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2018 IL App (3d) 150522-U

Order filed March 8, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois
)	
v.)	Appeal No. 3-15-0522
)	Circuit No. 15-CF-110
AARON M. EVANS,)	
)	Honorable
)	Kevin W. Lyons
Defendant-Appellant)	Judge, Presiding

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

ORDER

¶ 1 *Held:* Defendant was denied a fair trial by the State's improper comments in opening and closing arguments. The trial court also erred in failing to properly address defendant's *pro se* claims of ineffective assistance of counsel.

¶ 2 Defendant Aaron Evans was convicted by a jury of unlawful possession of a weapon by a felon. The conviction arose from a traffic stop in which a firearm was discovered under a seat in the vehicle. Evans moved for a new trial or judgment notwithstanding the verdict, and complained that his trial counsel was ineffective. The trial court denied Evans's posttrial

motions and found no basis for the ineffective assistance claim. The trial court sentenced Evans to a 3-1/2 year term of incarceration and denied his motion to reconsider his sentence. Evans appealed. We reverse and remand.

¶ 3

FACTS

¶ 4

Defendant Aaron Evans was indicted for unlawful possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2014). The charge resulted from a traffic stop in which Evans was a passenger in a vehicle where a gun was discovered. Two other passengers were in the vehicle, along with the driver, who fled the scene and was never apprehended. A jury trial took place.

¶ 5

In its opening statement, the State began by arguing that Evans “had a loaded gun, a loaded .45 caliber gun.” It told the jury that Evans tried to follow the other backseat passenger, who attempted to flee, and that the officers had their guns drawn and ordered the men back to the car and for Evans to put his hands up. The State then said: “The defendant leaned across the backseat of the car, laid down, and put his hands where the gun was laying. There was a .45 caliber, loaded gun underneath the driver’s side seat, at the feet of this defendant.” The State concluded its opening statement with the comment that the jury “will conclude that this defendant was in fact in possession of that gun that sat at his feet.”

¶ 6

Dustin Michael Bays testified for the State. He was a Peoria police officer in the training program on February 17, 2015, and had been in the program approximately six months. He was on routine patrol in a marked squad car and noticed the vehicle in which Evans was a passenger had a headlight out. He activated the squad’s lights but the vehicle did not immediately stop. The driver of the car eventually pulled into an apartment building parking lot, immediately jumped out and fled, leaving the car to roll backward toward the squad car. There were three passengers in the vehicle, including Evans. The other backseat passenger also left the vehicle. Evans started

to exit the passenger side back door and stood up. Bays pointed his service weapon at Evans. Bays and Andrew Smith, Bays's training officer, told the men to keep their hands up. Evans, who was standing up outside the vehicle, sat back down on the backseat and complied with the officers' commands. Evans laid backward across the seat, "put his hands up in a motion, and then had started to roll towards the driver's seat." Bays described that Evans started to reach under the driver's seat, at which point Bays ordered Evans not to move and to keep his hands up. Evans complied with the orders. Bays held Evans at gunpoint until other officers arrived. At that time, Evans was removed from the vehicle, handcuffed, and arrested. Bays performed an inventory search on the vehicle and saw a pistol pushed up under the driver's seat. He said it was located directly where Evans was reaching.

¶ 7 Bays stated on cross-examination that Evans did not try to flee but rather sat down in the vehicle, where he stayed seated per Bays's command. Bays did not see Evans or anyone else in the car handling the gun or attempting to hide it. He was unaware whether Evans knew the gun was there or whether he was reaching for it. When recalled later by the State, Bays testified there was a system of hydraulics and wires under the driver's seat that would have prevented the driver from passing the gun under the seat. On cross-examination, he admitted no photographs were taken under the driver's seat and he did not attempt to pass the gun under it. He further admitted it was possible for something to be dropped or slid in other places of the vehicle.

¶ 8 Still pictures from the squad video were admitted and the video was played for the jury. The squad video shows Evans duck his head when Smith yelled "lay down" and then both officers yelled, "Get down." Smith was holding another passenger at gunpoint and Bays had his gun drawn and was running toward the stopped vehicle. The officers can be heard on the video repeatedly yelling, "Get down!"; "Don't move!"; "Put your hands up!"; and "Get on the ground!".

Bays and Smith held Evans and the other men until backup arrived. The still photographs showed Evans laying on the back seat with his legs stretched out from the vehicle.

¶ 9 Andrew Smith testified. He was a Peoria police officer with 12 years' experience. He was Bays's field training officer on February 17, 2015, when they stopped the vehicle in which Evans was riding. The driver fled. The other backseat passenger was on the ground and Smith was able to hold him at gunpoint. He believed Evans also tried to exit the vehicle but his attention was on the other passenger. Bays was ordering Evans and the other passenger to either get on the ground or stay in the vehicle. On cross-examination, he admitted Evans did not try to flee. He did not see the gun until Evans and the other passengers were in custody. He never saw the gun in Evans's hand.

¶ 10 Scott Bowers testified. He was a Peoria police officer assigned to the crime scene unit. It was his responsibility to collect the gun at the scene. The gun was located under the driver's seat, with part of the handgrip sticking out. He took photographs of the gun and its location in the vehicle. The photographs were presented to the jury. After removing the gun from the scene, he swabbed the handgrip area for touch deoxyribonucleic acid (DNA) analysis, then tested it for fingerprints. It was not common to find fingerprints on a gun because of the surface material. Often the DNA results include the DNA of several people. The gun was loaded with nine cartridges in the magazine and one bullet in the chamber. The gun was "ready to be fired."

¶ 11 Dustin Johnson testified. He was a forensic scientist with the Illinois State Police, specializing in firearms identification. He analyzed the gun at issue and identified it as an operable .45 caliber, semi-automatic pistol. A .45 caliber gun is a "larger caliber firearm." The magazine had 10 rounds of ammunition in it. The gun, its ammunition and magazine were admitted into evidence.

¶ 12 The parties stipulated that Evans had been previously convicted of a felony in Illinois, the gun was analyzed at the state crime laboratory, there was no evidence of tampering with it, a DNA analysis detected a mixture of at least four people, and the DNA recovered from the gun was incomplete and unsuitable for comparison.

¶ 13 A jury instruction conference took place. The defense objected to an instruction on constructive possession, arguing the evidence did not support it. The instruction was allowed over the objection. The defense moved for a directed verdict, which the trial court denied.

¶ 14 The defense rested and closing arguments took place. The court admonished the jury that closing arguments were not evidence. The State argued that Evans “knowingly possessed a .45 caliber, fully-loaded firearm.” The squad car video was again played for the jury. The State pointed out Evans, arguing that he was trying to escape to avoid the police officer approaching the car because there was a gun in the car. The State repeatedly mentioned that Evans was “bailing.” The State submitted the gun was visible from a position outside the car, was protruding from under the driver’s seat, could not have been passed from the driver back to Evans, and Evans was the only person in that location. The State further argued: “If you look at the photograph, the gun is plainly visible when he exited the car. He had to climb over all this stuff, and head out that direction. There’s no way that this driver passed it to the back.” The State argued the gun was in Evans’s control.

¶ 15 The State said that Evans peeked his head out of the car and was told to put his hands in the air. The State further said:

“He leaned back on the seat, and he reached out with his hand to get the gun. He thought – the thought crossed his mind. The thought crossed his mind to get the gun, but he didn’t. He then complied. This could have been a different story. Different charge. But

that thought crossed his mind when he reached for that gun. The only person that reached for that gun was this defendant. The only person that had a .45 caliber, fully-loaded gun at his feet was this defendant, a convicted felon.

The Judge will instruct you that the State must prove that the – it was a firearm. This is a heavy gun. A large, very heavy gun. Fully-loaded. 10 rounds. 1 in the chamber, which means all you'd have to do is just pull this trigger. And it's heavy.”

¶ 16 In Evans's closing, defense counsel noted the lack of statements, fingerprint and DNA evidence linking anyone to the gun and that analysis revealed the DNA of four people on the gun. He acknowledged a gun was in the car and noted “as the State would like to point out, it was big, and was heavy, and it was loaded.” Counsel rejected the State's claims that Evans tried to flee and knew the gun was in the car or attempted to reach for it.

¶ 17 During rebuttal closing argument, the State said:

“The evidence, as I recall from Officer Bays, very specifically, is that the defendant leaped back against the seat, reached with his hand toward where the gun was later found. That's what he said, and that's what this defendant did.

The officer also said that he did not – and no one else told this defendant to lay down on the seat – backseat of that car. My goodness. That's certainly a provocative action on the part of this defendant, in view of what was transpired, to lean back like that, lay down, essentially, and then reach towards the backseat floor, which is what Bays saw. The defendant was sitting here. And where were his feet, but wrapped around that gun. That's where he sat. So his feet would have been somehow around the gun.”

¶ 18 Other comments made by the State include:

“Remember him coming out the door with his hands out? This defendant was trying to escape”; “the driver could not have put [the gun] there,” The other backseat passenger “certainly didn’t reach across the defendant’s lap and snatch that gun under the seat,” and Evans was “the only person that had access to that place in the car.”

¶ 19 The jury was instructed on the law and began deliberations. It sent out a note during deliberations requesting to see the video from Bays’s squad car, with the audio. The parties did not object to showing the video. The trial court brought the jury into the courtroom and played the video in its presence, as well as in the presence of the State, defense counsel and Evans. The court determined to play the video twice. The defense objected to showing portions of the video that were not presented to the jury. After the first viewing, the State asked whether the audio was loud enough, to which the trial court responded, “Well, you know how it is. They talk over [one] another, but whatever you can make of that is available for you.” The video was played a second time and the jury returned to the jury room to continue deliberations.

¶ 20 The jury returned a guilty verdict. Evans moved for a new trial or a judgment notwithstanding the verdict (JNOV), alleging that he was not proved guilty beyond a reasonable doubt and that error occurred when the jury was allowed to see more of the video during deliberations than what was played at trial. A hearing took place on Evans’s motion. Evans asked to speak to the judge, but was denied permission. Defense counsel stated she had met with Evans and discussed the issues raised in the posttrial motion but that Evans brought other issues to the hearing. Counsel explained that based on letters from Evans, she was unclear whether he had issues about her that he would want to present to the court. The court recessed to allow defense counsel to confer with Evans.

¶ 21 Following the recess, the trial court addressed Evans, asking him what he wished to bring to the court’s attention. Evans raised a claim of ineffective assistance of counsel, arguing that counsel should have filed a motion to suppress the gun and “mystery DNA”, that he was unaware the theory of constructive possession would be relevant and that he probably would have pleaded guilty had he been aware of the implications of that legal theory. Evans stated that he thought constructive possession was a separate charge for which he was not indicted. The trial court determined that the motion for a new trial included the issues Evans raised and that defense counsel could argue the *pro se* claims but it would take into account Evans’s comments “regarding the gun and regarding the argument about whether you would have pled guilty or not having known the definition of possession.”

¶ 22 Defense counsel argued that the evidence was insufficient to prove Evans guilty beyond a reasonable doubt. Counsel reminded the court that she had objected to the jury instruction on constructive possession. On the court’s invitation, the State responded that Evans was present at the jury instruction conference and knew about the constructive possession theory. The State argued that there was no basis to grant a motion to suppress and asked the court to deny the motion for a new trial, maintaining the evidence was sufficient to convict Evans. The trial court found there was no basis to file a motion to suppress, acknowledged Evans’s misunderstanding regarding constructive possession but stated the definitions “are what they are.” The court denied Evans’s motion for a new trial “on that basis.” A sentencing hearing took place the same day and the trial court sentenced Evans to a term of imprisonment of 3-1/2 years. Evans moved for reconsideration, arguing his sentence was excessive. The motion was heard and denied. Evans timely appealed.

¶ 23 ANALYSIS

¶ 24 Evans raises three issues on appeal. He challenges the State’s comments in opening and closing arguments, the viewing of the video in the courtroom during jury deliberations, and the response to his claims of ineffective assistance of counsel.

¶ 25 We begin with the first issue, whether Evans was denied a fair trial by the State’s comments in its opening and closing statements. Evans argues the State misstated the evidence in opening and closing arguments, emphasizing the size of the gun and that it was loaded, and suggesting that Evans thought about using the gun to shoot the officers. Evans maintains these improper statements were designed to inflame the passions of the jury since the only issue before the jury was whether Evans knowingly possessed a firearm.

¶ 26 Evans acknowledges that he failed to object to the State’s improper comments but urges plain error review. Under the plain error doctrine, a reviewing court may review unpreserved errors where (1) the evidence is close, regardless of the seriousness of the error, and the error served to prejudice the defendant in that the verdict could have resulted from the error, or (2) the error is so serious it affects the fairness of the trial and the integrity of the justice system, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 27 The State is generally afforded great latitude in opening and closing arguments and may properly comment on the evidence and reasonable inferences that arise from it. *People v. Schneider*, 375 Ill. App. 3d 734, 755 (2007). The State owes defendants a duty of fairness, which extends throughout the trial and includes closing arguments. *People v. Derr*, 316 Ill. App. 3d 272, 275 (2000). The duty includes “an ethical obligation to refrain from presenting improper and prejudicial argument.” *Id.* The State may not present argument that serves no purpose other than to inflame the jury and it may not “direct the jury’s attention away from the elements of the

crime by commenting on issues irrelevant to the question of guilt or innocence.” *Schneider*, 375 Ill. App. 3d at 755.

¶ 28 Evans was charged with unlawful possession of a firearm by a felon. 720 ILCS 5/24-1.1(a) (West 2014). To prove the offense, the State had to show Evans had a prior conviction and he knowingly possessed the gun. *People v. Adams*, 388 Ill. App. 3d 762, 766 (2009). Possession may be actual or constructive; constructive possession may be inferred from the evidence. *Id.* The parties stipulated as to Evans’s prior conviction and there was no dispute a firearm was found in the car after the traffic stop. At issue was only whether Evans knowingly possessed the gun. The State’s repeated comments in opening and closing arguments regarding the size and caliber of the gun and the fact that it was loaded were not relevant to the fact of possession.

¶ 29 The State’s speculation that Evans was reaching for the gun and doing so in order to pick it up and shoot the officers was not relevant to the charge at issue and was not supported by the evidence presented at trial. The suggestion that Evans was planning to shoot the officers could serve no purpose but to inflame the jury. None of the officers testified that Evans was hostile or failed to comply with their demands such that an inference he reached for the gun could be consistent with the evidence. Similarly, there was no testimony the officers were in fear for their lives or that Evans’s conduct was threatening in any fashion. The State’s comments that Evans leaped back onto the car seat and reached for the gun were not supported by the evidence, which indicated that officers were yelling for the men, including Evans, to get down and to put their hands up. Bays’s testimony added that Evans complied with orders, laid on the back seat of the car, and put his hands up. Bays did not testify regarding any provocative action on Evans’s part or surmise that Evans was reaching for the gun, which was not discovered until Evans was already removed from the car and under arrest.

¶ 30 The State made other statements that were not supported by or were contrary to the evidence. These statements included that Evans attempted to flee, which was not the testimony of either Bays or Smith, both of whom said Evans did not try to flee. The State further commented that only Evans had access to the location in the car where the gun was found and that the driver could not have passed it under the seat to Evans. However, the gun was not located until after Evans and the other men were arrested and any of them could have placed it under the car seat at any time prior to their arrest. Evans was not the sole occupant of the vehicle with access to the gun. Furthermore, the evidence did not establish that Evans had his feet wrapped around the firearm, particularly in light of Bays's testimony that Evans was laying across the back seat of the car with his legs dangling out the door.

¶ 31 The State's comments were improper. Evans argues this court should review the issue under the first prong of plain error review. We agree. The evidence was closely balanced. There were four people in the vehicle where the gun was discovered, including Evans and the driver who fled. There were no fingerprints on the gun and the DNA on it included four people and was inconclusive. There was no evidence specifically tying Evans to the gun. The State improperly commented in closing argument that Evans alone had access to the gun, reached for it, and considered shooting the officers with it. Not only were the comments contrary to the evidence, they served no valid purpose but to inflame the jury such that it could have found Evans guilty based on passion and not the evidence. The State committed substantial error in its comments in opening and closing statements where the evidence was closely balanced and the statements could have prejudiced Evans. Plain error review is appropriate and we find Evans was denied a fair trial.

¶ 32 The defendant raises two additional issues on appeal, namely that the trial court erred when it allowed the jury to review the video in the courtroom during deliberations in the presence of the judge, State, defense counsel and defendant and further that the trial judge did not conduct a proper *Krankel* inquiry into the defendant's claims of ineffective assistance of counsel. Since our ruling on the first issue is dispositive, we decline to consider these issues.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause remanded for further proceedings consistent with this order.

¶ 35 Reversed and remanded.