

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-657

DAMONT L. EWELLS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 4, 2009

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. CR-2007-228-IV]

HONORABLE MARCIA R.
HEARNSBERGER, JUDGE

REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

Appellant was sentenced to five years' imprisonment after a jury found him guilty of being a felon in possession of a firearm. Appellant argues that the trial court erred in permitting the State, in closing arguments, to make an erroneous statement of law, and in refusing to allow appellant's attorney to counter this error in his own closing argument. We agree, and we reverse and remand for retrial.

It is undisputed that appellant was found by the police to be driving a car with a gun under the seat. The contested facts relate to appellant's knowledge and intent. Appellant testified at trial that he was using his uncle's car and that he neither knew nor ever said that he knew that there was a gun in the car. During closing argument, counsel for the State told the jury that "[e]ven if it wasn't his, it was under the seat in a car he was driving, and that's



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guilty under Arkansas law.” Appellant’s attorney objected to this as a misstatement of the law; the State replied that the crime was a strict-liability offense that required no *mens rea*. The trial court overruled appellant’s objection. During appellant’s closing argument, his attorney told the jury that the defendant was not guilty unless he knew that the gun was in the car. The State objected based on misstatement of the law. The trial court sustained this objection. The jury subsequently found appellant guilty.

The State concedes that it was in error as to the law and that a person must have knowledge of the presence of contraband to possess it within the meaning of the statute. See *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994); *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990). The question, then, is whether appellant was prejudiced by the error. In reviewing an allegedly improper closing argument, we must consider the remarks and weigh their probable effect upon the issues, then look to the action of the trial court in dealing with them; if the trial court has not eliminated the sinister effect of the remarks, and they seem to have created prejudice and likely produced a verdict not otherwise obtainable, then the appellate court should reverse. *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999). When the evidence of guilt is overwhelming and the error is slight, we can declare that the error was harmless and affirm. *Id.*

Here, although the evidence was sufficient to withstand a directed-verdict motion, the question of appellant’s knowledge that the firearm was in the vehicle, and thus, of his intent to commit the offense of which he was convicted, rested entirely upon the jury’s assessment



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of the credibility of the witnesses. The trial court's denial of appellant's objection to the prosecutor's statement may not in itself have been reversible. However, by later sustaining the prosecutor's objection to appellant's argument that knowledge was an essential element of the offense, the trial court not only failed to rectify the harm, but in fact compounded it. In light of the combined effect of these errors, and because the issue rested almost entirely on a question of credibility, we cannot say that appellant was not prejudiced by them.

Reversed and remanded.

HART and GLOVER, JJ., agree.

Danny R. Williams, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.