe by removing the magazine clip and "the ammo," observed that the gun was loaded with 32 live rounds, and gave the weapon to Officer Smith, who inventoried it.

¶ 8 On cross-examination, Officer Huberts acknowledged that he did not mention a "grassy area" in his police report. Officer Huberts also testified that he observed both of Mr. Brittain's hands on the dark object and saw that he was not wearing gloves.

¶ 9 B. Officer Brandon Smith

¶ 10 Consistent with Officer Huberts's testimony, Officer Smith testified that he saw a group of approximately eight people obstructing traffic on 101st Street in the early morning hours of April 10, 2011. Officer Smith testified that, as he drove towards the group at about 5 miles per hour, he saw Mr. Brittain holding a dark object at waist level with both hands. Officer Smith testified that he had a clear and unobstructed view of Mr. Brittain under the ample lighting from the street lamps. According to Officer Smith, most of the individuals had moved to the right side or were in front of the vehicle, while Mr. Brittain was on the left. Officer Smith testified that he saw Mr. Brittain, less than ten feet away, walk into a grassy area, bend slightly at the waist, and drop the dark object to the ground, where it made a thud, like "metal hitting on the ground." He testified that there was no one else in that area.

¶ 11 Officer Smith testified that he exited the vehicle and detained Mr. Brittain. Although

some of the other individuals in the group were instructed to put their hands on the hood of the police car, Mr. Brittain was already handcuffed at that point. Officer Smith then saw Officer Huberts recover a firearm and witnessed him unload it. Officer Smith later inventoried the recovered weapon, magazine clip, and cartridges.

¶ 12 On cross examination, Officer Smith acknowledged that, although he also observed that Mr. Brittain was not wearing gloves, he never requested that the recovered weapon be tested for fingerprints.

¶ 13 C. Officer Armando Alonso

¶ 14 Chicago police officer and firearms evidence technician Armando Alonso was found qualified to testify as a firearms identification expert. He identified the recovered weapon as an Intertec Tec DC-9, a semi-automatic weapon. Officer Alonso testified that he did not clean the weapon and, in his examination, found no markings or "scruff" marks and no evidence of grass or mud stains on the weapon.

¶ 15 D. Certified Letter

¶ 16 Without objection from defense counsel, the State then entered a certified letter, signed by Patricia Sabo, from the Firearms Service Bureau of the Illinois State Police. The letter indicated that, as of May 19, 2011, and based on his name and date of birth, Mr. Brittain had never been issued a FOID card. Although the letter is not included in the record, a portion of the letter was read into the record at trial by Mr. Moore, the Assistant State's Attorney:

> "[The letter] indicates based on the following name and date of birth information provided by the Cook County State's Attorney's Office, I, Patricia M. Sabo, application processing section supervisor, firearms service bureau Illinois State Police, do

> certify after careful search of the firearm owner identification files, John Brittain***has never been issued a firearm owner's identification card as of May 19, 2011. Signed, Patricia M. Sabo."

¶ 17 At this time, Mr. Brittain moved for a directed verdict on the grounds that the testimony of the officers was incredible and inconsistent with the evidence presented. The court disagreed and denied Mr. Brittain's motion:

> "Viewing the evidence most favorable to the non-moving party, that is the State, I have evidence from two officers the defendant threw or placed or dropped the weapon in question to the ground. [The] officer explained about the use of the different terms. He explained that he referring to the weapon leaving the defendant's hand, winding up on the grass or ground.
>
> The officers essentially are unimpeached. There are corroborated by the weapon itself being found. There's no question the identity of the defendant, he was arrested immediately on the scene.
>
> For all those reasons, your motion is respectfully denied."

¶ 18 D. John Brittain

¶ 19 Following the close of the State's case-in-chief, Mr. Brittain elected to testify on his own behalf. Mr. Brittan stated that he had been to a nightclub and returned home in the early morning hours of April 10, 2017. He called a friend to meet him for breakfast and was talking with some of his other friends outside of his home while waiting for his friend to arrive. Mr. Brittan testified that his friend arrived in her car and he gestured to her to wait one moment while he said

goodbye to the others. Less than a minute later, Mr. Brittan saw a vehicle approach ”going really fast” and slow down as it neared the group of individuals, stopping about 20 feet away. According to Mr. Brittain, although some of the individuals he was talking to left the area when the car approached, he did not. He did, however, move out of the street and onto the curb.

¶ 20 Mr. Brittain denied changing the position of his body or hands when the officers stopped to ask what the group was doing outside after hours. According to him, the officers got out of the vehicle, instructed the individuals in the group, including Mr. Brittain, to put their hands on the hood of the car, and began searching them. Mr. Brittain stated that, when a second squad car arrived, he witnessed Officer Huberts “go somewhere else” and then Mr. Brittain was put in the back of the squad car. When asked if he ever held or possessed the Tec-9 that was recovered at the scene, Mr. Brittain stated “[n]ever.”

¶ 21 Following deliberations, the jury found Mr. Brittain guilty of AUUW for knowingly carrying or possessing a firearm without a valid FOID card on a public street, not on his own land or inside his home. (720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2010).

¶ 22 On May 19, 2014, Mr. Brittain’s motion for a new trial was heard and denied. The trial court found the testimony of the officers was credible and did not find that their use of the terms “dropped,” “placed”, or “put” interchangeably, when referring to Mr. Brittain’s actions, was “impeaching in any way.” The court also did not find the absence of mud or dirt on the weapon contradictory to the police officers’ statements because no testimony was presented that the grass was wet or muddy. The officers did not have to canvass the area to search for the weapon, but found it where they witnessed it being placed by the defendant.

¶ 23 The court sentenced Mr. Brittain to 14 months of imprisonment followed by one year of mandatory supervised release.

¶ 24 JURISDICTION

¶ 25 Mr. Brittain was sentenced on June 16, 2014, and timely filed his notice of appeal the same day. Accordingly, this court has jurisdiction over this appeal pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case. Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 26 ANALYSIS

¶ 27 Defendant John Brittain was charged with aggravated unlawful use of a weapon (AUUW) for possessing a firearm without a valid Firearm Owner's Identification (FOID) card on April 10, 2011. 720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2010). Mr. Brittain raises two arguments on appeal: (1) the evidence was insufficient to prove each element of his charge beyond a reasonable doubt, and (2) admitting the certified letter as the only evidence that he did not have a FOID card was plain error because it violated his sixth amendment right to confront witnesses.

¶ 28 I. Sufficiency of Evidence

¶ 29 Mr. Brittain first argues that the evidence presented at trial was insufficient to support a finding of his guilt because the evidence provided by the State neither connected him to nor proved that he had actual or constructive possession of the recovered firearm. Mr. Brittain points out that the officers offered "dramatically different accounts" of what happened; he did not have control over the area, which was occupied by seven other individuals when the officers arrived; and the State presented no forensic evidence, such as a fingerprint identification, to prove that the weapon was in Mr. Brittain's possession. Mr. Brittain argues that his mere proximity to the weapon was not enough to prove that he possessed it.

¶ 30 The State responds that the evidence presented at trial sufficiently proved that Mr. Brittain had knowledge of the presence of the weapon, and that he exercised "exclusive and immediate control over the area where the weapon was found." *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. The State maintains that the eyewitness testimony of Officer Huberts and Officer Smith was reliable and consistent, and that Mr. Brittain's attempt to discard the firearm after he saw the officers "provides further consciousness of guilt." The State also argues that while the street was accessible to everyone, Mr. Brittain was the only individual observed holding a firearm and the only individual in the immediate vicinity of where the firearm was retrieved.

¶ 31 When a criminal defendant challenges the sufficiency of the evidence that resulted in his conviction, the relevant question 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 of the crime beyond a reasonable doubt. *People v. De Filippo*, 235 Ill. 2d 377, 384-85 (2009). Under this standard, we will not overturn a criminal conviction unless the evidence is so unreasonable or improbable that it creates a reasonable doubt of the defendant's guilt. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). We afford great deference to the trial court's assessment of a witness's credibility because "the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witness' demeanor, and resolve conflicts in their testimony." *People v. Richardson*, 234 Ill. 2d 233, 251 (2009).

¶ 32 Actual possession is proved by showing that the defendant "exercised some form of dominion" over an unlawful substance or object, "such as trying to conceal it or throw it away." *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). Constructive possession, however, can be shown without "actual personal present dominion over the [object] but with an intent and

capability to maintain control and dominion over it." *Id*. Although the mere presence of a defendant in the vicinity of an object cannot establish that he had constructive possession over it (see *People v. Bailey*, 333 Ill. App. 3d 888, 892 (2002)), an object "found on the premises under the control of [the] defendant [will] give[ ] rise to an inference of knowledge and possession by him which alone may be sufficient to sustain a conviction" (*Scott*, 152 Ill. App. 3d at 871).

¶ 33 We reject Mr. Brittain's arguments that the evidence presented was insufficient to prove that he possessed the firearm in question. As the trial court noted, both of the arresting officers credibly testified that they witnessed Mr. Brittain holding a "dark object" and saw and heard him place that object, which was later discovered to be a firearm, on the ground. The police officers did not have to search for the weapon, but rather recovered it from where they saw Mr. Brittain place it. Although Mr. Brittain argues that it was "dark at the time," Officer Smith testified that there was ample lighting from the street lamps. On this record, we cannot agree with Mr. Brittain that the State offered only "fantastic conjecture," or that Mr. Brittain provided a "more believable account." Minor discrepancies such as the police car's speed and the specific words the officers used to describe Mr. Brittain's actions are not substantial enough to create reasonable doubt. *People v. Adams*, 109 Ill.2d 102, 115 (1985) ("Minor inconsistencies in the testimonies do not, of themselves, create a reasonable doubt.").

¶ 34 We also reject Mr. Brittain's argument that, absent fingerprint testing, he could not be linked to the weapon because seven other individuals were "milling around" the area. Both of the arresting officers testified that although initially there was a group of individuals in the street, when the officers approached Mr. Brittain was off to the side of the street with no one else in the immediate vicinity. And, as the trial court found, the two officers acted appropriately by waiting three to five minutes for backup to arrive before retrieving the object they witnessed Mr. Brittain

place on the ground.

¶ 35 The cases relied on by Mr. Brittain are different. In both *People v. Bailey*, 333 Ill. App. 3d, 888 (2002), and *People v. Macias*, 299 Ill. App. 3d 480, 487-88 (1998), this court held that circumstantial evidence was insufficient to show that the defendants in those cases had constructive possession of a firearm or illegal substance. In *Bailey*, the mere presence of the defendant in a car was insufficient to prove that he "had possessory or ownership interest" over a gun found under the seat of the car which was not visible from where the defendant was sitting. *Bailey*, 333 Ill. App. 3d at 892. And in *Macias*, a defendant who officers only saw entering the main door of an apartment building was not shown to have "immediate and exclusive control" of an apartment in that building where narcotics and a gun were found hidden under clothes and a mattress. *Macias*, 299 Ill. App. 3d at 486-88.

¶ 36 Here, the State did not rely on circumstantial evidence to establish constructive possession. The testimony of Officers Huberts and Smith established that Mr. Brittain had *actual* possession of the recovered firearm. Both officers saw Mr. Brittain, from a distance of less than ten feet, holding a large, dark object and watched him place the object on the ground. Officer Huberts then retrieved the object from that location. Although several minutes passed between when the object touched the ground and when it was collected and inventoried, according to the testimony, only seconds passed between when Mr. Brittain placed the object on the ground and when Officer Huberts walked to the object and identified it as a firearm. Considering this evidence in the light most favorable to the State, a rational trier of fact could have found that Mr. Brittan exercised "dominion" over the firearm by "trying to conceal it or throw it away" when the officers arrived on the scene. *Scott*, 152 Ill. App. 3d at 871.

¶ 37 *People v. Quintana*, 91 Ill. App. 2d 95, 96 (1968), and *People v. Johnson*, 191 Ill. App.

3d 940 (1989), two cases involving actual possession relied on by Mr. Brittain, are also distinguishable. *Quintana* involved the testimony of a single police officer, who claimed to have observed the defendant throw two packages of marijuana under a parked car. *Quintana*, 91 Ill. App. 2d 95, 96 (1968). We concluded in that case that "the testimony of the police officer [wa]s suspect and that his uncorroborated testimony [wa]s insufficient to prove the defendant guilty beyond a reasonable doubt." *Id.* at 99. However, our skepticism "stem[med] from the prior relationship between the officer and the defendant," which involved repeated harassment on the part of the officer to "get something" on the defendant and "pressure him into becoming the officer's personal informer." *Id.* at 97-98. We reached a similar conclusion in *Johnson*, where, among other issues affecting the officer's credibility, "the unrebutted testimony of the defendant [was] that [the officer] threatened to bring charges against him unless he became an informant," *Johnson*, 191 Ill. App. 3d at 947. Mr. Brittain urges us to reach the same conclusion in this case. But *Quintana* and *Johnson* are inapplicable because there was absolutely no evidence that the arresting officers in this case were pursuing any sort of personal agenda regarding Mr. Brittain at the time of his arrest.

¶ 38 In addition to the fact that there was evidence that Mr. Brittain had actual possession of the gun, because the object the officers saw Mr. Brittain place on the ground was the gun observed in that same location just seconds later, the evidence was also sufficient to establish Mr. Brittain's constructive possession of the gun. Officer Smith testified that the other individuals at the scene either moved to the right side of the squad car as it approached or were in front of the vehicle. Mr. Brittain was the only one to the left of the car, where the gun was retrieved from and, unlike the items at issue in both *Bailey* and *Macias*, the gun was not only in Mr. Brittain's immediate vicinity, but in plain sight and clearly visible to him.

¶ 39 In short, the evidence was sufficient to prove that Mr. Brittain possessed the weapon he was charged with possessing on April 10, 2011.

¶ 40 II. Certified Letter

¶ 41 Mr. Brittain next argues that the trial court committed plain error by allowing the State to admit into evidence a certified letter from the Illinois State Police indicating that he had never been issued a FOID card. A defendant's failure to raise an issue at trial generally constitutes a forfeiture of that issue; "however, the plain-error doctrine is applied where the evidence is closely balanced or substantial rights are affected." *People v. Feazell*, 386 Ill.App.3d 55, 62 (2007). It is the defendant's burden to demonstrate plain error. *People v. Herron*, 215 Ill.2d 167, 186-87 (2005). First, we determine whether there was a clear and obvious error. *Id.*

¶ 42 Mr. Brittain relies primarily on *People v. Diggins*, in which we recently held—albeit in the context of a preserved objection—that the introduction into evidence of a certified letter to demonstrate that the defendant did not have a FOID card violated the criminal defendant's sixth amendment right to confront adverse witnesses. *People v. Diggins*, 2016 IL App (1st) 142088, ¶ 17. In *Diggins*, we discussed at length the United States Supreme Court's thorough discussion of the sixth amendment in *Crawford v. Washington*, 541 U.S. 36, 59 (2004). *Diggins*, 2016 IL App (1st) 142088, ¶¶ 13-15. The *Crawford* court held that "testimonial statements of witnesses absent from trial" may be admitted "only where the declarant is unavailable [to testify] and only where the defendant has had prior opportunity to cross-examine" the declarant. *Crawford*, 541 U.S. at 59. Documents fall within the "core class of testimonial statements" when they are "functionally identical" to "testimony the analysts would be expected to provide if called at trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009). In *Diggins* we also addressed *Melendez-Diaz*, where the United States Supreme Court relied on *Crawford* to hold

that admission into evidence of affidavits of chemists that the material seized by police was cocaine violated the confrontation clause. *Diggins*, 2016 IL App (1st) 142088, ¶¶ 14-15 (citing *Melendez-Diaz*, 557 U.S. at 310-11).

¶ 43 The State is wrong in suggesting that there was no *Crawford* violation in this case because Mr. Brittain had the opportunity to call Ms. Sabo, but did not do so. As the United States Supreme Court made clear in *Melendez-Diaz*, the State bears the burden of bringing a witness to the stand to prove its case and provide a criminal defendant with the opportunity to cross-examine. *Melendez-Diaz*, 557 U.S. at 324. That the defendant could also call the witness "is no substitute for the right of confrontation." *Id.*

¶ 44 The State next argues that, because the certified letter was created in the ordinary course of business, it fell within the public records exception to the hearsay rule. However, in *Crawford* and in *Melendez-Diaz*, the Supreme Court made clear that the question is not whether the testimony in question does or does not fall within a "firmly rooted hearsay exception," but whether it is testimonial in nature. *Crawford*, 541 U.S. at 60, 68; *Melendez-Diaz*, 557 U.S. at 324. In *Melendez-Diaz* the Court distinguished between nontestimonial documents created for the administration of an entity's affairs and testimonial documents created for the purpose of establishing or proving some fact at trial. *Id*. The defendant in that case was charged with drug trafficking, and the prosecution introduced the sworn affidavits of drug chemists detailing the results of their analysis of drugs seized by the police. *Id.* at 308. Like the affidavits in *Melendez-Diaz*, the State's certified letter in this case was clearly produced for the purpose of being entered as evidence for trial and not as part of the ordinary operations of the Illinois State Police.

¶ 45 There was further no indication that Ms. Sabo, who signed the certified letter, was unavailable to give her testimony at trial, and it is undisputed that Mr. Brittain did not have a

prior opportunity to cross-examine the witness. Accordingly, we find that Mr. Brittain's right to confront the witnesses against him was violated when the trial court admitted the certified letter into evidence. So Mr. Brittain has demonstrated a clear and obvious error.

¶ 46 Under the normal rules of forfeiture, this would not matter because Mr. Brittain failed to object to the error during trial. And indeed, the Supreme Court in *Melendez-Diaz* contemplated that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence." *Id.* at 313 n.3. Although the court used the word "waived," it seems clear it was referring to forfeiture, which applies to "issues that could have been raised but were not," rather than waiver, used by our courts to describe "the voluntary relinquishment of a known right." *People v. Phipps*, 238 Ill. 2d 54, 62 (2010). In the United States Supreme Court's view then, the prosecution would either be on notice that it must produce a witness for cross-examination because of the defendant's objection, or the confrontation clause issue would be forfeited. In Illinois, however, errors not objected to at trial may still be considered on appeal under the plain error doctrine. This means that a defendant could choose not object to the admission of a testimonial document and win reversal of a conviction if the prosecution easily might have produced a witness to be cross-examined.

¶ 47 In *People v. Sebby*, our supreme court recently addressed the concern that our plain error doctrine might "give defense attorneys an improper incentive to 'sit on their hands' and allow errors to unfold without objection in the trial court if they believed the evidence to be closely balanced." *Sebby*, 2017 IL 119445, ¶ 70. But our supreme court squarely rejected any assumption that defense counsel would "gamble with the defendant's liberty" by strategically declining to object to a possible error, proceeded with its plain error analysis, and reaffirmed its commitment to reversing a criminal conviction where the evidence is closely balanced. *Id.* at

¶ 71. Having noted this consideration, we do the same.

¶ 48 To prove plain error, after the defendant shows that "a clear and obvious error" occurred, he must also demonstrate that either (1) the evidence was so closely balanced, regardless of the seriousness of the error, or (2) the alleged error was so serious that it affected the fundamental fairness of the proceeding, regardless of the closeness of the evidence. *People v. Piatowski*, 225 Ill. 2d 551, 565 (2007); *Herron*, 215 Ill.2d at 186-87 (2005).

¶ 49 We first consider whether "the evidence was so closely balanced, that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 186-87. Here, the State presented no evidence other than the certified letter to prove that Mr. Brittain had not been issued a valid FOID card, an essential element of the crime he was charged with. Under these circumstances, the erroneously admitted evidence not only "threatened" to tip the result, it undeniably did so. Reversal is thus required under the first prong of plain error.

¶ 50 Because the first prong of the plain-error doctrine is satisfied, we need not consider Mr. Brittan's alternative arguments that the second prong plain error was implicated or that Mr. Brittain's trial counsel provided ineffective assistance by failing to object to the introduction of the State's certified letter.

¶ 51 CONCLUSION

¶ 52 We find the evidence sufficient to connect Mr. Brittain with the firearm. However, the trial court committed plain error when it admitted into evidence the State's certified letter containing testimonial hearsay establishing Mr. Brittain's lack of a FOID card. Where, as here, "the evidence presented at the first trial, including the improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt," double jeopardy does not apply and "retrial is the proper remedy."

See *People v. McKown*, 236 Ill. 2d 278, 311 (2010). Accordingly, we reverse the trial court's judgment and remand for a new trial.

¶ 53 Reversed and remanded.