

No. 1-10-2746

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 11058
)	
PEDRO HERNANDEZ,)	Honorable
)	John J. Moran,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Steele and Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err when it denied defendant's motion to dismiss the indictment; the evidence was sufficient to support defendant's conviction for aggravated unlawful use of a weapon; and the sentencing court did not fail to consider defendant's ability to pay when assessing fines, fees, and costs.
- ¶ 2 Following a bench trial, the defendant, Pedro Hernandez, was convicted of aggravated unlawful use of a weapon (UW) and was sentenced to 30 months of probation. On appeal, defendant contends that the trial court erred in denying his motion to dismiss the indictment, that the

State failed to prove him guilty beyond a reasonable doubt, and that the court failed to consider his financial resources and future ability to pay when assessing fines, fees, and costs.

¶ 3 For the reasons that follow, we affirm.

¶ 4 On June 3, 2009, the State filed a complaint for preliminary examination, charging defendant with having committed aggravated UUV as defined by section 24-1.6(a)(1), (3)(B) of the Criminal Code of 1961 (Code). 720 ILCS 5/24-1.6(a)(1), (3)(B) (West 2008). Specifically, the complaint alleged that on that date, while not on his own land, abode, or fixed place of business, defendant possessed a firearm that was uncased and unloaded and had ammunition immediately accessible at the time of the offense.

¶ 5 At the preliminary hearing, Chicago police officer Brian Okrasinski testified that about 7:20 p.m., on June 3, 2009, he was in his police vehicle near 2925 West Belden Avenue when he saw defendant. Defendant started walking toward him, but when Officer Okrasinski got out of the car to call him, defendant took off running. As defendant ran, Officer Okrasinski saw him "fiddling around with his right side of his body." Officer Okrasinski started running after defendant and saw him "toss a small black object over the fence." Shortly thereafter, defendant was placed in custody. Officer Okrasinski testified that he returned to the area of the fence where he saw defendant throw the object and recovered a .25-caliber small black handgun and a loaded magazine for that gun. He performed a custodial search of defendant during which he found a spent round that matched the ammunition used for that gun in defendant's pocket.

¶ 6 On cross-examination, Officer Okrasinski testified that he was in the area because he was responding to a call of shots fired. He clarified that when he first saw defendant, defendant was walking on the street, and he agreed that he saw defendant throw one object. Officer Okrasinski testified that he recovered the gun from one side of the fence and the magazine from the other, that

there were three live rounds in the magazine, and that he found a spent round on the ground next to the gun.

¶7 Following Officer Okrasinski's testimony, the trial court made a finding of no probable cause. In doing so, the trial court stated that it was a reasonable inference that the object thrown over the fence was a handgun. However, the trial court also emphasized that the subsection of the Code under which defendant had been charged required that the ammunition for the weapon be immediately accessible at the time of the offense. The trial court stated,

"The problem I have here is that there is no testimony as to where the ammunition was at the time that the officer saw him throw the black object over the fence. *** I mean, at this point, I don't know if the clip that's found outside the fence has anything to do with the weapon, which I believe the defendant clearly had and threw over the fence, was -- you know, were together at any time."

¶8 On June 18, 2009, the State initiated new charges against defendant before a grand jury. At the proceedings, Officer Okrasinski testified that on the date in question, he received a call of shots fired and thereafter went to the 2900 block of Belden Avenue. Defendant was the first person he saw on the scene. Officer Okrasinski testified that he wanted to talk to defendant, but defendant "took off running." He chased defendant by a fence. In answer to the prosecutor's question, "What did he toss over the fence?" Officer Okrasinski answered, "A black handgun." Officer Okrasinski also stated that he was about four feet from defendant at the time. When a grand juror asked, "So you saw him clearly, that he threw the gun?" Officer Okrasinski answered, "Yes." Officer Okrasinski testified that he was able to catch defendant and that once defendant was under the control of other officers, he was able to go back to the fence area. There, he found an unloaded handgun. Officer Okrasinski testified that defendant did not have a Firearm Owner's Identification (FOID) card, that

defendant was 19 years old, and that the locations where he saw defendant were not defendant's property, fixed place of business, or home.

¶ 9 When a grand juror asked why the case was "thrown out" at the preliminary hearing, Officer Okrasinski answered, "I believe it was thrown out because it was an unloaded weapon." The prosecutor then asked Officer Okrasinski the following series of questions:

"Q. There are elements of aggravated or unlawful use of [a] weapon, various different elements; is that correct?

A. Yes.

Q. We are not proceeding under the Act where you are carrying a gun that's loaded, are we?

A. No.

Q. Because the gun was separated from the chip [*sic*]?

A. I believe we are going with the statute that says that the magazine was readily accessible.

Q. Obviously, it was in his hands and it was accessible until it separated.

A. Uh-huh.

* * *

Q. So you are right, the magazine and the gun are close together and were accessible with the runner, because he tossed them over the fence. And at some point, the magazine and the clip were not in the weapon but they were accessible to him; is that correct?

A. Yes."

¶ 10 The grand jury returned a four-count indictment, charging defendant with having violated, respectively, subsections (3)(A), (C), (F), and (I) of the aggravated UUV statute. 720 ILCS 5/24-1.6

(a)(1), (3)(A), (C), (F), (I) (West 2008). Each count charged that defendant, while not on his own land, abode, or fixed place of business, knowingly carried a firearm on or about his person. Count 1 charged that the firearm was uncased, loaded, and immediately accessible at the time of the offense; Count 2 charged that defendant had not been issued a currently valid FOID card; Count 3 charged that defendant was a member of a street gang or was engaged in street gang related activity; and Count 4 charged that defendant was under 21 years of age.

¶ 11 Defendant filed a motion to dismiss the indictment, arguing that the indictment had been obtained by deceptive and inaccurate grand jury testimony. Defendant contrasted Officer Okrasinski's testimony at the preliminary hearing with his testimony before the grand jury and asserted that he had presented the grand jury with false testimony that he clearly saw defendant throw a handgun -- as opposed to a "black object" -- over the fence, that the clip was in defendant's hand, that defendant had the clip and gun together at some point, that the finding of no probable cause was due to the gun being unloaded, and that the judge never communicated to him the reasons for the finding of no probable cause. Following a hearing, the trial court indicated it had reviewed the transcripts and the applicable authority, and denied the motion to dismiss.

¶ 12 At trial, Officer Okrasinski testified that around 7:15 or 7:20 p.m., on the date in question, he and his partner were on routine patrol when they were assigned to a call of shots fired at 2919 West Belden Avenue. Prior to receiving the assignment, Officer Okrasinski had heard a sound like gunshots or fireworks. The officers proceeded to the area identified in the dispatch and, upon approach, Officer Okrasinski saw a man, later identified as defendant, who matched the general description that had been given. Defendant was with another person. Officer Okrasinski got out of the car and called to defendant and the other man. Defendant looked at the officer and ran. As Officer Okrasinski chased defendant, he noticed that defendant was holding "a black object" on his right side. Officer Okrasinski testified, "After that I -- me thinking it was a gun, I had my gun -- I

had my gun out of my holster." When he was about three or four feet behind defendant, defendant threw the black object over a fence. Officer Okrasinski re-holstered his gun and eventually caught defendant and handcuffed him.

¶ 13 Officer Okrasinski testified that other officers stayed with defendant while he went back to the area where defendant had tossed the object over the fence. Inside the yard, he found a .25 caliber handgun on the ground. Near the gun was a spent .25 caliber casing and a magazine. There were no other black objects in the vicinity. Officer Okrasinski recovered the three items. Another officer gave Officer Okrasinski a spent .25 caliber casing that he had found in defendant's pocket.

¶ 14 On cross-examination, Officer Okrasinski testified that when he first told dispatch that he was running after defendant, he said defendant had a possible gun in his hand. However, in his arrest report, he only wrote that defendant was holding the right side of his waist while running, not that he was holding anything in his hand. Similarly, in his incident report, Officer Okrasinski wrote only that defendant was "holding his right side" while he was running. Officer Okrasinski also acknowledged that at the preliminary hearing, he testified that as defendant ran, he was "fiddling around with the right side of his body."

¶ 15 Officer Okrasinski acknowledged that he saw defendant throw only one small black object over the fence, did not see him throw or drop anything else, did not see the magazine in his hands, and did not see the gun and the magazine together. He reasserted that when he went back to the fence area, he recovered a gun, a magazine, and a spent casing. He clarified that the gun and spent casing were on one side of the fence, while the magazine was on the other side, and that the magazine had three rounds in it.

¶ 16 The State tendered a certified copy of defendant's birth certificate, reflecting that he was born on August 5, 1989, as well as a certified copy of a certification from the Illinois State Police

indicating that defendant had never been issued a FOID card. Defendant did not object to the self-authenticating documents.

¶ 17 Defendant made a motion for a directed finding, which the trial court denied.

¶ 18 Defendant called Francisco Mendez as a witness. Mendez testified that around 7 p.m., on the day in question, he was in his car on Belden Avenue, pulled over to the side of the street talking with a friend who was on the sidewalk. While Mendez was talking with his friend, he saw a police car drive by very slowly and then stop. An officer got out of the car, chased a man in the street, and eventually caught the man. Mendez did not see anything in the hands of the man being chased and did not see the man throw anything.

¶ 19 Justo Rios also testified for defendant. Rios testified that around 6 or 7 p.m., on the day in question, he and defendant decided to drive to a restaurant at Milwaukee and Belden. Defendant did not have a gun with him. The men parked on Belden and got out of the car to walk to the restaurant. As they approached the restaurant, a man came out of an alley and pointed a gun at them. Rios and defendant started running back toward the car, jumping over fences as they went. The man shot at them several times. When Rios and defendant heard that the shooting had stopped, they tried to run back to the car. About 20 feet from the car, Rios was "tackled" by a police officer and placed in a squad car. He did not know what happened to defendant.

¶ 20 The State called Chicago police officer Virginia O'Donnell as a rebuttal witness. Officer O'Donnell testified that between 7:30 and 8 p.m., on the day in question, she and her partner were responding to a call of shots fired when she saw a few people pointing at Justo Rios. Officer O'Donnell and her partner approached Rios, who was alone, and spoke with him. After having a conversation with a woman on a nearby porch, Officer O'Donnell and her partner detained Rios and placed him in their squad car. Officer O'Donnell stated that Rios did not run from her and that neither she nor her partner tackled him.

¶ 21 Following closing arguments, the trial court found defendant guilty of aggravated UUV on Count 2, which had charged that defendant had not been issued a currently valid FOID card, and Count 4, which had charged that he was under 21 years of age. Subsequently, the trial court entered judgment on Count 2 only.

¶ 22 Defendant thereafter filed and argued a motion for a new trial, which was denied by the trial court.

¶ 23 At sentencing, defendant addressed the trial court, stating that he worked full time for an accounting company and that he supports his two young daughters. The court noted that defendant had been convicted of a Class 4 felony, faced a possible sentence of anywhere from one to three years' imprisonment, and could be fined up to \$25,000. The court stated it had considered the nature, circumstances, and seriousness of the offense; the presentence investigation (PSI) report; defendant's statement; and the statutory factors in aggravation and mitigation, including, but not limited to, the history, age, and character of defendant, defendant's rehabilitative potential, the need to protect society, and the need to deter defendant and others from criminal misconduct in the future. The court sentenced defendant to 30 months of probation, imposed a \$1,500 probation fee, and assessed \$3,000 in fines, fees, and costs. The court further ordered that the probation fee, fines, fees, and costs would be deducted from defendant's bond.

¶ 24 Defendant filed a motion to reconsider sentence, fines, fees, and costs, arguing, among other things, that the court had failed to take into account his financial resources and ability to pay. Following argument, the trial court denied the motion.

¶ 25 Defendant's first contention on appeal is that the trial court erred in denying his motion to dismiss the indictment, which he asserts was based upon false, misleading, and deceptive testimony that denied him due process. Defendant bases his argument on differences between Officer Okrasinski's testimony at the preliminary hearing and before the grand jury. First, he contrasts

Officer Okrasinski's testimony at the preliminary hearing that he saw defendant "toss a small black object over the fence" with his grand jury testimony that defendant tossed "a black handgun" over the fence. Second, he contrasts Officer Okrasinski's preliminary hearing testimony that the gun and magazine were found on opposite sides of the fence with the prosecutor's statements during the grand jury proceedings that the magazine "was in his hands and it was accessible until it separated" and "the magazine and the gun are close together and were accessible with the runner, because he tossed them over the fence." Defendant asserts that Officer Okrasinski changed his testimony so that he and the prosecution could deceive the grand jury into believing both that defendant had been seen with a gun, and that when he held the gun, he was also holding the magazine clip and spent shell casing. According to defendant's argument, "This was a circumstantial case distorted by the prosecutor into an eyewitness case."

¶ 26 Generally, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury. *People v. DiVincenzo*, 183 Ill. 2d 239, 255 (1998). However, a defendant may challenge an indictment that is procured through prosecutorial misconduct. *DiVincenzo*, 183 Ill. 2d at 255. For example, a defendant's due process rights may be violated if the State deliberately misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. *DiVincenzo*, 183 Ill. 2d at 257. Dismissal of the indictment is warranted only if the prosecutorial misconduct affected the grand jury's deliberations. *DiVincenzo*, 183 Ill. 2d at 257. Where a trial court's decision on a motion to dismiss an indictment does not include the determination of any issues of fact, but rather, is based on transcripts, we review *de novo* whether the defendant was denied due process and, if so, whether that denial was prejudicial. *People v. Oliver*, 368 Ill. App. 3d 690, 695 (2006). If we conclude that a prejudicial denial of due process has occurred, we will review the trial court's ultimate decision whether to dismiss the indictment for an abuse of discretion. *Oliver*, 368 Ill. App. 3d at 695.

¶ 27 After reviewing the transcripts, we cannot agree with defendant that Officer Okrasinski's testimony before the grand jury was false, misleading, and deceptive. The differences defendant has identified between the officer's testimony at the preliminary hearing and before the grand jury are, in our view, minor, and occurred simply because the prosecutor did not ask the exact same questions in the exact same manner.

¶ 28 First, at the preliminary hearing, Officer Okrasinski was asked whether, as he ran after defendant, he observed defendant do anything. He answered, "Yes, I did. Upon going towards the fence, I saw him toss a small black object over the fence." He then testified that when he went back to the fence area, he recovered a handgun and a loaded magazine. At the grand jury proceedings, Officer Okrasinski answered affirmatively when asked whether defendant ran from him, whether he chased defendant, and whether they ran by a fence. The prosecutor then asked, "What did he toss over the fence?" to which Officer Okrasinski answered, "A black handgun." The officer's answer to this last question was not dishonest or inconsistent with his testimony at the preliminary hearing. At the preliminary hearing, he was asked what he *saw* defendant throw. In contrast, at the grand jury proceedings, he was asked *what* defendant threw. The officer's answers -- that he saw defendant throw a black object, and that it turned out that what defendant threw was a handgun -- are not contradictory.

¶ 29 Second, on cross-examination at the preliminary hearing, Officer Okrasinski acknowledged that he recovered the gun from one side of the fence and the magazine from the other. At the grand jury proceedings, he agreed with the prosecutor's statements that the magazine "was in [defendant's] hands and it was accessible until it separated" and "the magazine and the gun are close together and were accessible with the runner, because he tossed them over the fence." Again, these two portions of the officer's testimony are not inconsistent. During the grand jury proceedings, Officer Okrasinski was asked about the presumed location of the magazine before defendant threw the gun over the

fence; at the preliminary hearing, he testified as to where he found the magazine after defendant threw the gun. Nothing in the officer's testimony on this point is inherently contradictory, much less misleading or deceptive.

¶ 30 Defendant compares the instant case to *People v. Hunter*, 298 Ill. App. 3d 126 (1998), in which this court upheld the dismissal with prejudice of an indictment that had been obtained by perjured testimony. In *Hunter*, the defendant gave a written statement to the police indicating that he and the codefendant had tied a rope around a couch and lowered it out a window, and that the rope slipped and the couch fell onto the victim's head. *Hunter*, 298 Ill. App. 3d at 128. At the grand jury proceedings, however, when a grand juror asked the testifying detective whether the defendant had given a statement regarding the couch slipping, the detective answered, "[N]o, [o]ne statement by [the defendant] stated that exactly they were removing the couch through the window, they were throwing it out the window." *Hunter*, 298 Ill. App. 3d at 128.

¶ 31 Defendant asserts that Officer Okrasinski's testimony before the grand jury in his case was similarly deceptive and false. We do not agree. In *Hunter*, the detective gave grand jury testimony that was erroneous and directly contradicted by the defendant's written statement. Here, Officer Okrasinski's grand jury testimony, while not identical to his testimony at the preliminary hearing, was not contradictory to it. *Hunter* is distinguishable.

¶ 32 Defendant also compares his case to *People v. Oliver*, 368 Ill. App. 3d 690 (2006). In *Oliver*, a detective testified before the grand jury that he had observed the defendant engage in particular drug transactions, when in reality, his testimony was based on another officer's report and not his personal knowledge. *Oliver*, 368 Ill. App. 3d at 694, 695. Here, defendant argues that as in *Oliver*, the presentation of evidence in the instant case misled the grand jury into believing that Officer Okrasinski was an eyewitness to defendant's possession of both a handgun and a magazine clip. Again, we disagree with defendant's characterization of Officer Okrasinski's testimony. Officer

Okrasinski did not base his grand jury testimony on someone else's observations and attempt to pass off those observations as his own. Rather, Officer Okrasinski was an eyewitness who testified as to what he himself observed. *Oliver* is distinguishable.

¶ 33 Defendant's second contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt where Officer Okrasinski's trial testimony lacked credibility due to inconsistencies between his testimony at the preliminary hearing, before the grand jury, and at trial regarding whether he saw defendant with a gun. Defendant also argues that Officer Okrasinski's trial testimony was insufficient because while he said he saw defendant with a "black object," he never said the object looked like a gun, and there was no evidence that the black object he saw defendant throw over the fence was the gun that was recovered. He asserts that Officer Okrasinski's testimony was "so incredible and inconsistent that he should not have been believed, under any circumstances, about anything." Defendant suggests that the trial court should have instead found defendant not guilty based on Francisco Mendez's testimony that he did not see the man who was running from a police officer throw anything during the chase.

¶ 34 When reviewing the sufficiency of the evidence, the relevant 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 crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). Circumstantial evidence is sufficient to support a conviction as long as the elements of the crime have been proven beyond a reasonable doubt. *People v. Milka*, 211 Ill. 2d 150, 178

(2004). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 35 In the instant case, the State presented sufficient evidence to establish that defendant carried a firearm on or about his person. Officer Okrasinski testified at trial that as he chased defendant, he noticed defendant was holding "a black object" at his side, which he thought was a gun. At a point when he was only three or four feet behind defendant, Officer Okrasinski saw defendant throw the object over a fence. After he caught defendant, he went back to the area where he saw defendant throw the object over the fence and found a handgun on the ground. Viewing this evidence in the light most favorable to the State, we conclude that a reasonable trier of fact could have found defendant possessed a firearm. See *People v. Brown*, 362 Ill. App. 3d 374, 380 (2005) (where an officer saw a silver object being thrown from a car occupied solely by the defendant, and another officer retrieved a handgun on the ground in the area where the object would have landed, the logical conclusion was that the defendant possessed the gun).

¶ 36 It is the role of the finder of fact to judge how flaws in a witness's testimony affect the credibility of the whole. *People v. Cunningham*, 212 Ill. 2d at 283. Here, the trial court was well aware that at the preliminary hearing, Officer Okrasinski testified he saw defendant throw a "small black object" over the fence, that before the grand jury, he stated that defendant threw a "black handgun" over the fence, and that at trial, he testified that he saw defendant throw a "black object" over the fence. In the course of announcing its decision, the trial court addressed the defense theory that these differences showed Officer Okrasinski fabricated his testimony, stating, "Much of the so-called inconsistencies are really insignificant in terms of the evaluation of the case." We agree with the trial court that the differences in the officer's testimony are not so conflicting or contradictory that

they rendered his trial testimony unworthy of belief. As explained above, the officer's testimony was not inherently contradictory, much less misleading or deceptive.

¶ 37 We have examined the purported inconsistencies in Officer Okrasinski's testimony identified by defendant and find that they involve the sort of credibility determinations properly resolved by the trial court in the role of fact-finder. We will not substitute our judgment for the trial court's on these matters. See *Brooks*, 187 Ill. 2d at 131. After reviewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Defendant's challenge to the sufficiency of the evidence fails.

¶ 38 Defendant's final contention on appeal is that when assessing the \$1,500 probation fee and \$3,000 in fines, fees, and costs, the trial court abused its discretion by failing to consider his financial resources and future ability to pay. Defendant bases his argument on section 5-9-1(d)(1) of the Unified Code of Corrections, which provides that "[i]n determining the amount and method of payment of a fine, *** the court shall consider *** the financial resources and future ability of the offender to pay the fine." 730 ILCS 5/5-9-1(d)(1) (West 2008).

¶ 39 The record refutes defendant's claim that the trial court did not consider his financial resources and ability to pay. At sentencing, defendant informed the trial court that he worked full time for an accounting company and supported his two young daughters. The PSI report, which the trial court stated it had considered, indicated that defendant had been employed by the accounting company full time for four years and earned \$12 per hour. At the hearing on the motion to reconsider sentence, defense counsel asserted that defendant made less than \$25,000, from which he paid child support for his two daughters, and argued that no one took into account defendant's ability to pay the assessed charges. The trial court responded that statutorily, defendant could have been assessed up to \$25,000 in fines and costs. Defense counsel acknowledged that a judge could

impose such a fine, but reasserted that defendant's ability to pay had not been considered at sentencing. After further discussion, the trial court responded to defense counsel's argument as follows:

"The [sentencing] judge was well aware of the defendant's job, that he had a job, and that he is supporting his children. The PSI indicates that he was employed. *** [T]he employment was verified and that he had been there for four years. It does indicate exactly what he earns, so the judge was also aware of that."

The court found that the sentencing court had "complied with the statute," and accordingly denied defendant's request to reduce the fines, fees, and costs. In light of the record, defendant's argument fails.

¶ 40 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.