

No. 1-14-0038

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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. 10 CR 6604 |
| |) | |
| GIOVANNI SMITH, |) | Honorable |
| |) | Timothy Joseph Joyce, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We vacated defendant's convictions for aggravated unlawful use of a weapon in light of *People v. Burns*, 2015 IL 117387 and *People v. Mosley*, 2015 IL 115872, reversed his conviction for unlawful use of a weapon by a felon based on his possession of firearm ammunition but affirmed his remaining convictions for unlawful use of a weapon by a felon and aggravated assault over his contention there was insufficient evidence, the trial court shifted the burden of proof to him, the court improperly relied on its own personal knowledge and the court erred in refusing to consider whether he had been acquitted in a prior case. We remand for resentencing.

¶ 2 Following a bench trial, defendant Giovanni Smith was found guilty of multiple counts of aggravated unlawful use of a weapon, unlawful use of a weapon by a felon and aggravated

No. 1-14-0038

assault. After the trial court merged the convictions, it sentenced defendant to concurrent terms of four years' imprisonment for aggravated unlawful use of a weapon and two years' imprisonment for aggravated assault. On appeal, defendant contends: (1) the State failed to present sufficient evidence to prove him guilty where the physical evidence and timeline of events do not support the finding that he possessed a firearm or firearm ammunition, or pointed a firearm at a police officer; (2) the trial court improperly shifted a portion of the burden of proof from the State to him; (3) the trial court erred when it relied on its own personal knowledge of the area where the alleged crime occurred and the feelings of area residents toward firearms; and (4) the trial court erred when it allowed into evidence testimony related to his prior arrest on a weapons charge, but refused to consider evidence that he was acquitted in that case. We vacate defendant's three convictions for aggravated unlawful use of a weapon (counts 1, 3 and 5) pursuant to *People v. Burns*, 2015 IL 117387 and *People v. Mosley*, 2015 IL 115872. We reverse his conviction for unlawful use of a weapon by a felon based on his possession of firearm ammunition (count 8), but affirm his remaining convictions and remand for resentencing (counts 7, 9 and 10).

¶ 3 The State charged defendant with six counts of aggravated unlawful use of a weapon: counts 1 and 3 based on carrying a firearm on his person and in his vehicle that was uncased, loaded and immediately accessible at the time of the offense (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), counts 2 and 4 based on carrying a firearm on his person and in his vehicle without a Firearm Owner's Identification (FOID) Card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)), count 5 based on carrying a firearm on his person on a public street that was uncased, loaded and immediately accessible at the time of the offense (720 ILCS 5/24-1.6(a)(2), (a)(3)(A)

No. 1-14-0038

(West 2010)), and count 6 based on carrying a firearm on his person on a public street without a FOID Card (720 ILCS 5/24-1.6(a)(2), (a)(3)(C) (West 2010)). The State also charged defendant with two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), count 7 based on knowingly possessing a firearm and count 8 based on knowingly possessing firearm ammunition, and two counts of aggravated assault (counts 9 and 10) (720 ILCS 5/12-2(a)(6) (West 2010)).

¶ 4 At trial, Chicago police officer Deronis Cooper testified that, on the evening of March 18, 2010, he helped pursue a vehicle that had fled the police after a traffic stop. Eventually, the vehicle crashed into a utility pole in an alley near 1430 South Michigan Avenue. Defendant was an occupant of the vehicle and, after it crashed, he fled on foot. Officer Cooper searched the vehicle and recovered a .40-caliber Smith and Wesson semiautomatic handgun and two Glock magazines. Defendant was apprehended and arrested, along with three other men, on weapons charges.

¶ 5 In the morning of March 22, 2010, Officer Cooper received a telephone call from a federal agent, alerting him that four men were looking in the alley where defendant's vehicle had crashed. Officer Cooper explained this was significant because, while he had recovered a firearm and two magazines of ammunition four days prior, the police were still searching for a firearm that matched the ammunition. Officer Cooper testified that, as a result, that night at approximately 8:15 or 8:20 p.m., he went to the alley with his partner, Chicago police sergeant Cornelius Brown, who also testified at defendant's trial, but had not been involved with his prior arrest. Officer Cooper parked their police vehicle in the alley, located between 14th and 15th Streets and near Michigan Avenue. Approximately five minutes after arriving according to

No. 1-14-0038

Officer Cooper and less than one minute after arriving according to Sergeant Brown, they observed defendant, alone in a white vehicle, drive past their vehicle in the alley. Officer Cooper recognized him from the earlier incident. Defendant was not wearing a seatbelt. The officers activated their lights and sirens and pulled defendant over.

¶ 6 Sergeant Brown testified that, although it was "nighttime," the alley was illuminated by "good clear streetlights." Both officers exited their vehicle. Because they left the vehicle running, the headlights were on. As they began to approach defendant's vehicle, Sergeant Brown noticed the vehicle's brake lights were still illuminated and alerted Officer Cooper. Officer Cooper yelled at defendant to put his vehicle in park and turn it off. Officer Cooper approached the vehicle's driver side while Sergeant Brown approached the passenger side with a flashlight directed at the interior of the vehicle. Sergeant Brown stated he had a "clear unobstructed view" of defendant. Officer Cooper heard defendant yell "leave [me] the f*** alone."

¶ 7 Sergeant Brown then observed defendant put his hands underneath a garment on the passenger's seat. Sergeant Brown alerted Officer Cooper that defendant was "moving" and that he could not see defendant's hands. Sergeant Brown testified that defendant grabbed a semiautomatic handgun and pointed the firearm directly at him. Sergeant Brown yelled "[g]un, gun, gun," retreated, drew his weapon and fired two rounds at defendant. Although Sergeant Brown only saw the firearm "momentar[ily]," he stated he was "one hundred percent positive that it was a firearm," based on his 19 years of experience as a police officer and personal experience handling firearms. Officer Cooper did not see the firearm. He had not yet reached defendant's driver side window when he heard Sergeant Brown yell "gun, gun, gun," at which

No. 1-14-0038

point Officer Cooper retreated. After Sergeant Brown fired his weapon, defendant drove his vehicle northbound through the alley toward 14th Street.

¶ 8 Officer Cooper and Sergeant Brown got in their vehicle and followed defendant. Once defendant arrived at 14th Street, he turned right and headed toward Michigan Avenue where he ran a red light. As the officers approached the red light, they had to "break traffic" and proceed cautiously through the intersection. Defendant continued to Indiana Avenue where he turned left and headed toward Roosevelt Road. There, he turned right and headed toward Lake Shore Drive, where Sergeant Brown and Officer Cooper lost sight of him. During their pursuit of defendant's vehicle, Officer Cooper stated the vehicle drove past 1211 and 1343 South Indiana Avenue. Officer Cooper stated their vehicle remained about a half block behind defendant's vehicle, and he never saw anything come out of the windows of defendant's vehicle. After losing sight of defendant, Officer Cooper and Sergeant Brown used their radio to report the incident. They then unsuccessfully searched for defendant and later returned to the alley.

¶ 9 On cross-examination, Sergeant Brown stated the incident on March 22 with defendant occurred at approximately 9 p.m. On re-direct examination, he acknowledged testifying during direct examination that the incident occurred around 9:15 p.m., but agreed the incident actually occurred at 8:20 p.m. However, he later acknowledged testifying at a preliminary hearing and stating the incident occurred at approximately 10:20 p.m. He then clarified that the incident occurred at 8:15 p.m.

¶ 10 At around 9 p.m. on the night in question, Chicago police officer James Brill drove to an area near 1400 South Michigan Avenue after hearing a radio call of an officer needing help in an alley. Officer Brill received information from onlookers that a vehicle had "sped off" eastbound

No. 1-14-0038

down the street. He began to walk in that direction. At approximately 1343 South Indiana Avenue, in the median of the street, he found a loaded 9-millimeter magazine and two loose 9-millimeter rounds. He found the ammunition about 400 feet from where he started walking and "four or five minutes" after hearing the radio call. A few minutes later, an evidence technician arrived at the scene, recovered and subsequently inventoried the ammunition, which the parties stipulated was a 9-millimeter Smith and Wesson magazine and two live 9-millimeter rounds. No one touched the magazine or bullets until the evidence technician arrived. Officer Brill acknowledged preparing a report in the case, but did not believe he included the time he arrived on the scene.

¶ 11 Robert Corsentino testified that, on the night in question, he lived in the South Loop in Chicago with his daughter. At approximately 8 or 9 p.m., his daughter returned home from work and told him that she thought she had observed a firearm on the street. Mr. Corsentino immediately left his residence, got in his vehicle, drove to the middle of South Indiana Avenue "approximately 30 feet" south of Roosevelt Road and observed a black 9-millimeter firearm. Without wearing any gloves, Mr. Corsentino picked up the weapon, unloaded it, put it in the back of his vehicle and called the police. The police arrived shortly thereafter. He gave them the firearm, which the parties stipulated was a Smith and Wesson 9-millimeter handgun, and several live rounds of ammunition. Mr. Corsentino estimated "it had to be five minutes" from the time his daughter told him about the firearm to when he actually recovered it. He acknowledged he found the firearm near a building under construction, but could not recall telling the police that he observed two vehicles pulling into the construction site around the time he recovered the firearm.

No. 1-14-0038

¶ 12 Chicago police detective John Korolis investigated the police-involved shooting and learned evidence had been recovered near the scene of the shooting, including a Smith and Wesson 9-millimeter handgun and a 9-millimeter magazine that "would have fit" the handgun. Detective Korolis submitted the firearm and ammunition for fingerprint testing, but the results were not suitable for identification. He did not submit either for DNA testing because they were "too dirty" after being "exposed to the elements for too long" near a "dusty" construction site.

¶ 13 Detective Korolis also testified to certain "calls" made in connection with the case. He referred to a document called an "event query," which logs all events related to an initial 911 call. The first call listed on the event query occurred at 8:21 p.m. from an officer using his police radio alerting that "in the alley at white TIA and there's a vehicle northbound on Michigan over to Roosevelt." Detective Korolis stated a separate event query listed a call at 8:23 p.m. and 37 seconds from a "Corbentino," regarding a "gun turn in." Detective Korolis, who had interviewed Mr. Corsentino in connection with this case, believed "Corbentino" was a misspelling of Mr. Corsentino's last name. Based on Detective Korolis' subsequent interviews of Officers Cooper and Sergeant Brown, who identified defendant, and the recovery of the firearm and ammunition, Detective Korolis "ordered that [defendant] be arrested," which he believed eventually occurred on March 27, 2010.

¶ 14 Detective Korolis denied that Mr. Corsentino told him he saw two vehicles pull into a construction site around the time he recovered the firearm from the street, but acknowledged including in his report that Mr. Corsentino told this to Chicago police detective Patty Martin. The parties stipulated that, if Detective Martin were to testify, she would have stated Mr. Corsentino told her that he observed two vehicles pull into a construction site that night.

No. 1-14-0038

¶ 15 The parties also stipulated that if Chicago police officer Claudio Salgado were to testify, he would have stated that while he was working at a police station on the night in question at approximately 9 p.m., he received a phone call from an individual who identified himself as defendant. That individual told Officer Salgado he had been the victim of a police shooting in an alley between Michigan and Wabash Avenues an hour earlier, where an officer who had arrested him the prior week had shot at him. The man told Officer Salgado that he did not know what to do. Officer Salgado told the man to turn himself in to the police, but the man did not trust the police and refused. The man provided Officer Salgado his cell phone number, and the name, phone number and business address of his attorney. Officer Salgado asked the man where he was located, and the man told him "it's the same place I said last week." Officer Salgado also asked what type of vehicle the man drove, and the man responded that it was a rental vehicle, but he did not know the make and model of it. The man then hung up.

¶ 16 Twenty minutes later, Officer Salgado called the number the man had provided, and the individual who answered said "I'm f*** up." Officer Salgado asked if he or anyone else had been wounded, but the man simply stated "no" and "I f*** it up." The man further told Officer Salgado that he would not speak to any other police officers except Officer Salgado and would turn himself in. Afterward, "the call was terminated."

¶ 17 After resting its case, the State requested, and was granted over defendant's objection, leave to re-open its case in chief to submit into evidence a certified copy of defendant's conviction for the manufacturing and delivery of cannabis in case number 07 CR 12595 to support the charges of unlawful use of a weapon by a felon.

¶ 18 Defendant moved for a directed finding, but the trial court denied the motion.

No. 1-14-0038

¶ 19 Defendant testified that he worked as a plumbing assistant for a plumbing company. He acknowledged being arrested by Chicago police officers, including Officer Cooper, on the evening of March 18, 2010, in an alley. He stated he was released from custody two days later. On March 22, 2010, he went to "the pound" and obtained his vehicle that he had crashed a few days prior. He showed his driver's license, vehicle registration and valid proof of insurance, depicted in defendant's exhibit number 2, at the pound.

¶ 20 After retrieving his vehicle, he had it towed to an automobile repair shop and called State Farm insurance company to alert them to the vehicle's location. A representative from State Farm told defendant that, in order to submit an insurance claim for his vehicle, he needed photographs of the scene of the accident and a police report. Defendant then drove to the alley in an Avis rental vehicle to take photographs with his cell phone's camera. He testified he arrived between 7 and 7:30 p.m.

¶ 21 The alley was located between Michigan and Wabash Avenues, stretching from 14th to 16th Streets. The pole that defendant had crashed into was located closer to 16th Street in the alley. Defendant entered the alley off 16th Street, but could not stop to take photographs because two other vehicles were in the alley, a police vehicle traveling north and another vehicle traveling south. Defendant drove around the police vehicle, heading north in the alley, when he realized it was following him closely. He pulled over to the side of the alley to let the police vehicle pass him, but the police put their emergency lights on.

¶ 22 Two officers approached defendant, one on the driver's side and one on the passenger's side, although later defendant stated he "didn't really see" the officer on his passenger side. Officer Cooper, whom he recognized from his prior arrest, told defendant to exit his vehicle.

No. 1-14-0038

Defendant responded that he had not done anything wrong and told Officer Cooper he had his driver's license and insurance. Defendant put his vehicle in park, but left it running. In defendant's right hand, he was holding his black cell phone with a black and white case, but put the phone down when Officer Cooper approached. Suddenly, defendant heard two "booms" from the rear of the vehicle. He recognized them as gunshots and "sped off." He did not see from where the gunshots came. Defendant denied that he had a firearm or ammunition on him that night, or that he pointed a firearm at Sergeant Brown. He stated the only object in his hand was his cell phone. He added that, because his vehicle was a rental, he did not have any clothes on the passenger seat.

¶ 23 Defendant drove to a friend's house and called "311" to obtain the phone number for the Office of Professional Standards (OPS). Although defendant did not look at the time, he thought he called 311 at 8 or 8:15 p.m. The individual he spoke with gave him the phone number for the First District of the Chicago Police Department, which defendant called. He told an officer his name and that he "was in fear of [his] life," explaining that he had been arrested a few days prior and the "same officers shot at [him] for no reason." He told the officer where the incident occurred, what type of vehicle he was driving, his telephone number and the name of his attorney. He told the officer he wanted the phone number for OPS. The officer told defendant to come to the police station, but defendant refused because he was "afraid." Eventually, the call between defendant and the officer terminated because either defendant hung up or he lost the signal. However, the officer called defendant back and asked him if he was hurt. Defendant told the officer "it's f*** up what's going on out here." He denied telling the officer that he "f*** up."

No. 1-14-0038

¶ 24 The following day, defendant talked to his attorney, who told him to report the incident to OPS. Defendant called OPS and told an individual that two officers who had arrested him a few days prior had shot at him for no reason. The individual asked defendant if he knew the officers' names, but defendant did not. He also gave the individual the name and telephone number of his attorney. Three days later, the police arrested defendant at the courthouse when he appeared for a preliminary hearing for the incidents that occurred on March 18.

¶ 25 In rebuttal, Officer Cooper stated that Sergeant Brown alerted other officers via radio about the incident on March 22 only after they lost sight of defendant during the vehicle chase. Officer Cooper stated that it took approximately one minute from when Sergeant Brown fired his weapon to radio in the incident because Sergeant Brown had to find the right "zone" on his radio. Officer Cooper explained that Chicago was divided into 13 different zones based on geographical location, and they were in zone 4 that night. By finding zone 4 on the radio, Sergeant Brown could alert the officers closest to them.

¶ 26 Following argument, the trial court found defendant not guilty of three counts of aggravated unlawful use of a weapon (counts 2, 4 and 6), the charges involving the lack of a FOID Card. The court found defendant guilty of the remaining three counts of aggravated unlawful use of a weapon (counts 1, 3 and 5), two counts of unlawful use of a weapon by a felon (counts 7 and 8) and two counts of aggravated assault (counts 9 and 10).

¶ 27 The court rejected the defense theory that there was too short a time frame from when defendant allegedly pointed the firearm at Sergeant Brown to when Mr. Corsentino discovered the firearm on the street for the weapon to be defendant's. The court observed that it would be a "coincidence beyond estimation" that, along the very path defendant's vehicle traveled that night,

No. 1-14-0038

the police would find ammunition and Mr. Corsentino would find a firearm. The court also stated "I don't believe [defendant]," finding his explanation that he was in the alley that night in order to take photographs to submit with an insurance claim unbelievable. Conversely, the court found Officer Cooper and Sergeant Brown credible. It found that the officers' delay in reporting the incident on the radio was not significant, noting that the officers "would anticipate justly the traffic on Michigan Avenue and 14th Street would be busy. It's a busy commercial area these days, after having been an area that's somewhat blighted, it's very dynamic now." The court further stated that, because of the busy location, the officers would have had to "take their time" in traveling through a red light.

¶ 28 Defendant filed a motion for new trial, which the trial court denied. The court subsequently merged the five weapons convictions into one conviction for aggravated unlawful use of a weapon and merged both aggravated assaults convictions. The court sentenced defendant to concurrent terms of four years' imprisonment for aggravated unlawful use of a weapon and two years' imprisonment for aggravated assault. This appeal followed.

¶ 29 In defendant's opening brief, he argued that his convictions for aggravated unlawful use of a weapon and aggravated assault had not been proven beyond a reasonable doubt. Initially, however, we address an issue raised in the State's brief. The State contends, and defendant agrees in his reply brief, that his three convictions for aggravated unlawful use of a weapon (counts 1, 3 and 5) must be vacated in light of *Burns*, 2015 IL 117387 and *Mosley*, 2015 IL 115872. We agree.

¶ 30 In *Burns* and *Mosley*, taken together, our supreme court held that the sections in the aggravated unlawful use of a weapon statute that prohibit carrying an uncased, loaded and

No. 1-14-0038

immediately accessible firearm on one's person or in any vehicle, or on a public way (720 ILCS 5/24-1.6(a)(1) (West 2010), 720 ILCS 5/24-1.6(a)(3)(A) (West 2010); 720 ILCS 5/24-1.6(a)(2) (West 2010), 720 ILCS 5/24-1.6(a)(3)(A) (West 2010)), are unconstitutional. *Burns*, 2015 IL 117387, ¶¶ 25, 32; *Mosley*, 2015 IL 115872, ¶¶ 25, 61. Defendant was charged and convicted of aggravated unlawful use of a weapon under these sections. When a statute is declared unconstitutional, it is void *ab initio*, or as if the law never existed. *People v. Davis*, 2014 IL 115595, ¶ 25. A defendant cannot be sentenced pursuant to a statute declared unconstitutional. *People v. Taylor*, 2015 IL 117267, ¶ 19. Accordingly, in light of *Burns* and *Mosley*, we must vacate defendant's three convictions for aggravated unlawful use of a weapon. *Burns*, 2015 IL 117387, ¶ 32; *Mosley*, 2015 IL 115872, ¶ 61.

¶ 31 Given that we must vacate these three convictions, defendant contends in his reply brief that his remaining convictions for unlawful use of a weapon by a felon and aggravated assault must be reversed because the State failed to prove him guilty of them beyond a reasonable doubt.

¶ 32 When a defendant challenges his convictions based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crimes proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. The positive and credible testimony of a single witness is sufficient evidence to convict a defendant even if he presents contradictory evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). While we must carefully examine the evidence before us, we must give proper deference to the trier of fact who observed the witnesses testify

No. 1-14-0038

(*Brown*, 2013 IL 114196, ¶ 48), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. Despite this highly deferential standard, if the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt," we will overturn his convictions. *Brown*, 2013 IL 114196, ¶ 48.

¶ 33 We first examine whether there was sufficient evidence to prove defendant committed aggravated assault. To sustain his two convictions for the offense, the State had to prove that defendant placed a peace officer, Sergeant Brown, in reasonable apprehension of receiving a battery by pointing a firearm at him. 720 ILCS 5/12-1(a) (West 2010), 720 ILCS 5/12-2(a)(6) (West 2010); see *People v. Taylor*, 2015 IL App (1st) 131290, ¶ 12. Defendant does not contest that, if he actually pointed a firearm at Sergeant Brown, this conduct would have placed Sergeant Brown in reasonable apprehension of receiving a battery. Rather, defendant asserts that the evidence fails to support the finding that he pointed a firearm at Sergeant Brown.

¶ 34 Viewing the evidence in the light most favorable to the State, and making all reasonable inferences in its favor, a rational trier of fact could have found beyond a reasonable doubt that defendant pointed a firearm at Sergeant Brown. Sergeant Brown testified that, when he approached defendant's vehicle, defendant placed his hands underneath a garment on the passenger seat. Defendant then took out a firearm and pointed it directly at Sergeant Brown, which caused Sergeant Brown to fire his weapon at defendant. Sergeant Brown testified he had a clear and unobstructed view of the interior of the vehicle. The alley was illuminated by streetlights, the headlights of Sergeant Brown's police vehicle were on and Sergeant Brown had

No. 1-14-0038

flashlight directed toward the interior of defendant's vehicle. Sergeant Brown, who had been a police officer for 19 years and whose testimony the trial court found credible, testified that the object in defendant's hand was a semiautomatic handgun and stated he was positive it was a firearm despite only seeing it briefly. Because the positive and credible testimony of a single witness is sufficient evidence to sustain a conviction (see *Siguenza-Brito*, 235 Ill. 2d at 228), Sergeant Brown's testimony provided sufficient evidence to convict defendant of both aggravated assaults.

¶ 35 We next examine whether there was sufficient evidence to prove defendant possessed a firearm and firearm ammunition to support his unlawful use of a weapon by a felon convictions. To sustain these convictions, the State had to prove that he was a felon and he knowingly possessed a firearm or firearm ammunition. 720 ILCS 5/24-1.1(a) (West 2010); see *People v. Adams*, 388 Ill. App. 3d 762, 766 (2009). Defendant does not contest his status as a felon, thereby conceding this element of the offense was sufficiently proven. Rather, defendant asserts that the evidence fails to support the finding that he possessed either a firearm or firearm ammunition.

¶ 36 Possession may be actual or constructive. *People v. Alicea*, 2013 IL App (1st) 112602, ¶ 24. Actual possession can be proven with evidence that the defendant exercised some form of dominion over the weapon. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). When the defendant is not found in actual possession of a weapon, the State must prove constructive possession, which it may do by establishing the defendant: (1) knew a weapon was present; and (2) exercised immediate and exclusive control over the area where the weapon was found. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. Constructive possession is often exclusively

No. 1-14-0038

proven through circumstantial evidence. *People v. Smith*, 2015 IL App (1st) 132176, ¶ 26. The defendant's mere presence in the vicinity of the location where the weapon was found, however, is insufficient evidence to establish constructive possession. *Sams*, 2013 IL App (1st) 121431, ¶ 13.

¶ 37 Viewing the evidence in the light most favorable to the State, and making all reasonable inferences in its favor, a rational trier of fact could have found beyond a reasonable doubt that defendant possessed a firearm. Sergeant Brown, whose testimony the trial court found credible, testified adamantly that defendant had a firearm and pointed it at him. See *In re Angel P.*, 2014 IL App (1st) 121749, ¶ 52 (police officer's testimony that the defendant had a pistol in his hand was sufficient evidence to prove his actual possession of a firearm). The evidence also revealed a strong opportunity for Sergeant Brown to make this identification. Because the positive and credible testimony of a single witness is sufficient evidence to sustain a conviction (see *Siguenza-Brito*, 235 Ill. 2d at 228), Sergeant Brown's testimony provided sufficient evidence to prove defendant had actual possession of a firearm to support his conviction for unlawful use of a weapon by a felon based on possession of a firearm.

¶ 38 Defendant argues, however, that we must reject the trial court's credibility determination in favor of Sergeant Brown and find his testimony "incredible." As previously noted, credibility determinations are within the purview of the trier of fact, not the reviewing court. See *Vaughn*, 2011 IL App (1st) 092834, ¶ 24. Although we must heavily defer to the trier of fact on issues of witness credibility, those determinations are not conclusive or binding (*In re Jonathon C.B.*, 2011 IL 107750, ¶ 59), and may be rejected if the witness was "so wholly incredible or so thoroughly impeached that [his testimony] is incapable of being used as evidence against

No. 1-14-0038

defendant." *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 15. We do not find this is the case with Sergeant Brown's testimony, which was only minimally impeached with inconsistent testimony regarding what time he and Officer Cooper arrived at the alley on the night in question. Furthermore, Sergeant Brown's testimony was not wholly incredible. The parties' stipulation that Officer Salgado would have testified that defendant told him "I f*** it up," supports Sergeant Brown's testimony that defendant pointed a firearm at him.

¶ 39 Defendant also argues his testimony should be believed over Sergeant Brown's as he called the police shortly after the incident and because his version was more supported by the evidence. However, when defendant chose to testify, he placed his credibility at issue just as any other witness. *In re A.M.*, 274 Ill. App. 3d 702, 713 (1995); *People v. Clark*, 55 Ill. App. 3d 379, 391 (1977). As such, when he explained his version of events, he was bound to tell a reasonable story or be judged by its improbabilities. *People v. Williams*, 209 Ill. App. 3d 709, 721 (1991). In defendant's version of events, he was in the alley, at night, with his cell phone at the behest of a State Farm insurance company representative in order to submit an insurance claim on the vehicle he had crashed while attempting to flee from the police a few days prior. He asserted that he had no firearm and only his cell phone that night. With nothing to corroborate defendant's version of events, the court found his testimony to be incredible after hearing him testify and observing his demeanor. There is no basis in this record to overrule the trial court's credibility determinations.

¶ 40 Finally, with respect to defendant's remaining conviction for unlawful use of a weapon by a felon based on his possession of, as charged in the information, "firearm ammunition," we find insufficient evidence that he possessed either the ammunition found in the firearm recovered by

No. 1-14-0038

Mr. Corsentino or the magazine and loose bullets found in the median by Officer Brill. The only evidence presented at trial that connected defendant to either the firearm or the magazine and loose bullets was the fact that they were found on South Indiana Avenue along the very route defendant's vehicle traveled. However, defendant's "mere presence in the vicinity of the location where the contraband was found is insufficient evidence to establish his constructive possession." *Sams*, 2013 IL App (1st) 121431, ¶ 13.

¶ 41 Other than their proximity to the street defendant traveled, there was no other evidence presented connecting defendant to the firearm or magazine and loose bullets. Sergeant Brown never testified that the firearm defendant pointed at him was the same firearm recovered by Mr. Corsentino. The firearm recovered by Mr. Corsentino was also dusty and dirty, yet Sergeant Brown never described the firearm pointed at him as dusty or dirty. Neither Sergeant Brown nor Officer Cooper testified to seeing defendant throw anything out of the window of his vehicle during their pursuit of him. Fingerprint testing of the firearm and magazine came back negative, and the police did not submit either for DNA testing. Further, the timeline evidence contained too many questions to convince us that the firearm observed by Sergeant Brown was the same one recovered by Mr. Corsentino. In short, we find the evidence that defendant possessed firearm ammunition to be so unsatisfactory as to justify a reasonable doubt of his guilt for the offense. We therefore reverse defendant's conviction for unlawful use of a weapon by a felon based on "firearm ammunition."

¶ 42 Defendant additionally contends that the trial court improperly shifted a portion of the burden of proof from the State to him when it stated, after discussing the conflicting evidence regarding whether Mr. Corsentino saw two vehicles enter the construction site near where he

recovered the firearm, "[t]hat point doesn't evince a doubt about [defendant's] guilt" and later "[s]o the existence of those two cars if in point of fact they existed doesn't do anything to raise a doubt regarding [defendant's] guilt. Neither does the no DNA testing." Defendant also alleges the trial court improperly relied on its own personal knowledge of the area where the alleged crimes occurred and the feelings of the area residents toward firearms in finding him guilty. The court's allegedly improper comments on both issues, however, only related to the evidence recovered on the street. Based on our resolution of defendant's sufficiency of the evidence contention, in which we relied only on Sergeant Brown's testimony, not on any of the evidence recovered on the street, we need not address these arguments.

¶ 43 Defendant also contends that the trial court's conclusion that he had returned to the alley on the night in question to retrieve firearms he and his companions had hidden was unfounded. We note, however, that the court made the challenged comment about defendant's return to the alley during sentencing, not when announcing the verdict and explaining its reasoning. As defendant makes no argument that these comments led to an increased sentence, we find it unnecessary to address this argument in the context of the evidence at trial because the comments occurred at an entirely different proceeding. We will not speculate on whether comments made by the trial court during a sentencing hearing reflect its reasoning in reaching a guilty verdict.

¶ 44 Lastly, defendant contends that the trial court's various errors were "compounded" when it allowed into evidence testimony related to defendant's March 18, 2010, arrest on a weapons charge, but refused to consider evidence that defendant was acquitted in that case. Defendant acknowledges he failed to preserve this claim of error for review by not raising it in the trial

No. 1-14-0038

court, but asserts that plain-error review is appropriate. Before determining if an error is plain error, we must first determine whether an error actually occurred. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 45 During defendant's trial, Officer Cooper testified to the incident of March 18 where defendant had crashed his vehicle into a pole in the alley and then attempted to flee from the police. Officer Cooper further stated that defendant was eventually arrested and charged with a weapons offense. During defense counsel's cross-examination of Officer Cooper, the State objected to counsel's question as to whether defendant had been acquitted of that charge. The trial court sustained the objection and prevented defense counsel from further inquiry, finding "what some other fact finder decided about something is irrelevant."

¶ 46 Although defendant argues the court's other errors were compounded by this error, he also asserts the court's refusal to consider evidence that he was acquitted of the charge, standing alone, was reversible error, relying on *People v. Bedoya*, 325 Ill. App. 3d 926 (2001). In *Bedoya*, during a defendant's jury trial for murder, the State introduced into evidence that he had been previously charged with aggravated discharge of a firearm in order to show his mental state at the time of the alleged murder. *Id.* at 928. The defendant, however, was precluded from introducing evidence that he was acquitted of the charges. *Id.* The jury subsequently found him guilty of murder. *Id.* at 937. The appellate court reversed the defendant's murder conviction, finding that "[f]airness required disclosure" that the defendant had been acquitted of the charges because the "jury could have been left with the false impression that those 'offenses' were alive and pending" and thus, "[t]he risk of misleading or overpersuading the jury [was] palpable." *Id.* at 943.

¶ 47 In *Bedoya*, the purpose of the defendant's prior aggravated discharge of a firearm charge was as proof of other-crimes evidence in order to show his mental state at the time of the alleged murder, *i.e.*, that, because he did intend to fire a gun during a previous incident, he also intended to fire his gun at the victim when he allegedly committed murder. *Id.* at 928, 937. Because the State had to show the defendant intentionally fired his gun at the victim in order to prove murder (*id.* at 939), the other-crimes evidence was relevant to this critical issue. Given the purpose of this evidence, whether the defendant had been acquitted of the aggravated discharge of a firearm charge was relevant to the issue of defendant's intent to commit the alleged murder.

¶ 48 Here, as defendant acknowledges, the purpose of Officer Cooper's testimony regarding the incident on March 18 was merely to show course of police conduct, *i.e.*, why he and Sergeant Brown went to the alley on March 22. See *People v. Risper*, 2015 IL App (1st) 130993, ¶ 39 (stating the relevance of course of police conduct testimony "lies in explaining to the [trier of fact] how a law enforcement investigation led to the defendant"). Officer Cooper's testimony was not admitted to substantively show that defendant had been charged with a crime as a result of the incident on March 18, but rather to provide context to the officers' presence in the alley on March 22. See *id.* (explaining that course of police conduct testimony "is offered not to prove the truth of the matter asserted" but rather to show the trier of fact "how an officer got from point A to point C"). Therefore, *Bedoya* is distinguishable from the present case.

¶ 49 The proper framing of this claim of error is one of evidentiary relevance, and whether the trial court erred in excluding evidence that defendant might have been acquitted of the weapons charge. "A trial court's finding concerning whether evidence is relevant and admissible will not be reversed absent a clear abuse of discretion." *People v. Morris*, 2013 IL App (1st) 111251,

No. 1-14-0038

¶ 100. Because the purpose of Officer Cooper's testimony was only to show his and Sergeant Brown's course of conduct, the court did not abuse its discretion in finding evidence of defendant's acquittal irrelevant and precluding defense counsel's inquiry into it.

¶ 50 Because the trial court did not abuse its discretion, there can be no plain error. See *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Defendant's final alternative argument that his trial counsel was ineffective for failing to preserve this claim of error for review must also fail. If there was no error in the first instance, counsel cannot be considered ineffective. See *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 28. Accordingly, we affirm defendant's remaining convictions.

¶ 51 In light of the foregoing, we vacate defendant's three convictions for aggravated unlawful use of a weapon (counts 1, 3 and 5), reverse his conviction for unlawful use of a weapon by a felon based on his possession of firearm ammunition (count 8), but affirm his remaining convictions for unlawful use of a weapon by a felon and aggravated assault (counts 7, 9 and 10). Consequently, the sole issue remaining concerns resentencing. The parties disagree regarding resentencing. The State asserts that we should remand the matter to the trial court for resentencing on only the one remaining conviction for unlawful use of a weapon by a felon that had previously been merged into his aggravated unlawful use of a weapon conviction. Defendant asserts that we should remand the matter to the trial court for resentencing on not just his remaining conviction for unlawful use of a weapon by a felon, but also on his two affirmed convictions for aggravated assault.

¶ 52 We find *People v. Hurry*, 2013 IL App (3d) 100150-B, instructive. In *Hurry*, the defendant had been convicted of 10 counts of predatory criminal sexual assault of a child and

No. 1-14-0038

sentenced to consecutive terms of imprisonment totaling 108 years. *Id.* ¶ 2. The appellate court affirmed three counts, reduced two counts to aggravated criminal sexual abuse and reversed the remaining five counts. *Id.* The defendant argued that the appellate court should remand his case for resentencing on not only the two reduced counts, but on the three affirmed counts as well. *Id.* ¶ 23. The court remanded only the two reduced counts for resentencing. *Id.* ¶ 27.

¶ 53 The appellate court observed that our supreme court had held "that remand for resentencing is not required where: (1) the [trial] court sentenced defendant separately on each conviction; and (2) the record does not otherwise show that the court considered the vacated convictions in imposing sentence on the remaining convictions." *Id.* ¶ 23 (citing *People v. Maggette*, 195 Ill. 2d 336 (2001)). The court found that defendant had been sentenced separately on each conviction, and the record did not establish that the trial court considered the since-vacated convictions in imposing sentences on the remaining convictions. *Id.* ¶¶ 24-25. Accordingly, the appellate court remanded only the reduced counts for resentencing. *Id.* ¶ 27.

¶ 54 Here, the trial court did not sentence defendant separately on each conviction. Rather, the court merged defendant's 10 convictions into two convictions, one for aggravated unlawful use of a weapon and one for aggravated assault, and subsequently sentenced him to four years' and two years' imprisonment, respectively. Therefore, remand for resentencing is warranted on all of defendant's remaining convictions. See *id.* ¶ 23.

¶ 55 For the foregoing reasons, we vacate defendant's three convictions for aggravated unlawful use of a weapon (counts 1, 3 and 5), reverse his conviction for unlawful use of a weapon by a felon based on his possession of firearm ammunition (count 8), but affirm his

No. 1-14-0038

remaining convictions for unlawful use of a weapon by a felon and aggravated assault (counts 7, 9 and 10). We remand the matter for resentencing on those convictions.

¶ 56 Affirmed in part; reversed in part; vacated in part; remanded in part.