2018 IL App (4th) 160672-U

NO. 4-16-0672

FILED
October 24, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANTHONY M. GILMORE,	)	No. 16CF133
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The State presented sufficient evidence to prove beyond a reasonable doubt defendant possessed a handgun. The trial court did not err in admitting evidence of the handgun's clip and ammunition. Defendant is entitled to *per diem* credit toward fines.

¶ 2 A jury found defendant, Anthony M. Gilmore, guilty of possession of a firearm with a defaced serial number (720 ILCS 5/24-5(b) (West 2016)) and the offense of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2016)). The trial court sentenced him to 13 years in prison. Defendant appeals, arguing (1) the State failed to present sufficient evidence he actually possessed the handgun; (2) the trial court erred in admitting evidence regarding the handgun's clip and ammunition; and (3) the circuit clerk failed to provide a *per diem* credit against three fines. We affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 In January 2016, the State charged defendant with possession of a firearm with a defaced serial number (720 ILCS 5/24-5(b) (West 2016)) and the offense of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2016)). The charges stem from defendant's attempt to evade police, which ended when defendant crashed his vehicle into a nearby residence. After defendant was apprehended, a handgun was found next to defendant's vehicle, hidden behind a storm door to the residence.

¶ 5 Defendant's jury trial began on July 11, 2016. Officer Edward Sebestik testified he was on patrol alone when he observed defendant's vehicle, a minivan, traveling southbound on North Prospect Avenue in Champaign, Illinois. He observed defendant cut into a nearby parking lot at a high rate of speed in order to avoid a red light. Officer Sebestik testified that he began to follow defendant's vehicle without turning on his emergency lights or siren. He stated defendant increased his speed to approximately seventy miles per hour. When defendant attempted to make a turn, his vehicle lost control and struck a nearby residence. Officer Sebestik parked his squad car so it faced the residence and defendant's vehicle. Officer Sebestik stated he drew his weapon and ordered defendant to exit his vehicle. He testified he drew his weapon because "the way [defendant's] vehicle fled, in [his] experience as a police officer[,] *** generally dictates that the person fleeing may be armed ***." He further stated that, from his vantage point, he could not see defendant exit his vehicle. Officer Sebestik testified, in pertinent part, as follows:

> "First I saw a head pop up over the driver's side of the van and observe me. Once I observed that, I began reiterating my verbal commands ***. They [*sic*]

> disappeared back behind the van. Approximately five to ten seconds later, they [*sic*] exited around the back side of the *** driver's side of the vehicle. *** They [*sic*] came around the back side of the vehicle and began walking northbound along the passenger side of the vehicle."

¶ 6 The State introduced video footage from Officer Sebestik's squad car. Officer Sebestik testified the video camera was located on the front windshield, directly below the rear view mirror. The video shows Officer Sebestik following defendant's vehicle in high speed pursuit, which concluded when defendant's vehicle crashed into the residence. The video shows defendant's vehicle positioned directly adjacent to the front door of the residence. According to the video, defendant exited his vehicle approximately 42 seconds after the van struck the residence. Defendant is not visible in the video during those 42 seconds.

¶ 7 Officer Sebestik testified defendant fled the scene on foot and disregarded multiple commands to stop. Defendant ran through the front yard, jumped over a fence, and was apprehended when Officer Sebestik sprayed him with mace. Defendant was subsequently searched, but Officer Sebestik found nothing on him. Officer Sebestik further testified the Champaign Fire Department arrived at the scene and checked the residence for structural damage. Officer Sebestik stated a handgun was discovered positioned between the front door and storm door of the residence.

¶ 8 The State presented several photographs of the handgun positioned inside the storm door. The storm door is depicted directly adjacent to the driver's door of defendant's vehicle. According to Officer Sebestik, photographs depict the lower glass panel of the storm door was "popped out of its position." With respect to the handgun, Officer Sebestik testified he

examined it and found eight rounds of ammunition in the magazine and one round in the chamber.

¶ 9 Officer Sebestik further testified that, after the handgun was discovered, defendant was transported to Carle Hospital. While there, defendant was given his *Miranda* rights. According to Officer Sebestik, defendant stated he fled because he knew he had violated a traffic law by cutting through a parking lot to avoid a red light. Officer Sebestik asked defendant if the reason he fled had to do with the handgun that was discovered. Defendant stated he knew nothing about the handgun.

¶ 10 Mike Verchota, the owner of the residence struck by defendant's van, testified the residence had been vacant for approximately two weeks before the incident. He had been there three days prior to check on it. He stated he "walked in the front door, made sure everything was as it should be *** [and] lock[ed] it back up ***." He testified he never possessed a firearm at that location. He stated he had never seen a firearm between the front door and the storm door.

¶ 11 Lieutenant Andrew Quarnstrom of the Champaign Fire Department testified next. He stated that, after defendant was apprehended, he discovered the handgun when he opened the storm door to the residence. The handgun was "[a]t the bottom of the door, right in the center." He confirmed the storm door was not locked at the time.

¶ 12 At the close of the State's case, the trial court read two stipulations to the jury. In the first stipulation, the parties agreed no latent fingerprints or deoxyribonucleic acid (DNA) was found on the handgun, clip, or ammunition. In the second stipulation, the parties agreed defendant had been convicted previously of certain felonies.

¶ 13 Next, defendant testified on his own behalf. He stated that, on the night of the incident, he cut through a parking lot to avoid a red light because he was rushing home after running an errand for his eight-month-old daughter. He testified he saw Officer Sebestik driving behind him, but the officer did not have his sirens or emergency lights turned on. He stated he fled from Officer Sebestik because defendant knew he was driving on a revoked license. When defendant crashed into the house, he hit the left side of his head against the door panel of his vehicle. He could only partially open his driver's side door, and he squeezed himself out of the vehicle. He denied being disoriented following the car accident, but his head was hurting. When he emerged from behind his vehicle, he could see Officer Sebestik had his weapon drawn. He stated that he ran because he was "just scared," he knew he had been driving on a revoked license, and he was afraid of returning to jail. Defendant denied possessing the handgun.

¶ 14 The jury found defendant guilty of possession of a firearm with a defaced serial number and the offense of armed habitual criminal.

¶ 15 Defendant filed a motion for acquittal or in the alternative, a motion for a new trial. On September 7, 2016, the trial court denied defendant's motion and sentenced him to thirteen years in prison. The court ordered defendant to pay restitution to the homeowner. The court also awarded defendant $1120 in *per diem* credit for 224 days previously served in custody.

¶ 16 The court's "order for fines/assessments," dated the day of the sentencing hearing and signed by the trial judge, reflects fines totaling $310. The order does not identify defendant's *per diem* credit or a DNA assessment.

¶ 17 On September 15, 2016, defendant filed a motion to reconsider his sentence. The

trial court denied the motion.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues on appeal that (1) the State failed to present sufficient evidence that he actually possessed the handgun; (2) the trial court erred in admitting evidence regarding the handgun's clip and ammunition; and (3) the circuit clerk failed to provide a *per diem* credit against three fines.

¶ 21 A. Possession of the Handgun

¶ 22 Defendant argues the evidence was insufficient to show he possessed the handgun discovered behind the storm door of the residence. Specifically, defendant contends the evidence was insufficient because (1) no fingerprints or DNA was found on the handgun; (2) defendant testified the only reason he fled from Officer Sebestik was because he did not want to be caught driving on a revoked license, not because he possessed a handgun; (3) the video of the incident does not show the storm door moving or defendant's hand near the storm door; (4) if defendant had dropped the handgun through the dislodged lower glass panel of the storm door, it would not have "neatly" landed in the position it was found; and (5) the approximately 42 seconds between the time defendant crashed his vehicle into the house and when he was first seen emerging from behind his vehicle was an insufficient amount of time to dispose of the handgun.

¶ 23 "When considering a challenge to the sufficiency of the evidence in a criminal case, our function is not to retry the defendant." *People v. Lloyd*, 2013 IL 113510, ¶ 42, 987 N.E.2d 386. Instead, the proper inquiry 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 offense beyond a reasonable doubt." *Id.* Under this standard of review, the trier of fact is given the responsibility of resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from the facts. *People v. Howery*, 178 Ill. 2d 1, 38, 687 N.E.2d 836, 854 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A reviewing court "will not overturn the verdict of the fact finder 'unless the evidence is so unreasonable, improbable[,] or unsatisfactory that it raises a reasonable doubt of defendant's guilt.' " *People v. Singleton*, 367 Ill. App. 3d 182, 187-88, 854 N.E.2d 326, 331 (2006) (quoting *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004)).

¶ 24 To sustain a conviction for possession of a firearm with a defaced serial number, the State must prove defendant intentionally or knowingly possessed a firearm upon which the serial number has been changed, altered, removed, or obliterated. 720 ILCS 5/24-5(b) (West 2016). To sustain a conviction for the offense of armed habitual criminal, the State must prove defendant possessed a firearm after having been convicted of at least two qualifying predicate offenses. 720 ILCS 5/24-1.7(a) (West 2016). Here, it is undisputed the handgun at issue had a defaced serial number. It is also undisputed defendant had qualifying prior felony convictions. The only question we consider is whether the State presented sufficient evidence to prove beyond a reasonable doubt that defendant possessed the handgun at issue here.

¶ 25 Possession of a handgun falls into two categories, actual and constructive, which are described as follows:

> "Actual possession is proved by testimony which shows [that the] defendant exercised some form of dominion over the [contraband], such as trying to conceal it or throwing it away. *People v. Scott*, 152 Ill. App. 3d 868, 871, 505

> N.E.2d 42, 44 (1987). On the other hand, 'constructive possession' arises when the defendant has the intent and capability to maintain control and dominion over the contraband." *People v. Love*, 404 Ill. App. 3d 784, 788, 937 N.E.2d 752, 756 (2010).

"Because possession is often difficult to prove directly, proving possession frequently rests upon circumstantial evidence. [Citation.] In a case based on circumstantial evidence, each link in the chain of circumstances does not need to be proved by a preponderance of the evidence if all the evidence considered collectively satisfies the trier of fact by a preponderance of the evidence that the defendant is guilty." *Id.*

¶ 26 Here, we find the State sufficiently proved defendant's actual possession of the handgun through circumstantial evidence. Viewing the evidence in the light most favorable to the State, the jury could have reasonably inferred that, following the van impacting the house, defendant quickly disposed of the handgun by dropping it through a partially open glass panel in the storm door located directly adjacent to defendant's driver's side door. The State presented photos showing the lower glass panel on the storm door was cracked open, creating a gap through which defendant could have dropped the handgun. The photos also reveal the handgun was ultimately discovered between the storm door and the front door of the residence, resting on its barrel, and slightly tilted against the front door. Contrary to defendant's argument, we do not find the position the handgun inconsistent with it having been dropped through the gap in the panel. Further, the State presented the testimony of the homeowner, Mike Verchota. He testified he did not own the handgun. He stated he had used the front door of the residence three days before the incident occurred, and he did not see a handgun. The State also presented the video

from Officer Sebestik's squad car, which showed defendant's vehicle immediately after it crashed into the house with the driver's door located directly next to the storm door. Our review of the video reveals that only the top of the storm door is visible in the video. The lower portion of the storm door, including the damaged lower glass panel, is not visible in the video due to the van obstructing the view. Therefore, defendant had the opportunity to dispose of the handgun through the glass panel of the storm door outside the view of the video camera.

¶ 27 Further, defendant testified he ignored Officer Sebestik's commands and fled after crashing his vehicle into the residence because he was "just scared." Although defendant claimed he evaded Officer Sebestik because he knew he had been driving on a revoked license, it was reasonable for the jury to infer he fled because he knew he unlawfully possessed a firearm. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17, 965 N.E.2d 1135 ("Knowledge may be shown by evidence of a defendant's acts, declarations, or conduct ***."). Thus, the circumstantial evidence sufficiently established defendant actually possessed the handgun.

¶ 28 B. The Clip and Ammunition

¶ 29 Defendant argues the admission of evidence regarding the handgun's clip and ammunition during Officer Sebestik's testimony was error. Specifically, defendant contends this evidence was inadmissible because it (1) was irrelevant and (2) constituted improper "bad acts" evidence.

¶ 30 Defendant acknowledges he failed to object to this evidence at trial or raise the issue in a posttrial motion. He maintains, however, that his forfeiture may be excused under the plain error doctrine. A reviewing court may consider an unpreserved error in the following circumstances:

> " '(1) a clear or obvious error occurred and 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) a clear or obvious error occurred and that 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. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

On review, "[t]he ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010).

¶ 31 Assuming, for the sake of defendant's argument, that the evidence of the clip and ammunition was irrelevant, we note that defendant stipulated to the very evidence he now claims was erroneously admitted. According to the stipulation, the parties agreed that the handgun *as well as* a magazine clip and ammunition were all submitted to the Illinois State Police Crime Laboratory for testing and, according to two crime lab scientists, no suitable fingerprints or useful DNA evidence was discovered in their analyses.

¶ 32 "Parties who agree to the admission of evidence through a stipulation are estopped from later complaining about that evidence being stipulated into the record." *People v. Calvert*, 326 Ill. App. 3d 414, 419, 760 N.E.2d 1024, 1028 (2001). Stipulations are binding and conclusive on the parties. *Id.* at 420. "When a party procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, that party cannot contest the

admission on appeal." *People v. Caffey*, 205 Ill. 2d 52, 114, 792 N.E.2d 1163, 1202 (2001); see also *People v. Williams*, 192 Ill. 2d 548, 571, 736 N.E.2d 1001, 1014 (2000) ("A criminal defendant cannot complain on appeal of the introduction of evidence which he procures or invites.")

¶ 33 Here, by stipulating to the evidence—and *using* the evidence at trial to argue there were no traceable fingerprints or DNA—defendant cannot now claim this same evidence was erroneously admitted. Indeed, it was a point of emphasis of the defense's theory at trial that the clip, ammunition, and handgun could not be linked to defendant. During closing arguments, defense counsel specifically stated there were no fingerprints or DNA evidence connecting defendant to the evidence. Defendant referenced the now contested evidence to his advantage at trial but now, on appeal, argues the evidence was irrelevant. Defendant cannot have it both ways. We find that, by stipulating to the evidence he now contests, defendant affirmatively waived any objection to the admission of such evidence.

¶ 34 Further, we note defendant contends it was error to admit the testimony regarding the clip and ammunition because it constituted improper "bad acts" or "other crimes" evidence. Specifically, defendant contends this evidence had the effect of suggesting defendant was "armed and dangerous" and a "bad person deserving of punishment." Again, we disagree.

¶ 35 Generally, "[e]vidence of other crimes is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crime." *People v. Pikes*, 2013 IL 115171, ¶ 11, 998 N.E.2d 1247. It is "admissible to show *modus operandi*, intent, motive, identity, or absence of mistake with respect to the crime with which the defendant is charged." *Id.* The trial court's admission of other-crimes evidence is reviewed under an abuse of discretion

standard. *People v. Braddy*, 2015 IL App (5th) 130354, ¶ 27, 32 N.E.3d 39.

¶ 36 In this case, defendant fails to explain how the evidence of the magazine clip and ammunition constitutes "bad acts" or "other crimes" evidence. A magazine clip is an integral part of a handgun such as this, and it is designed to hold ammunition. We fail to understand how the jury could view this testimony that the handgun contained a clip with ammunition as evidence of "other crimes" or "bad acts" by defendant.

¶ 37 C. *Per Diem* Credit

¶ 38 Finally, defendant argues he is entitled to $95 of *per diem* credit against court-assessed fines. Again, the State asserts we are without jurisdiction to consider the issue.

¶ 39 The *per diem* monetary credit statute provides, in pertinent part, that a person incarcerated on a bailable offense "shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2016). The amount of the credit cannot exceed the amount of the fine. *Id. Per diem* credit can only be applied to offset fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580, 861 N.E.2d 967, 974 (2006). Because the issue of *per diem* credit raises a question of statutory interpretation, we review the issue *de novo*. *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 34, 13 N.E.3d 1280.

¶ 40 In support of his argument that he is entitled to *per diem* credit, defendant cites *People v. Caballero*, 228 Ill. 2d 79, 88, 885 N.E.2d 1044, 1049 (2008) for the proposition that a claim for monetary credit may be raised at any time despite defendant's failure to raise the issue in the trial court. Recently, in *People v. Young*, 2018 IL 122598, ¶ 26, our supreme court had occasion to address its decision in *Caballero*.

¶ 41 In *Young*, defendant appealed the dismissal of his postconviction petition, raising

for the first time on appeal the trial court's error in failing to award him the correct amount of presentence custody credit. *Id.* ¶ 7. The supreme court held "the appellate court properly refused to grant the credit requested by defendant for the first time in his appeal from the dismissal of his postconviction petition." *Id.* ¶ 31. However, in so holding, the court in *Young* noted several important distinctions between the presentence custody credit statute and the *per diem* monetary credit statute. The court observed that the "*per diem* monetary credit statute provides, in pertinent part, that a person incarcerated on a bailable offense 'shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant.' " *Id.* at ¶ 22 (quoting 725 ILCS 5/110-14(a) (West 2016)). The court in *Young* further explained that a careful reading of *Caballero* "reveals that the 'upon application' language was pivotal to this court's reasoning." *Id.* at ¶ 26. The court explained the "upon application" language used in the *per diem* credit statute was "the lynchpin of the analysis because it demonstrated the legislature's intent to permit a request for *per diem* credit in the appellate court, even where the issue has not been properly preserved for review." *Id.* Accordingly, unlike forfeited claims for presentence custody credit, claims for *per diem* monetary credit may be raised at any time. Therefore, we have jurisdiction to consider defendant's *per diem* claim.

¶ 42 Here, at defendant's sentencing hearing, the trial court stated defendant would "receive a $1,120 credit towards the appropriate fines for time served." However, it appears from the record that the circuit clerk failed to apply the *per diem* credit to three fines. Defendant argues he was denied a $95 *per diem* credit for the following three fines: (1) $50 court finance fee (see *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54, 18 N.E.3d 912) (a court assessment is a fine); (2) $15 state police operations assessment (see *People v. Warren*, 2016 IL App (4th)

120721-B, ¶¶ 133-134, 55 N.E.3d 117) (a state police operations assessment is a fine); and (3) $30 juvenile expungement fund assessment (see *Id.*) (the juvenile expungement fund assessment is a fine).

¶ 43 Based on our review of the record, defendant is correct. It appears the above three fines were imposed but no *per diem* credit was given. Accordingly, we direct that the circuit clerk provide an additional *per diem* credit of $95.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we modify the amount of the per diem credit to reflect that an additional amount of $95 is awarded. We otherwise affirm the trial court's judgment. As part of our judgment we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 46 Affirmed as modified.