NOTICE
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2019 IL App (4th) 160157-U

NO. 4-16-0157

FILED
January 2, 2019
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.	)	Macon County
DRAKE A. ELLIS,	)	No. 14CF1368
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) reversed, concluding defendant received ineffective assistance of counsel where counsel failed to object to unnecessary and prejudicial hearsay testimony and (2) remanded for a new trial.

¶ 2 In November 2014, the State charged defendant, Drake A. Ellis, with unlawful possession of a weapon by a felon, alleging he knowingly possessed .22-caliber firearm ammunition (720 ILCS 5/24-1.1(a) (West 2014)). In December 2015, a jury found defendant guilty. In January 2016, the trial court sentenced defendant to a term of six years' imprisonment.

¶ 3 Defendant appeals, arguing (1) the State failed to meet its burden of proving beyond a reasonable doubt that defendant's conduct of picking up bullets found in an alley did not satisfy the affirmative defense of necessity; (2) defense counsel was ineffective for failing to object to irrelevant and prejudicial hearsay testimony; and (3) his sentence was excessive. For the following reasons, we reverse and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In November 2014, the State charged defendant with unlawful possession of a weapon by a felon, alleging he knowingly possessed .22-caliber firearm ammunition (720 ILCS 5/24-1.1(a) (West 2014)).

¶ 6 A. Trial

¶ 7 In December 2015, the jury heard the following evidence.

¶ 8 1. *Jim Atkinson*

¶ 9 Jim Atkinson, a detective with the Decatur Police Department, testified that on November 3, 2014, he became involved in an incident involving defendant. According to Atkinson, "dispatch had sent patrol units to the Tennessee Meat Market because a subject inside the store was apparently threatening an employee with a knife." Atkinson was near the Tennessee Meat Market and saw a subject, later identified as defendant, matching the dispatch description walk across the street.

¶ 10 When Atkinson made contact with defendant, he asked if defendant had any weapons. Defendant reported he had shells in his jacket pocket. Atkinson recovered six .22-caliber bullets from defendant's jacket pocket. Defendant did not have a gun in his possession. According to Atkinson, defendant did not resist arrest or otherwise cause the officers any problems when they arrested him. Atkinson testified he did not ask defendant where the bullets came from or why he had them in his possession.

¶ 11 Following Atkinson's testimony, the parties stipulated defendant had a prior felony conviction and the State rested its case.

¶ 12 2. *Amber Blackburn*

¶ 13 Amber Blackburn, defendant's fiancée, testified she was with defendant on November 3, 2014, when they were stopped by police. That day, Blackburn, defendant, and Blackburn's daughter walked through an alleyway on their way to the Tennessee Meat Market to buy food and saw bullets on the ground. Blackburn told defendant not to pick the bullets up. However, defendant was concerned that children might pick the bullets up, so he picked them up. According to Blackburn, police stopped defendant "maybe a half-hour [later], if it was even that long." Blackburn testified neither she nor defendant had a cellular phone to call the police to have them confiscate the ammunition.

¶ 14 3. *Defendant*

¶ 15 Defendant testified that on the day of his arrest, Blackburn's daughter was hungry, so they decided to walk to the Tennessee Meat Market to get some food. As they walked through the alley behind Olga's House of Stuff, defendant observed some bullets on the ground. Although Blackburn told him not to touch them, defendant decided to pick up the bullets. Defendant acknowledged that, as a felon, he was not allowed to have a firearm or firearm ammunition. When asked why he picked up the bullets, defendant responded, "I didn't want no kid playing with them, you know, I didn't want some kid hitting them with a law [*sic*] mower or going off and going in somebody's back window, you know. I done heard kids playing with bullets, throwing cinder blocks on them on everything, you know. I lost my cousin to gun violence, you know, and I was just going to turn them in."

¶ 16 Defendant testified he did not consider calling the police because he did not have a cellular phone. Defendant also did not consider calling the police from Olga's House of Stuff because it was closed. According to defendant, there was a fire department near the Tennessee Meat Market but he did not stop and give them the ammunition. Defendant did not have the

opportunity to call the police at the Tennessee Meat Market because he got involved in an altercation. Defendant testified, "I went in there and *** it was a misunderstanding. He came from behind the counter and he thought I was—I don't know—and we got into it, I walked across the street and that's when Detective Atkinson put me on the ground." When he left the Tennessee Meat Market, defendant planned to stop at Walgreens before going home.

¶ 17 B. Verdict

¶ 18 Following a lunch break, defendant did not return to the courtroom and the matter continued to closing argument *in absentia*. During deliberation, the jury sent out two questions. First, the jury asked, "Is ammunition considered a weapon as stated on guilty or not guilty papers?" The court responded, "Yes." Second, the jury asked about the meaning of "necessity." The court responded, "[P]lease rely on the instructions that you have been given." Thereafter, the jury found defendant guilty of unlawful possession of a weapon by a felon.

¶ 19 C. Sentence

¶ 20 In January 2016, the matter proceeded to sentencing. Neither party presented additional evidence beyond the presentence investigation report (PSI). The PSI detailed defendant's criminal history, including convictions for (1) a 2005 residential burglary (a Class 1 felony), (2) a 2007 residential burglary (a Class 1 felony), and (3) a 2011 theft (a Class 3 felony). According to the PSI, defendant had mental-health problems since childhood and received both residential and outpatient mental-health treatment since the age of seven. Defendant had been diagnosed with paranoid schizophrenia, bipolar disorder, manic depression, compulsive disorder, explosive disorder, attention deficit disorder, attention deficit hyperactivity disorder, and personality disorder. At the time of sentencing, defendant was currently in treatment and taking medication to help control his conditions. Defendant reported receiving social security disability

benefits for years due to his mental-health problems. Defendant also reported a long history of untreated substance abuse.

¶ 21 At the sentencing hearing, defendant apologized and took responsibility for his actions. Defendant expressed his desire to overcome his drug addiction and asked the trial court for leniency. Defendant asked for the opportunity to prove to his family, including his two children, that he could be a productive member of society.

¶ 22 The State noted defendant's prior criminal history and recommended a term of nine years' imprisonment. Defense counsel noted defendant's prior convictions were related to his drug addiction and were not violent offenses. Counsel further pointed out defendant's history of mental-health problems and requested a minimum sentence of four years' incarceration.

¶ 23 The trial court noted defendant's mental-health and substance-abuse problems. However, the court saw no connection between defendant's drug problem and his conviction for unlawful possession of a weapon. The court elected not to sentence defendant to an extended term. Instead, the court sentenced defendant to a term of six years' imprisonment and recommended him for drug treatment.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues (1) the State failed to meet its burden of proving beyond a reasonable doubt that defendant's action of picking up bullets found in an alley did not qualify for the affirmative defense of necessity; (2) defense counsel was ineffective for failing to object to irrelevant and prejudicial hearsay testimony; and (3) his sentence was excessive. We turn first to defendant's assertion that the evidence was insufficient to prove him guilty beyond a reasonable doubt.

¶ 27 A. Sufficiency of the Evidence

¶ 28 Defendant first contends the State failed to meet its burden of proving beyond a reasonable doubt that defendant's action of picking up bullets found in an alley did not qualify for the affirmative defense of necessity. The State asserts the evidence was sufficient to support the jury's verdict. Specifically, the State argues the evidence supported an inference that defendant wanted to keep the ammunition rather than turn it in.

¶ 29 When considering whether sufficient evidence supported a conviction, "our function is not to retry the defendant." *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006). Instead, we must determine " '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.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We allow all reasonable inferences in favor of the State. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011). It is the province of the finder of fact to determine the credibility of a witness and the finding is entitled to great weight. *People v. Smith*, 185 Ill. 2d 532, 542, 708 N.E.2d 365, 370 (1999). We reverse only where the evidence is so unsatisfactory, unreasonable, or improbable that it raises a reasonable doubt as to the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004).

¶ 30 Due process "protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *People v. Young*, 128 Ill. 2d 1, 48, 538 N.E.2d 461, 472 (1989). To sustain a conviction for unlawful possession of a weapon by a felon, the State must prove the defendant (1) has a prior felony conviction and (2) had knowing possession of a firearm or firearm ammunition. *People v.*

Brown, 327 Ill. App. 3d 816, 824, 764 N.E.2d 562, 570 (2002). If an affirmative defense is raised, either through the State's evidence or through some evidence introduced by the defendant, "then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense." 720 ILCS 5/3-2(b) (West 2016)).

> "The elements of the affirmative defense of necessity are that: (1) the person claiming the defense was without blame in occasioning or developing the situation, and (2) the person reasonably believed that his conduct was necessary to avoid a greater public or private injury than that which might reasonably have resulted from his conduct. [Citation.] This defense is viewed as involving the choice between two admitted evils where other optional courses of action are unavailable [citations], and the conduct chosen must promote some higher value than the value of literal compliance with the law [citation]." *People v. Janik*, 127 Ill. 2d 390, 399, 537 N.E.2d 756, 760 (1989).

¶ 31 Defendant concedes the State proved beyond a reasonable doubt he had a prior felony conviction and knowing possession of firearm ammunition. Rather, defendant argues the State did not prove beyond a reasonable doubt that he did not act out of necessity in picking up the ammunition he found in the alley. Specifically, defendant argues his testimony, corroborated by Blackburn, that he picked up the bullets to prevent children from playing with the ammunition and harming themselves was not rebutted by the State. The State argues the evidence supported

an inference that defendant did not intend to turn the ammunition in but, rather, intended to keep the ammunition.

¶ 32 As noted, both Blackburn and defendant testified they happened upon the bullets in an alley as they walked to the store to buy food. Defendant feared that children might find the bullets and injure themselves, so he picked up the bullets and put them in his jacket pocket. Neither defendant nor Blackburn had a cellular phone, so they did not consider calling the police to report the ammunition. Defendant testified there was a nearby fire department, but he did not take the ammunition there to turn it in. Instead, defendant went to the Tennessee Meat Market. After he got into a disagreement with the clerk there, he left the store to go get a pizza at Walgreens and then go home. However, officers arrested him in the Walgreens parking lot, at which time defendant informed the officers of the ammunition in his pocket.

¶ 33 The record shows the jurors heard the foregoing testimony and were properly instructed as to the defense of necessity and the State's burden of proof. Drawing all reasonable inferences in the light most favorable to the State, we conclude a rational trier of fact could find defendant guilty beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261. Although the State did not introduce any explicitly contradictory evidence regarding defendant's conduct, it did elicit defendant's testimony that he did not turn in the ammunition at a nearby fire station. It further elicited defendant's testimony that, when he left the Tennessee Meat Market, he intended to go to Walgreens and then go home. Based on this evidence, a rational trier of fact could have concluded defendant intended to keep the ammunition. See *People v. Wheeler*, 226 Ill. 2d 92, 114-15, 871 N.E.2d 728, 740 (2007) ("The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses."). Moreover, it is possible the jury rejected defendant's story

that he found the bullets in the alley. Defendant testified to being at home prior to leaving for the store. Perhaps the jury concluded defendant possessed the bullets when he left home and simply made up the story about finding the bullets in the alley. See *People v. Lenoir*, 125 Ill. App. 3d 260, 264, 465 N.E.2d 1027, 1030 (1984) ("the reasoning for rejecting or disregarding a witness' testimony may be found in the testimony itself rather than in the contradictions posed by conflicting testimony.") Having concluded the evidence was sufficient to prove defendant guilty beyond a reasonable doubt, we turn now to defendant's claim of ineffective assistance of counsel.

¶ 34 B. Ineffective Assistance of Counsel

¶ 35 Defendant next argues defense counsel was ineffective for failing to object to irrelevant and prejudicial hearsay testimony from the responding officer regarding a 911 dispatch reporting a subject threatening a store employee with a knife. The State asserts the record is insufficient to resolve defendant's ineffective assistance of counsel claim. Alternatively, the State argues the dispatch was not inadmissible hearsay and defendant cannot show prejudice.

¶ 36 A claim of ineffective assistance of counsel is reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, the defendant must show his attorney's performance was deficient and prejudice resulted from that deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143, 874 N.E.2d 23, 29 (2007). Specifically, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767 (quoting *Strickland*, 466 U.S. at 694). Our review of defense counsel's performance is highly deferential. *Strickland*, 466 U.S. at

689. A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Id.* Both prongs of the *Strickland* test must be satisfied; therefore, a finding of ineffective assistance of counsel is precluded if a defendant fails to satisfy one of the prongs. *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601.

¶ 37 We first note the State's assertion that the record is insufficient to resolve this claim because it does not disclose counsel's reasons for not objecting to this testimony. The State argues defense counsel might have feared an objection would highlight the remark or had strategic reasons not to object. However, we conclude the record is sufficient to address this claim on direct review. Accordingly, we turn to the merits of defendant's claim.

¶ 38 Defendant contends Atkinson's testimony that dispatch "sent patrol units to the Tennessee Meat Market because a subject inside the store was apparently threatening an employee with a knife" was inadmissible hearsay. The State argues this was not inadmissible hearsay because it was not introduced to show the truth of the matter asserted but, instead, to show the investigative steps taken by Atkinson.

¶ 39 "[A] police officer may recount the steps taken in the investigation of a crime, and may describe the events leading up to the defendant's arrest, where such testimony is necessary and important to fully explain the State's case to the trier of fact." *People v. Simms*, 143 Ill. 2d 154, 174, 572 N.E.2d 947, 954-55 (1991). However, hearsay statements that explain investigatory steps "should be admitted only to the extent necessary to provide that explanation and should not be admitted if they reveal unnecessary and prejudicial information." *People v. O'Toole*, 226 Ill. App. 3d 974, 988, 590 N.E.2d 950, 959-60 (1992). "Testimony about the steps

of an investigation may not include the *substance* of a conversation with a nontestifying witness." (Emphasis in original.) *People v. Boling*, 2014 IL App (4th) 120634, ¶ 107, 8 N.E.3d 65.

¶ 40 This court, in *People v. Cameron*, 189 Ill. App. 3d 998, 1003-04, 546 N.E.2d 259, 263 (1989), noted evidence which would otherwise be hearsay may be admitted for the limited purpose of explaining police conduct. The *Cameron* court cautioned, "[T]he trial court must carefully assess such testimony to ensure that it does not include more than is necessary to explain police conduct." *Id.* at 1004. *Cameron* went on to discuss the purpose of admitting hearsay statements to explain a police officer's investigatory steps and the danger this evidence presents as follows:

> " 'In criminal cases, an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted upon information received, or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.' " (Internal quotation marks omitted.) *Id.* (quoting Edward W. Cleary, McCormick on Evidence § 249 (3d ed. 1984)).

When the trial court faced an objection to the officer testifying about what he was told by the confidential informant, "the court should have conducted a hearing out of the presence of the jury to determine both the *scope* of these third-party out-of-court statements and the *need* for the jury to hear them." (Emphases in original.) *Id.* at 1005. Such a hearing would allow the trial court to assess the need for the officer's testimony and bar any improper portions of the testimony, thereby allowing the State to present legitimate explanations for police conduct while protecting a defendant from any prejudicial hearsay statements. *Id.*

¶ 41 We are mindful that the Illinois Appellate Court and the Illinois Supreme Court have repeatedly addressed the substantive use of inadmissible hearsay evidence under the guise of explaining police procedures. *People v. Warlick*, 302 Ill. App. 3d 595, 600, 707 N.E.2d 214, 218 (1998) (collecting cases); *People v. Jura*, 352 Ill. App. 3d 1080, 1094, 817 N.E.2d 968, 981 (2004) ("The substantive use of inadmissible hearsay conversations between police officers and witnesses has been condemned for over 20 years."). Unfortunately, this issue continues to occur with frequency. *Id.*

¶ 42 In this case, we conclude defense counsel's failure to object to the testimony was objectively unreasonable. Had counsel objected, the trial court could have conducted a brief hearing as suggested by *Cameron*, 189 Ill. App. 3d at 1005. Such a hearing would have shown the statements in Atkinson's testimony that the radio dispatch reported a subject (whom Atkinson identified as defendant) threatening a store clerk with a knife was improper. This information was not necessary to explain Atkinson's next step of arresting defendant. Testimony that Atkinson received a radio dispatch regarding an unrelated matter and arrested defendant based on that dispatch would have been sufficient to explain his course of conduct without revealing unnecessary and prejudicial information. Absent was any need for the jury to hear the

substance of the radio dispatch. The report of a subject threatening a store clerk with a knife was not relevant to any issue in the State's case against defendant for the charge of unlawful possession of a weapon by a felon. Moreover, it hurt defendant's credibility, which was particularly problematic where he testified in his own defense.

¶ 43 This testimony was so unnecessary and prejudicial we find counsel could have no strategic reason not to object. Even if the objection was contemporaneous and the jury still heard the testimony about a subject with a knife, counsel could have requested a limiting instruction to prevent the jury from considering the testimony for the truth of the matter asserted. *People v. Cordero*, 244 Ill. App. 3d 390, 392, 613 N.E.2d 391, 394 (1993).

¶ 44 We further find defendant has shown a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. As noted above, this testimony hurt defendant's credibility and he testified in his own defense. The prejudicial effect of the improper hearsay testimony was compounded by the fact that the State put on a single witness in its case. Essentially, this case boiled down to a credibility contest between defendant and Atkinson. *Jura*, 352 Ill. App. 3d at 1093 (The defendant was prejudiced by counsel's failure to object to officers' testimony that they responded to a report of a person "with a gun" where the outcome of the case came down to "whether the jury believed the defendant or the three police officers.").

¶ 45 The prejudicial effect of the improper hearsay was further exacerbated by the fact that it indicated defendant possessed a weapon in a case where defendant was charged with unlawful possession of a weapon by a felon. From the improper hearsay statements, the jury could have inferred that defendant was the type of person to possess a weapon. In this sense, the testimony essentially constituted propensity evidence. *Boling*, 2014 IL App (4th) 120634, ¶ 112.

¶ 46 We find the admission of the substance of the radio dispatch substantially damaged defendant's credibility, particularly in light of the fact that the State put on only one witness in its case. The radio dispatch also suggested defendant had a propensity to possess weapons where defendant was charged with unlawful possession of a weapon. Counsel's failure to object to this testimony resulted in the jury hearing this prejudicial testimony without a limiting instruction to prevent consideration of the radio dispatch for the truth of the matter asserted. Given these circumstances, we conclude there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Accordingly, we reverse defendant's conviction. Because we concluded the evidence was sufficient to prove defendant guilty beyond a reasonable doubt, double jeopardy does not bar a retrial. *People v. Wilson*, 392 Ill. App. 3d 189, 202, 911 N.E.2d 413, 424 (2009). As the defendant must receive a new trial, we decline to address his excessive-sentence claim.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we reverse defendant's conviction and remand for a new trial.

¶ 49 Reversed; cause remanded.