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IN THE
COURT OF APPEALS OF INDIANA

CLARENCE E. LAMPKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-1005-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0912-FB-128

December 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Clarence Lampkins appeals his conviction for possession of a firearm by a serious violent felon as a Class B felony. We reverse and remand.

Issues

Lampkins raises three issues. We find one of his issues, which we restate as whether he received effective assistance of trial counsel, dispositive. Because we are reversing Lampkins's conviction, we will also address his sufficiency argument as it relates to whether he may be retried.

Facts

On December 18, 2009, the Fishers Police Department received a complaint regarding a possible drunk driver in a white Pontiac Grand Prix on Interstate 69. Officer Justin Lowrance found the vehicle and saw that the vehicle was speeding and swerving between the center lane and the right lane. He initiated a traffic stop, and when he approached the vehicle, the vehicle was still running. After obtaining some information from the driver and the passenger, Officer Lowrance determined that the driver, Lampkins, had a suspended driver's license, but he was unable to confirm the passenger's identity. Neither Lampkins nor the passenger was the owner of the vehicle. Both Lampkins and the passenger seemed "very nervous" and tense. Tr. p. 179-80. When Officer Lowrance returned to the vehicle, it was turned off.

Because Lampkins was being arrested for driving while suspended and he was unable to confirm the passenger's identity, Officer Lowrance impounded the vehicle and

performed an inventory of the vehicle. During the search, Officer Lowrance discovered that the glove box was locked. He removed the keys from the ignition, unlocked the glove box, and saw a gun in the glove box on top of other items.

The State charged Lampkins with driving while suspended as a Class A misdemeanor and possession of a firearm by a serious violent felon as a Class B felony. The State alleged that Lampkins was a serious violent felon based on his prior conviction for aggravated battery. On February 3, 2010, Lampkins made telephone calls from the Hamilton County Jail to a woman. During one telephone call, they discussed fingerprints on the weapon found in the glove box. When she asked if his fingerprints would be on the gun, Lampkins responded, "No telling. There's no telling. They shouldn't be. They shouldn't be. There's no telling though. Know what I mean? I probably done it. Know what I mean? There shouldn't be though, hopefully." State's Exhibit 12. In another call, he told the woman that he knew another person's fingerprints would be on the gun "for sure." Id. A fingerprint analysis of the gun showed that one fingerprint was on the gun but it was "incomplete and of low quality and not identifiable." State's Exhibit 4. Consequently, the analyst was not able to make a positive identification of the fingerprint.

Lampkins pled guilty to driving while suspended, and a jury trial was held on the possession of a firearm by a serious violent felon charge. Lampkins and the State entered into a stipulation of evidence, in which they agreed that Lampkins had previously been convicted of aggravated battery as a Class B felony. The stipulation also provided that certified copies of the charging information, sentencing order, abstract of judgment, and

chronological case summary were submitted to the trial court as State's Exhibit 1. State's Exhibit 1 included charging informations for Class A felony attempted robbery resulting in serious bodily injury and Class B felony aggravated battery. The attempted robbery charging information alleged that Lampkins had demanded keys from a victim, held a gun to her head, and shot her twice. Lampkins pled guilty only to Class B felony aggravated battery, and the sentencing order discussed several aggravating factors, including the fact that Lampkins was "a person who is of a cold, calculating nature who demonstrates no remorse" and that Lampkins has a history of criminal behavior. State's Exhibit 1. Although a discussion occurred regarding the admission of State's Exhibit 1, Lampkins's trial counsel ultimately did not object to its admission.

The jury found Lampkins guilty of possession of a firearm by a serious violent felon as a Class B felony, and the trial court sentenced him to concurrent sentences of fifteen years for the possession of a firearm charge and 280 days for driving while suspended. Lampkins now appeals his Class B felony possession of a firearm by a serious violent felon conviction.

Analysis

I. Ineffective Assistance of Trial Counsel

Lampkins argues that his trial counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)), cert. denied. A counsel's

performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

According to Lampkins, his trial counsel was ineffective because he failed to object to the admission of State's Exhibit 1, particularly the attempted robbery charging information and the aggravating circumstances described in the sentencing order for his aggravated battery conviction. Lampkins's trial counsel raised concerns regarding the documents but ultimately did not object.

Our supreme court held in Hines v. State, 801 N.E.2d 634, 635 (Ind. 2004), that the acceptance of a stipulation that the defendant is a serious violent felon eliminates the need for the admission of prior conviction evidence during trial. See also Sams v. State, 688 N.E.2d 1323, (Ind. Ct. App. 1997) (holding that the trial court abused its discretion by admitting the defendant's entire motor vehicle driving record instead of allowing the defendant to admit that his license was suspended for life), trans. denied; Old Chief v. United States, 519 U.S. 172, 190-91, 117 S. Ct. 644, 655 (1997)) ("The most the jury needs to know is that the conviction admitted by the defendant falls within the class of

crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions."). Lampkins stipulated to his prior conviction for Class B aggravated battery. Consequently, it was unnecessary to admit the charging informations, sentencing order, abstract of judgment, and chronological case summary regarding his prior felony conviction. If Lampkins's trial counsel had objected, the trial court should have sustained the objection. Lampkins has demonstrated that his trial counsel's performance was deficient.

Lampkins must also demonstrate that he was prejudiced by his trial counsel's performance. The documents admitted in State's Exhibit 1 included certified copies of the charging information, sentencing order, abstract of judgment, and chronological case summary. The charging information for Class A felony attempted robbery resulting in serious bodily injury, as well as the charging information for Class B felony aggravated battery, were included. The attempted robbery charging information alleged that Lampkins had demanded keys from a victim, held a gun to her head, and shot her twice. Lampkins pled guilty only to Class B felony aggravated battery, and the attempted robbery charge was dismissed. As a result, the jury was given information on a charge for which Lampkins was never convicted. Additionally, the sentencing order, which was included in State's Exhibit 1, discussed several aggravating factors, including the fact that Lampkins was "a person who is of a cold, calculating nature who demonstrates no remorse" and that Lampkins has a history of criminal behavior. State's Exhibit 1.

According to the State, little attention was drawn to Lampkins's prior conviction and the supporting documentation. However, the documents were passed to the jury and contained extremely prejudicial information regarding Lampkins's prior conviction, other charges against him, and his character. The State also claims that Lampkins was not prejudiced by the admission of the documents because the evidence against him was overwhelming. Although the evidence presented at the trial was sufficient to sustain a conviction, we cannot describe it as overwhelming.

Lampkins must show a reasonable probability that, but for his trial counsel's error, the result of the proceeding would have been different. A "reasonable probability" has been defined as "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Given the lack of overwhelming evidence and the extremely prejudicial information contained in State's Exhibit 1, we conclude that Lampkins has met his burden.[1]

We understand that a lawyer, in the heat of a trial is, many times, forced to make decisions which, in hindsight, do not hold up to appellate scrutiny as well as one would have hoped. We also are not inclined to disturb a jury's verdict. However, here the prejudicial information made available to the jury, including facts of at least one crime for which Lampkins was not convicted, and a character assessment that was harmful, yet

[1] Given our conclusion regarding Lampkins's ineffective assistance of counsel claim, we need not address his fundamental error claim regarding the same documents. See Culver v. State, 727 N.E.2d 1062, 1070 (Ind. 2000) (holding that "[e]stablishing a claim of fundamental error requires a showing of at least as much prejudice to the defendant as a claim of ineffective assistance of counsel").

accurate, simply tipped the scale in the direction of unfairness and prejudice in a way that cannot be overlooked.

II. Sufficiency of the Evidence

Although we reverse Lampkins's conviction based on ineffective assistance of trial counsel, we must consider his sufficiency argument as it relates to whether he may be retried. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, generally does not bar a retrial on the same crimes where the reversal is due to error in the admission of evidence. Thompson v. State, 690 N.E.2d 224, 237 (Ind. 1997). However, double jeopardy forbids a retrial if the reviewing court concludes that the evidence is legally insufficient to support the conviction. Id. Evidence is sufficient if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id. We do not reweigh evidence or assess the credibility of witnesses. Id.

The evidence is sufficient to support the conviction, and Lampkins's retrial is not barred. Lampkins argues that he did not knowingly possess the weapon. A conviction for possession of contraband may rest upon either actual or constructive possession. Goodner v. State, 685 N.E.2d 1058, 1061 (Ind. 1997). Evidence of constructive possession is sufficient if the State shows that the defendant had both the capability and the intent to maintain dominion and control over the contraband. Hardister v. State, 849 N.E.2d 563, 573 (Ind. 2006).

"The capability element is met when the state shows that the defendant is able to reduce the [firearm] to the defendant's personal possession." Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). The weapon here was in the glove box of the vehicle that Lampkins was driving, and he was capable of reducing it to his possession.

To prove the intent element, the State must establish the defendant had knowledge of the presence of the contraband. Id. "This knowledge may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband." Id. Circumstances that will support such an inference include: 1) incriminating statements made by the defendant; 2) attempted flight or furtive gestures; 3) a drug manufacturing setting; 4) proximity of the defendant to the contraband; 5) contraband in plain view; and 6) the mingling of the contraband with items owned by the defendant. Henderson v. State, 715 N.E.2d 833, 836 (Ind. 1999).

Lampkins did not have exclusive possession over the vehicle, and thus, evidence of additional circumstances was required. Lampkins was nervous and tense when Officer Lowrance pulled him over. After Lampkins was arrested, the officer performed an inventory of the vehicle and found the weapon in the locked glove box of the vehicle. While in the Hamilton County Jail, Lampkins made telephone calls to a woman. During one telephone call, they discussed fingerprints on the weapon found in the glove box. When she asked if his fingerprints would be on the gun, Lampkins responded, "No telling. There's no telling. They shouldn't be. They shouldn't be. There's no telling

though. Know what I mean? I probably done it. Know what I mean? There shouldn't be though, hopefully." State's Exhibit 12. In another call, he told the woman that he knew another person's fingerprints would be on the gun "for sure." Id.

The State presented evidence that the weapon was in close proximity to Lampkins and he made incriminating statements regarding the weapon. While not overwhelming, we conclude that the evidence is sufficient to support a retrial of Lampkins.

Conclusion

We reverse Lampkins's conviction for possession of a weapon by a serious violent felon as a Class B felony because he received ineffective assistance of trial counsel, and we remand for a new trial.

Reversed and remanded.

VAIDIK, J., concurs.

BAKER, C.J., dissents with separate opinion.

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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

Baker, Chief Judge, dissenting.

I respectfully dissent. While I agree with the majority's conclusion that the admission of documents from the prior criminal proceeding was "unnecessary," slip op. p. 6., I part ways from its conclusion that the admission was prejudicial to Lampkins.

Lampkins admitted that he was a serious violent felon pursuant to Indiana Code section 35-47-4-5(c). Thus, the <u>only</u> disputed matter related to this charge was whether or not Lampkins possessed the firearm at issue. His prior conviction, and the documents related thereto, is simply irrelevant to that matter, and I do not believe that the admission of those documents could possibly have affected the jury's conclusion that Lampkins possessed the firearm. In other words, I do not believe that the result would have been different even if trial counsel had raised a successful objection to the admission of these documents. Consequently, I do not believe Lampkins has established prejudice—or

fundamental error. Inasmuch as I agree with the majority's conclusion that the evidence is sufficient to support the conviction, I would affirm the trial court.