SIXTH DIVISION
APRIL 21, 2017

No. 1-14-3541

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. 12 CR 19439
	)	
JOSHUA FLEMING,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's trial counsel was ineffective in failing to challenge whether his prior unlawful use of a weapon (UUW) conviction qualified as a predicate offense to support the charge of armed habitual criminal (AHC), and stipulating that there were two qualifying predicate convictions, when the UUW charge was not an enumerated qualifying predicate offense under the AHC statute.

¶ 2 Following a jury trial, defendant, Joshua Fleming, was convicted of armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2012)). Defendant argues on appeal that (1) the evidence presented at trial was insufficient to prove him guilty beyond a reasonable doubt, (2) his trial counsel was ineffective for stipulating that he had been convicted of two qualifying

predicate felonies for AHC, and (3) his prior conviction for unlawful use of a weapon (UUW) was void and could not serve as a qualifying predicate felony for AHC. As we agree that defendant's trial counsel was ineffective, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 The State charged defendant by information with one count of AHC, two counts of UUW by a felon, and four counts of aggravated UUW. The AHC count was predicated on defendant's prior conviction for aggravated robbery in case number 11 CR 07822, as well as a 2010 conviction for UUW in case number 10 CR 15517. Defendant's prior UUW conviction was for violation of section 24-1(a)(4) of the UUW statute, which occurs when one knowingly carries or possesses a firearm "in any vehicle or concealed on or about his person except when on his land *** or on the land or in the legal dwelling of another person as an invitee." 720 ILCS 5/24-1 (a)(4) (West 2010). That offense is a Class 3 felony if committed on any public way within 1000 feet of any school or public park. 720 ILCS 5/24-1(c)(1.5) (West 2010). The record on appeal includes the charging instrument from the 2010 UUW case, which indicates that the defendant was found in possession of a firearm in a "public park." The defendant pled guilty to the 2010 UUW charge and received a sentence of probation.

¶ 5 Before trial in this case, defendant moved to dismiss all counts of the information. His counsel argued, *inter alia*, that the AHc criminal charge could not stand because the underlying statute for his prior UUW offense was unconstitutional pursuant to *People v. Aguilar*, 2013 IL 112116. Notably, defendant's counsel did *not* raise an argument that the 2010 UUW conviction did not constitute a qualifying predicate offense under the language of the AHC statute. During argument on the motion to dismiss, defendant's counsel noted that the prior UUW conviction was

for firearm possession "within a thousand feet of a school or park," and the State's attorney also noted that "[defendant] was caught in a park with [a firearm] and he pled guilty to that charge." The trial court denied the motion to dismiss.

¶ 6 At a subsequent pre-trial hearing, the State informed the court that it would proceed only on count 1 for AHC, and moved to "nolle pros Counts 2 through 7." The parties and the court subsequently discussed a number of motions *in limine*, including a motion by defendant to prohibit the State from naming the defendant's prior offenses, including those that were offered as predicates for the AHC count. Defendant's counsel indicated "that we fear specifically with respect to the previous firearm conviction, that the jury would be tempted to use this as propensity evidence" to "punish him for his criminal past." The trial court indicated that it would not allow the State to mention "[t]he prior conviction for possessing a firearm in a school" or a separate conviction for possession of a controlled substance, but would permit the State to impeach the defendant, should he testify, about the prior aggravated robbery conviction.

¶ 7 The parties then agreed to stipulate that the defendant had been convicted of two qualifying predicate offenses to support the AHC charge. The defendant's trial counsel stated that she agreed to this "so the jury wouldn't hear the specifics of [defendant's] previous convictions, one of which was a firearms conviction."

¶ 8 In June 2014, the matter proceeded to a jury trial. Police officer Craig Coughlin testified that, on October 7, 2012, at around 7:16 p.m., he and his partner, Andrew Russell, responded in their unmarked police vehicle to a report of a man carrying a gun in the area of 317 West 51st Place in Chicago. Driving down Princeton Avenue, Officer Coughlin observed a man, later identified as defendant, wearing a gray hooded sweatshirt and tan pants approximately 150 feet

away. Driving toward defendant, Officer Coughlin could see defendant's right side profile and saw a semi-automatic handgun in his hand. Officer Coughlin saw that the handgun was colored gray on top and a darker color on the bottom. Defendant looked at the approaching vehicle and fled. When the officers had closed to within 20 feet of defendant, Officer Coughlin saw that the bottom of the handgun was colored dark green. The officers lost sight of defendant but ultimately found him on the second floor of a nearby residence.

¶ 9 Officer Coughlin approached defendant, patted him down, and secured him. A two-toned handgun was on the floor of a bedroom next to where defendant had been standing. Officer Coughlin testified he knew it was the same handgun the defendant had been carrying because he had never seen such a two-toned handgun. Officer Coughlin also saw a gray sweatshirt on a couch in the residence.

¶ 10 Officer Russell similarly testified that he and Officer Coughlin responded to a call at around 7:15 p.m. on October 7, 2012. Officer Russell observed the defendant in tan pants and a gray hooded sweatshirt standing near the residence at 317 West 51st Place. Defendant was 150 feet away from Russell and was holding a gun at his side. Defendant looked in the police vehicle's direction and fled by foot. The officers pursued defendant on foot, lost sight of him and eventually located him on the second floor of a nearby residence, where they apprehended him.

¶ 11 Officer Russell recognized defendant as the man they had been chasing and saw a gray sweatshirt on a nearby couch. Officer Russell noticed a two-toned gun lying on the floor 10 to 15 feet away from defendant. Officer Russell knew that it was the same gun because he had never seen a weapon with a similar color combination.

¶ 12 At the close of the State's case, the following stipulation was read before the jury: "It is hereby stipulated by and between the parties that the [d]efendant, Joshua Fleming, has been convicted of two qualifying felony offenses." Defense counsel responded: "So stipulated." Following the stipulation, the defense rested without presenting any evidence.

¶ 13 At the conclusion of the trial, the jury found defendant guilty of AHC. The trial court denied defendant's posttrial motions, in which he again argued that his prior UUW conviction was unconstitutional and void. The court sentenced defendant to eight years' imprisonment. This appeal followed.

¶ 14 On appeal, defendant argues that (1) the evidence presented at trial was insufficient to prove him guilty of AHC beyond a reasonable doubt; (2) his trial counsel was ineffective for stipulating that he had been convicted of two qualifying felonies for AHC, and (3) his AHC conviction cannot stand as it was predicated, in part, on a UUW conviction stemming from an unconstitutional statute.

¶ 15 Defendant's first two arguments are based upon his contention that his 2010 UUW conviction did not qualify as a predicate offense under the AHC statute. The AHC offense is committed if a person "receives, sells, possesses, or transfers any firearm" having been convicted two or more times of any combination of the following offenses:

> "(1) a forcible felony as defined in Section 2-8 of this Code;
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child ***;

> intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm ***; or
>
> (3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7(a) (West 2012).

¶ 16 Defendant argues that, unlike *aggravated* UUW, his 2010 conviction for non-aggravated UUW does not fall within the enumerated list of qualifying offenses in section 24-1.7(a)(2). Moreover, he asserts "there can be no dispute that [his] prior conviction for simple UUW was not a forcible felony" that would otherwise qualify as a predicate offense under section 24-1.7(a)(1).

¶ 17 Defendant argues that the evidence was insufficient to convict him of AHC, as his 2010 UUW conviction was not a qualifying predicate offense. Alternatively, he asserts that his trial counsel was ineffective for stipulating that he had been convicted of two qualifying felonies.

¶ 18 The State responds that, in light of his trial counsel's stipulation that he had been convicted of two qualifying offenses, defendant was proven guilty of AHC beyond a reasonable doubt. However, the State agrees with the defendant "that a prior conviction for [UUW] is not one of the enumerated qualifying offenses" for AHC. The State also agrees that defendant's trial counsel was ineffective for stipulating that the defendant had two prior qualifying felonies, which "caused the [State] to forego proving an element of the [AHC] criminal offense and from proceeding on the other valid nolle prossed charges." Thus the State urges that we reverse defendant's conviction for AHC and remand this cause for further proceedings.

¶ 19 With respect to the defendant's first argument, we agree with the State that the evidence was sufficient to convict, due to defendant's stipulation that he had been convicted of two

qualifying predicate offenses. Generally, we view a challenge to the sufficiency of the evidence on an element of the charged offense in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Amigon*, 239 Ill. 2d 71, 78 (2010).

¶ 20 The defendant does not claim that there was insufficient evidence that he possessed a firearm at the time of his October 2012 arrest. Rather, his sufficiency of the evidence argument is limited to his claim that the 2010 UUW conviction did not qualify as a predicate felony under the AHC statute. However, the stipulation at trial that defendant "has been convicted of two qualifying offenses" established the requisite two prior convictions to support the AHC offense, so that the State did not have to otherwise prove the nature of the two qualifying convictions at trial. See *People v. McFadden*, 2016 IL 117424, ¶ 15 ("[A] stipulation is an 'agreement between parties or their attorneys with respect to an issue before the court' [citation], and a defendant may, by stipulation, waive the necessity of proof of all or part of the State's case against him."). In light of the stipulation, the jury could have found defendant guilty of AHC beyond a reasonable doubt.

¶ 21 Next, we turn to defendant's ineffective assistance claim, which is governed by the two-prong standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Under *Strickland*, a defendant must prove that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense in that absent counsel's deficient performance there is a reasonable probability that the result of the proceeding would have been different. [Citations.]" *People v. Evans*, 209 Ill. 2d 194, 219-20 (2004).

¶ 22 In order to satisfy the first prong under the *Strickland* standard, defendant must overcome a strong presumption that, under the circumstances, the challenged action or inaction of counsel was a valid trial strategy. *People v. Bloomingburg*, 346 Ill. App. 3d 308, 317 (2004). "The reasonableness of counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, and without hindsight, in light of the totality of the circumstances, and not just on the basis of isolated acts." *People v. Nowicki*, 385 Ill. App. 3d 53, 82 (2008). Further, "mistakes in trial strategy or judgment will not, of themselves, render the representation incompetent." *Id.*

¶ 23 "Regarding the second *Strickland* prong, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220. In order to satisfy the prejudice prong, defendant need not show that he would have been acquitted, only that a different outcome would be reasonable, as prejudice may be found "even when the chance that minimally competent counsel would have won acquittal is significantly less than 50 percent as long as a verdict of not guilty would be reasonable." (Internal quotation marks omitted.) *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 24 The defendant's ineffective assistance claim arises from his argument that his 2010 UUW conviction was not a qualifying predicate offense that could support his AHC conviction. That is, he claims his trial counsel was ineffective in (1) failing to raise any argument that the prior conviction was not a qualifying predicate offense and (2) stipulating that the prior UUW conviction was a qualifying felony.

¶ 25 To evaluate the merits of the ineffective assistance claim, we must address whether the 2010 conviction could properly serve as a predicate offense under the AHC statute. Although the State concedes the point, we still undertake an independent review. See *People v. Carter*, 2015 IL 117709, ¶ 22 ("[I]t is well established that we, as a court of review, are not bound by a party's concession.").

¶ 26 In addition to setting forth enumerated predicate offenses, the AHC statute also provides that "a forcible felony as defined in Section 2-8" of the Criminal Code of 2012 (Code) may serve as a predicate offense. 720 ILCS 5/24-1.7(a) (West 2012). As recognized by the parties, the simple form of UUW does *not* appear in the statutory list of enumerated predicate offenses.

¶ 27 That does not end the inquiry, since a forcible felony could still serve as a predicate offense for AHC. In turn, section 2-8 of the Code defines a number of specific offenses (not including UUW) as forcible felonies; section 2-8 also includes a residual clause defining a forcible felony to include "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2012). "Pursuant to section 2-8's residual clause, an offense constitutes a forcible felony where the defendant contemplates that force or violence against an individual might be involved and the defendant has implied he was willing to use force or violence against an individual. [Citation.]" *People v. White*, 2015 IL App (1st) 131111, ¶ 30.

¶ 28 In this case, defendant's 2010 UUW conviction was premised on a statute that is violated if one "[c]arries or possesses" a firearm under certain circumstances, without requiring any threat of force or act of violence. 720 ILCS 5/24-1(a)(4) (West 2010). The record indicates that the defendant was arrested with a firearm in a public park, so as to qualify as a Class 3 felony. 720

ILCS 5/24-1(c)(1.5) (2010). However, there is nothing in the record to suggest that the 2010 UUW offense, to which the defendant pled guilty and received probation, "involve[d] the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2012). Indeed, the State did not make that argument in the trial court and does not attempt to raise it in this appeal.

¶ 29 We acknowledge that, on the record before us, we cannot determine with certainty that the 2010 UUW offense did *not* involve circumstances that would allow it to qualify as a forcible felony. As defendant's trial counsel never disputed the issue, the State was not required to make any showing in the trial court that the prior UUW offense was a forcible felony, as would be necessary to support the AHC conviction. Nevertheless, we find that trial counsel's decision to relieve the State of its burden of proof on this issue constituted ineffective assistance of counsel.

¶ 30 We find that both prongs of the *Strickland* standard have been met. First, we find that the deficient performance prong was satisfied. Defendant's trial counsel apparently failed to recognize that the non-aggravated UUW offense was not one of the enumerated predicate offenses under the AHC statute. Despite making a motion to dismiss the AHC charge on other grounds, counsel failed to raise the argument that the UUW conviction did not fall within the statutory language defining the predicate offenses for AHC.

¶ 31 Moreover, by entering into the stipulation, defendant's trial counsel relieved the State of its burden to prove the two qualifying predicate offenses. We recognize that, to establish the first prong of the ineffective assistance inquiry, "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *People v. Bloomingburg*, 346 Ill. App. 3d 308, 317 (2004).

We also recognize that defendant's trial counsel indicated that she agreed to the stipulation to prevent the jury from learning the nature of the prior firearm offense to avoid prejudice to the defendant. Although this may have been a valid concern, it does not explain why defendant's trial counsel failed to raise in a motion (outside the presence of the jury) that the 2010 conviction was not a qualifying predicate offense. Indeed, trial counsel made a pretrial motion to dismiss the AHC charge on other grounds; at that time, trial counsel could also have brought to the court's attention that UUW was not an enumerated qualifying offense under the AHC statute. We find that the failure to do so—in combination with the stipulation relieving the State of its burden of proof on this element of the AHC offense—was not objectively reasonable, constituting deficient performance under the first prong of the *Strickland* standard.

¶ 32 We also find that the prejudice prong is satisfied, as we find there is at least a reasonable probability that the outcome of the trial would have been different absent trial counsel's conduct. Had trial counsel made a motion to bring to the court's attention that the 2010 UUW conviction did not fall within the enumerated predicate offenses listed in the AHC statute, it appears quite possible that the State (as it does now in this appeal) would have conceded that point without even attempting to argue that the 2010 offense otherwise constituted a forcible felony. In that case, the State would not be able to establish the two predicate offenses to support the AHC conviction, at least not on the basis of the prior offenses identified in its charging instrument in this case.

¶ 33 Moreover, even if the State had responded to a defense motion by asserting the 2010 conviction otherwise qualified as a forcible felony (which it does not raise in this appeal), there is nothing in the record before us to indicate that the State could have succeeded in that claim.

That is, we find there is at least a reasonable probability that the State would *not* be able to establish that the prior UUW offense was a forcible felony, and thus could not support the AHC charge. In other words, we find that the probability of a different result, had defendant's trial counsel acted differently, is more than "sufficient to undermine [our] confidence in the outcome" of the AHC conviction. *Evans*, 209 Ill. 2d at 220. Having found both deficient performance by defendant's trial counsel and resulting prejudice, we agree with the parties' briefs that defendant received ineffective assistance of trial counsel under the two-part *Strickland* inquiry.

¶ 34 Our finding of ineffective assistance of counsel warrants reversal of the defendant's conviction. Thus, we need not address defendant's alternative argument, previously rejected by the trial court, that the 2010 UUW offense could not serve as a predicate offense because it was based on an unconstitutional statute.

¶ 35 We remand for further proceedings. Ordinarily, a finding of ineffective assistance warrants reversal and a new trial on the same charges. However, there are unique circumstances in this case, as: (1) the ineffective assistance was trial counsel's failure to recognize that the UUW offense was not one of the specifically enumerated qualifying offenses under the AHC statute; (2) the State has conceded that point on appeal, but (3) there remains a possibility that the circumstances of the 2010 offense could demonstrate that it was a forcible felony to serve as a predicate offense for AHC. Under these circumstances, the State may attempt to re-try the defendant on the AHC charge, if it believes it can establish that the 2010 UUW conviction was a forcible felony, or if it can identify some other qualifying prior offense.

¶ 36 Apart from the AHC charge, we note that the State's brief suggests it may wish to pursue the remaining charges that were nol-prossed before trial. The State suggests that it nol-prossed

those charges on the basis of the defense counsel's stipulation that there were two qualifying predicate convictions for AHC. As noted in defendant's reply brief, this is not supported by the hearing transcript, which reveals that the State moved to *nolle prosequi* the non-AHC charges *before* defense counsel agreed to the stipulation.

¶ 37 In any event, our supreme court has clarified the State's options if it wishes to pursue a nol-prossed charge. "A *nolle prosequi* is not an acquittal of the underlying conduct that served as the basis for the original charge but, rather, it leaves the matter in the same condition as before the prosecution commenced. [Citation.] Thus *** if a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant subject to other relevant statutory or constitutional defenses [citations.]" *People v. Hughes*, 2012 IL 112817, ¶ 23. If jeopardy has not yet attached, "[t]he State ha[s] the right to reprosecute [in a new proceeding] or seek to vacate the dismissal and reinstate the charges." *Id.* ¶ 26.

¶ 38 Jeopardy had not yet attached when the State nol-prossed the non-AHC charges in this case, as the jury was not yet empaneled and sworn. See *People v. Cabrera*, 402 Ill. App. 3d 440, 447 (2010). As a result, the State may either commence a new proceeding to reprosecute those charges, or it may move to vacate the *nolle prosequi* order and reinstate the nol-prossed charges. *Hughe*s, 2012 IL 112817, ¶ 25. Of course, any reprosecution is "subject to other relevant statutory or constitutional defenses," including the applicable limitations period. *Id.* ¶ 23.

¶ 39 For the foregoing reasons, we reverse the defendant's AHC conviction and remand for further proceedings consistent with this order.

¶ 40 Reversed and remanded.