2018 IL App (1st) 160469-U

No. 1-16-0469

Order filed October 22, 2018

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 19719
	)	
ARTURO WILLIAMS,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed habitual criminal is affirmed over his contention that he was denied his right to a fair trial when the trial court limited the scope of his cross-examination of the State's eyewitness. Defendant's conviction for unlawful use of a weapon by a felon is vacated under the one-act, one-crime rule because it was based on the same physical act as his conviction for armed habitual criminal and the mittimus is corrected accordingly.

¶ 2 Following a bench trial, defendant Arturo Williams was found guilty of armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)) and unlawful use of a weapon by a felon

(UUWF) (720 ILCS 5/24-1.1(a) (West 2014)), and sentenced to 12 years' imprisonment. On appeal, defendant contends that he was denied his right to a fair trial when the trial court limited the scope of his cross-examination of the State's eyewitness by preventing defense counsel from impeaching the witness with two prior inconsistent statements. Defendant also contends that his conviction for UUWF should be vacated under the one-act, one-crime rule because it was based on the same physical act—his possession of a handgun—as his conviction for AHC. We affirm defendant's conviction for AHC, vacate his conviction for UUWF, and correct the mittimus accordingly.

¶ 3 Defendant was charged with one count of AHC (720 ILCS 5/24-1.7 (a) (West 2014)); one count of UUWF (720 ILCS 5/24-1.1(a) (West 2014)) (gun); one count UUWF (720 ILCS 5/24-1.1(a) (West 2014)) (ammunition); and six counts of aggravated UUWF (720 ILCS 5/24-1.6(a) (West 2014)). The charges resulted from an incident that occurred on October 26, 2014, in the vicinity of 5700 West Race Street. Defendant waived his right to a jury trial and a bench trial commenced on November 23, 2015.

¶ 4 The evidence adduced at trial showed that on October 26, 2014, Chicago police officer Ali was working in plain clothes and was the passenger in an unmarked Chicago police car. Ali was working with his partner, Officer Tanovic. About 7:30 p.m., Ali noticed a vehicle with broken rear lights travelling southbound on Waller Avenue. The officers activated their emergency equipment and curbed the vehicle for a traffic stop. As Ali and Tanovic approached the vehicle to conduct a field interview, Ali observed defendant open the front passenger door and flee westbound into an alley. Ali gave chase and was able to get within three to five feet from defendant during the course of the pursuit. As he was running after defendant, Ali said that

defendant "reached into his front waistband, removed a handgun, and threw it over his shoulder." Ali clarified that "[defendant] removed a dark metal object, which from [Ali's] experience resembled a handgun, and tossed it." He saw the object land on the inside of a fenced in area on a piece of concrete located in the rear of an apartment building. Ali detained defendant about 75 to 100 feet from where he saw him throw the object. Ali estimated the chase lasted "approximately less than a block."

¶ 5 Tanovic and other officers arrived on the scene and Ali went to the location where he saw defendant throw the object. There, he recovered a Smith and Wesson handgun loaded with six rounds of ammunition. Ali testified there were no other metallic objects in the area and the handgun was the only gun located on the concrete. He estimated that just a few minutes elapsed from the time he detained defendant until the handgun was recovered. Defendant was transported to the 15th police district for processing. After Ali advised defendant of his *Miranda* rights, defendant told him that he uses the handgun for protection because "T-Man of the Four Corner Hustlers was trying to kill him."

¶ 6 On cross-examination, Ali acknowledged that the traffic stop occurred at Chicago Avenue and Waller, and defendant was arrested about five blocks away in an alley between Race and Waller. Ali's police reports listed the address of defendant's arrest as the same address where the handgun was recovered. Ali did not have defendant sign the statement he made concerning the handgun nor did he show defendant the statement. As defense counsel questioned Ali about whether the driver of the vehicle was issued a traffic citation, the following colloquy took place:

"DEFENSE COUNSEL:

Q. Could you see how many people were in that vehicle when you stopped the vehicle?

A. Yes

Q. How many?

A. Approximately two to four.

Q. But you're not sure?

A. That's correct.

Q. And was the driver of that vehicle ticketed?

ASSISTANT STATE'S ATTORNEY (ASA): Objection, relevance.

THE COURT: Overruled. You can answer. Was he ticketed?

THE WITNESS: Yes.

Q. And was that recorded anywhere in your police report?

A. As far as I'm concerned, yes.

Q. Can you tell me in which police report that you wrote did you document –

THE COURT: You know what, we're going to move on. He wrote the ticket. Sustained. Move on.

TRIAL COUNSEL:

Q. Who wrote the tickets to this driver?

ASA: Objection.

THE COURT: Sustained."

¶ 7 Counsel also questioned Ali regarding his testimony at defendant's preliminary hearing. The following colloquy took place:

"DEFENSE COUNSEL:

Q. Now you testified in a preliminary hearing in regards to this matter back on the 4th of November of 2014, correct?

A. I did.

Q. You were under oath on that day, correct?

A. Absolutely.

Q. Were you asked the following question, and did you give the following answer?

Page 8 line 16—line 13.

'QUESTION: And as you pursued my client on foot, you say you saw him throw an item; is that right?

ANSWER: Yes.

QUESTION: Could you tell at that time what the item was?

ANSWER: No, Just being dark in color.'

Were you asked those questions and did you give those answers at that time?'

ASA: I'm going to object, not impeaching.

THE COURT: Sustained. He indicated the same on direct."

¶ 8 The State concluded their evidence against defendant by entering his two prior certified convictions: one for manufacture/delivery of a controlled substance and the other for aggravated vehicular hijacking. The State rested and defendant's motion for a directed finding was denied. Defendant did not present any evidence.

¶ 9 The trial court found defendant guilty of AHC (count I) and UUWF (count II). The State nol-prossed counts three through nine.

¶ 10 Defendant filed a motion for new trial arguing, in part, that the trial court erred in not allowing him to impeach Ali with the police reports authored by him that reflect the driver of the vehicle, from which defendant fled, was not issued a traffic citation. Defendant also argued the trial court erred in not allowing him to impeach Ali with his testimony from the preliminary hearing that he did not see what object defendant had thrown over his left shoulder. The State argued that whether or not traffic citations were issued was not relevant to the charges in this case and that the preliminary hearing testimony was not impeaching. In denying the motion, the trial court found Ali's testimony "very credible" and that there was "nothing impeaching." After hearing arguments in both aggravation and mitigation, the trial court sentenced defendant to 12 years in prison.

¶ 11 On appeal, defendant first contends that he was denied a fair trial when the trial court limited his cross-examination of Ali by preventing defense counsel from impeaching Ali with two prior inconsistent statements that would have undermined his account of the offense.

¶ 12 The State initially responds that defendant is barred from raising this issue because he failed to make a formal offer of proof as to what the evidence he sought to introduce would include. In setting forth this argument, the State relies on *People v. Peeples*, 155 Ill. 2d 422, 457-58 (1993). In *Peeples*, the Illinois Supreme Court held that "when a trial court refuses evidence, no appealable issue remains unless a formal offer of proof is made." *Id.* (citing *People v. Montgomery*, 51 Ill. App. 3d 324, 331 (1977)). The court further held that "the failure to make an adequate offer of proof results in a waiver of the issue on appeal." *Id.* (citing *People v. Andrews*, 146 Ill. 2d 413, 421 (1992)). However, the court explained that "an offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the

evidence sought to be introduced, or where the question itself and the circumstances surrounding it show the purpose and materiality of the evidence." *Id.* (citing *Volvo of America Corp. v. Gibson*, 83 Ill. App. 3d 487, 491 (1980)); *People v. Montgomery*, 51 Ill. App. 3d at 331.

¶ 13 Here, we are not persuaded by the State's argument that defendant is barred from raising this issue because he failed to make a formal offer of proof. In this case, it is apparent that the trial court understood the nature and character of the impeachment evidence, but deemed it not impeaching. The record shows that, at trial, defendant attempted to impeach Ali with these two statements. However, the court sustained the State's objection. Defendant also raised the issue in his motion for new trial and the parties made arguments on the motion. The court ultimately agreed with the State that this evidence was not impeaching and denied the motion. Under these circumstances, we choose to consider the issue at bar, notwithstanding defendant's failure to make a formal offer of proof.

¶ 14 We next turn to the question of the appropriate standard of review. Defendant argues that we should apply the *de novo* standard of review based on the legal question of whether he was denied his constitutional right of confrontation. *People v. Blue*, 205 Ill. 2d 1, 13-14 (2001). The State argues that the issue should be resolved under an abuse of discretion standard. *People v. Jones*, 240 Ill. App. 3d 1055, 1060 (1992). We agree with the State that the proper standard of review for a trial court's evidentiary decisions is the abuse of discretion standard. See *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 56 ("The limitation of cross-examination rests within the sound discretion of the trial court and will not be reversed unless there has been a clear abuse of discretion."). That said, under either standard the outcome of this case would be the same.

¶ 15 The credibility of a witness may be attacked by any party including the party calling the witness. Ill. S. Ct. R. 238(a) (eff. Apr. 11, 2001). "Such an attack may be accomplished by impeaching the witness with evidence of a prior inconsistent statement." *People v. Cruz*, 162 Ill. 2d 314, 358 (1994). Although out-of-court statements are generally barred as hearsay, a witness's prior inconsistent statements are permissible to impeach the credibility of that witness. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 33. To qualify as a prior inconsistent statement, the two statements must be inconsistent on a material issue. *People v. Eggert*, 324 Ill. App. 3d 79, 82 (2001). Prior inconsistent statements are those that either have a tendency to contradict or are directly contradictory with the witness's testimony. *People v. Modrowski*, 296 Ill. App. 3d 735 (1998). "In order to impeach a witness with prior inconsistent statements, the impeaching party must show that the 'testimony has damaged, rather than failed to support the position of the impeaching party.' " *People v. Amato*, 128 Ill. App. 3d 985, 986-87 (1984) (quoting *People v. Weaver*, 92 Ill. 2d 545, 563 (1982)).

¶ 16 In this court, defendant argues that he is entitled to a new trial because the trial court erred in preventing him from cross-examining Ali about whether the police reports, authored by him, indicated that the driver of the vehicle stopped was issued a citation. Defendant also argues the trial court erred in denying him an opportunity to impeach Ali with his preliminary hearing testimony that was inconsistent with his trial testimony regarding the object he observed defendant throw.

¶ 17 Here, we need not determine whether the court erred in preventing defendant from impeaching Ali with his inconsistent statements or whether a traffic citation was issued to the driver because even assuming *arguendo* that it was error, the error would be harmless beyond a

reasonable doubt. See *People v. Wilkerson*, 87 Ill. 2d 151, 157 (1981) (citing *Chapman v. California*, 386 U.S. 18 (1967)) (applying a harmless error analysis to the trial court's limitation of the scope of the defendant's cross-examination of a witness). The test for harmless constitutional error is whether the error was harmless beyond a reasonable doubt. *Wilkerson*, 87 Ill. 2d at 157. In assessing whether the error was harmless, we can look to whether: (1) the error contributed to the conviction; (2) other evidence overwhelming supports the conviction; and (3) the evidence is cumulative or merely duplicates properly admitted evidence. *Id.*

¶ 18 After carefully reviewing the record, we find that the court's alleged errors were harmless because they did not contribute to the conviction and other evidence overwhelmingly supported defendant's guilt. With regard to the traffic citation issue, we note that, even if the court erred in not permitting defendant to perfect impeachment of Ali with his police report which lacked any mention that the driver of the vehicle had been cited, this error did not contribute to defendant's conviction. Any issue as to whether a traffic citation was issued to the driver of the vehicle from which defendant fled is not material to whether defendant committed the crime charged *i.e.* defendant's possession of the handgun when he had previously been convicted of two qualifying offenses. Additionally, on cross-examination Ali testified that "[A]s far as I'm concerned, yes" the driver of the car was ticketed. Even if the driver was not ticketed, this would merely indicate that Ali was either mistaken or misinformed about a matter that had no bearing on the material issues involved in an illegal possession prosecution.

¶ 19 Regarding the claim that defendant was precluded from impeaching Ali with his preliminary hearing testimony, we find the trial court did not preclude defense counsel from making his point. In context, Ali's testimony at trial was that defendant fled from the car, Ali

gave chase and, during the pursuit, he saw defendant throw an object over his left shoulder and the object landed on a piece of concrete. On direct examination, Ali initially stated that defendant "removed a handgun and threw it over his shoulder" and then clarified this by stating "[defendant] removed a dark metal object, which from [Ali's] experience resembled a handgun, and tossed it." On cross-examination, Ali agreed that he testified at the preliminary hearing that when defendant threw the object, he could not tell what the object was, only that it was "just dark in color." In sustaining the State's objection that this was not impeaching, the trial court stated "Sustained. He indicated the same on direct." The difference between the direct testimony of "removing a handgun," and defendant "removed a dark metal object that resembled a handgun" and the preliminary hearing testimony that Ali did not know what the dark object was that defendant removed from his waistband was sufficiently similar for the trial court to correctly conclude that there was no impeachment shown. Notwithstanding the lack of precision in the officer's testimony and the court's discretionary ruling on the issue, the record shows that other evidence overwhelmingly supports defendant's conviction. There is no contrary evidence that Ali chased defendant and saw him toss an object during the chase, he returned to the location where he saw defendant throw the object and recovered a handgun. He testified there were no other metallic objects in the area and the gun was the only gun located on the concrete. Moreover, defendant made a statement at the police station, admitting that the gun was his and he used it for protection because a gang member was trying to kill him. Accordingly, the complained-of errors were harmless beyond a reasonable doubt and defendant was not denied his right to a fair trial.

¶ 20 Defendant next contends that his mittimus should be corrected to reflect only a conviction for AHC since his conviction for UUWF was based on the same physical act—possession of the firearm—as his conviction for AHC. The State concedes and argues that the trial court only imposed a sentence on defendant's AHC conviction, even though the mittimus reflects a sentence for both AHC and UUWF.

¶ 21 Defendant acknowledges that he did not raise the issue at trial or in his motion for new trial, but claims we should review for plain error. The plain error doctrine allows a reviewing court to address unpreserved error when (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Our supreme court has held that an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Our review of defendant's argument is *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 22 The one-act, one-crime principle prohibits a defendant from being convicted of multiple offenses based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). An "act" has been defined as "any overt or outward manifestation that will support a separate conviction." *Id.* at 566. "To sustain multiple convictions, the charging instrument must indicate that the State intends to treat the defendant's conduct as separate and multiple acts." *People v. Crespo*, 203 Ill. 2d 335, 345 (2001).

¶ 23 Here, defendant was convicted of being an AHC and UUWF. A person commits the offense of AHC if he possesses any firearm after being convicted two or more times of enumerated offenses, including a forcible felony or a violation of the Illinois Controlled Substances Act. 720 ILCS 5/24-1.7 (West 2014). A person is guilty of UUWF if he possesses any firearm or firearm ammunition and he has previously been convicted of a felony. 720 ILCS 5/24-1.1(a), (e) (West 2014). The State incorrectly argues that the trial court only sentenced defendant on the AHC count. The record shows that the trial court found defendant guilty of AHC and UUWF, and the Criminal Disposition Sheets also reflect findings and a sentence for both offenses.

¶ 24 We agree with defendant that his convictions for AHC and UUWF violate the one-act, one-crime rule. Defendant's convictions were based on the same physical act—his possession of the Smith and Wesson handgun recovered by Officer Ali. Accordingly, we vacate defendant's conviction and sentence for UUWF. See *People v. Bailey*, 396 Ill. App. 3d 459, 465 (2009) and *People v. Quinones*, 362 Ill. App. 3d 385, 397 (2005). Pursuant to our authority under Supreme Court Rule 615(b) (eff. Jan. 1, 1967), we order the clerk of the circuit court to correct the mittimus accordingly.

¶ 25 Affirmed in part; vacated in part; mittimus corrected.