



presented at trial failed to prove beyond a reasonable doubt that his accomplice was armed with an actual firearm and challenges fees imposed by the trial court. We affirm as modified.

¶ 3 Defendant and codefendant Marcus Shaw were charged with one count of armed robbery and one count of vehicular invasion. Relevant here is the armed robbery charge, which alleged defendants "knowingly took property \*\*\* from \*\*\* Camella Allen, by the use of force or threatening the imminent use of force and they carried on or about their persons or were otherwise armed with a firearm." 720 ILCS 5/18-2(a)(2) (West 2012). Defendant and Shaw were tried simultaneously in severed bench trials. Shaw is not a party to this appeal.

¶ 4 At trial, Camella Allen testified that, on the afternoon of September 20, 2012, she and her cousin Camilya Allen were sitting in her car. It was "a nice day" and she was parked at Marquette Park. Camella's driver's side window was down approximately three inches. She was on her phone when "a young man," subsequently identified as Marcus Shaw, "came and tapped the window." Camella saw "he had a gun to the window." Shaw demanded she "hurry up and give me your things because I don't want to shoot you." Camella testified that the gun "was silver, \*\*\* like a chrome gun," and that it was "an automatic." She knew it was an automatic because she was "taking gun classes now." Camella testified that she knew the difference between "a semiautomatic gun and a revolver" and, when asked by the State if the gun was "a semiautomatic handgun," she replied that it was.

¶ 5 Shaw was wearing his hood up but his face was exposed so Camella had a clear view of it. She testified Shaw "put the gun inside of the crack inside of the window" and demanded she hand over her "things." Camella gave him her car keys and purse, which contained "roughly \*\*\* \$150" cash. Shaw took the purse and the keys and "kind of skipped off" toward the rear of the

car. Camella and her cousin both called the police, who arrived "less than a minute" later. The officers took Camella to identify "a young man and a young lady" they had detained on the opposite side of the park. She could not identify them and returned to her vehicle. Later that day, Camella was shown a photo array and recognized Shaw as the man who "ran up to the car and pulled out the gun and robbed me."

¶ 6 Camilya Allen testified that, on September 20, 2012, she was seated in the front passenger's seat of Camella's car, parked near Marquette Park, with her niece and a friend asleep in the back seat. Her window was down and Camella's driver's side window was "slightly cracked." Camilya observed two men and one woman, all African American, "a couple of feet" in front of the car. The group walked past on Camilya's side of the vehicle towards the rear of the car, where Camilya could still "kind of" see them in the rear-view mirror.

¶ 7 Approximately two minutes after the group passed, a "young man" with "a gun in his hands," subsequently identified as Shaw, approached the vehicle. He announced that he was committing a robbery, demanded Camella's purse, and warned Camella and Camilya that he did not want to kill them. He held the gun, which Camilya recalled as being silver, against the window. Camilya testified that the gun "was like slightly halfway in the window," pointed at Camella's head. Camella handed her car keys and purse through the cracked window. While the robbery took place, Camilya saw in the rearview mirror the men and woman she had seen walk past the car. They were standing "about five or six feet away" from the car. Camilya identified defendant in court as one of the men. Camilya watched as Shaw "walked off" with the group that was standing behind the car, which included defendant. Camilya got out of the car, saw where they were walking and phoned the police.

¶ 8 The police arrived after "[r]oughly about a minute." They brought Camilya to where they had detained a man whom she recognized as defendant. Camilya was unable to identify anyone in a photo array, but in a subsequent lineup identified "the one that had the gun."

¶ 9 Officer Stanley testified that, on September 20, 2012, he received a dispatch call detailing a robbery near Marquette Park and a description of the offenders. He and his partner responded and observed "[o]ne male black and one female black walking." When Stanley stopped his car and exited, the man, identified in court as defendant, fled northbound through the park. Stanley pursued and detained defendant. After receiving a "flash message" indicating that the female offender was wearing a pink shirt, he then also detained the woman who had accompanied defendant, as she was wearing a pink shirt. Stanley received another flash message that the proceeds taken during the robbery were "\$151 and a black leather purse with a gold chain and a Dodge Challenger car ring." Stanley recovered \$151 from defendant's "front right watch pocket." His partner recovered a black leather purse with a gold chain approximately "100 to 400 yards" from where they had detained defendant.

¶ 10 Detective Chopp testified that during his interview of defendant, defendant identified a photograph of Shaw as "the individual who had the handgun, approached the victim, and robbed her." Defendant told Chopp that, after he, Shaw, and their female companion walked past Camella's car, Shaw announced "something to the effect that he was going to get them b\*\*\*ches." Defendant told Chopp that he saw Shaw "pull a silver gun and rob the lady and then run away with her purse." He told Chopp he "caught the purse" and that another man named "Derrick" took the money out and split it "\$60 apiece." Defendant then walked away, intending to split the money he received with Shaw at a later date.

¶ 11 The State rested. Defendant made a motion for a directed finding, which the court denied. Defendant presented no evidence. The court found defendant guilty of both counts. It found Camella and Camilya testified "clearly and credibly," their testimony corroborated each other's, and neither was impeached. The trial court denied defendant's posttrial motions and sentenced him to 23 years' imprisonment on the armed robbery conviction. It imposed fees and fines totaling \$699.

¶ 12 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that Shaw was armed with an actual firearm during the robbery and thus his conviction should be reduced from armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)) to simple robbery (720 ILCS 5/18-1(a) (West 2012)).

¶ 13 When a defendant challenges the sufficiency of the evidence, as defendant does here, our inquiry is limited to determining "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." *People v. Hall*, 194 Ill. 2d 305, 330 (2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In a bench trial, it is the responsibility of the trial court, as the trier of fact, to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009) (citing *Jackson*, 443 U.S. at 318-19). "It follows that where the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004).

¶ 14 The reviewing court should not substitute its judgment for that of trial court and it is not our function to retry the defendant. *Siguenza-Brito*, 235 Ill. 2d at 224-25; *Hall*, 194 Ill. 2d at 329-30 (2000). We must set aside a defendant's conviction only if, after reviewing the evidence, we find that it was so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 15 Defendant was convicted of armed robbery under section 18-2(a)(2) of the Criminal Code of 1961 (the Code) (720 ILCS 5/18-2(a)(2) (West 2012) based, in relevant part, on the trial court's finding that codefendant Shaw committed robbery while armed with a "chrome or silver automatic gun." Defendant does not dispute that he is guilty of robbery. He argues instead he is not guilty of armed robbery as the State did not prove the "firearm" element of the offense.

¶ 16 Section 2-7.5 of the Code (720 ILCS 5/2-7.5 (West 2012)) provides that the term "firearm" has the meaning ascribed to it in section 1.1 of the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/1.1 (West 2012)). The FOID Act defines a firearm as: "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2012). The definition specifically excludes any pneumatic, spring, paint ball or BB gun and assorted other devices. *Id.* Defendant argues the State did not prove that the "gun" Camella, Camilya, and defendant saw Shaw brandishing met this definition of a firearm or did not fall under any of the exceptions.

¶ 17 We first note that defendant includes in his brief a photograph of a pellet gun to demonstrate "that replica guns can be indistinguishable from real firearms." He also cites to various decisions from other jurisdictions where police officers mistook toy guns for real ones.

This evidence was not first submitted to the trial court, and we therefore cannot consider it on appeal. *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 20 (holding that to consider photographs of a pellet gun and air pistol not submitted to the trial court " 'would amount to a trial *de novo* on an essential element of the charges' ") (quoting *People v. Williams*, 200 Ill. App. 3d 503, 513 (1990)); *People v. Clark*, 2015 IL App (3d) 140036, ¶ 24 (rejecting the defendant's request to consider "a photograph of an air rifle that would not be considered a 'firearm' under the statutory definition" and "federal and [state] cases in which police officers mistook fake guns for real guns" because they had not been submitted as evidence to the trial court).

¶ 18 We find the evidence sufficient to support a finding by the trial court beyond a reasonable doubt that Shaw was armed with a firearm as defined by the Code. The State does not have to prove by direct or physical evidence that the "gun" seen by the witnesses is a firearm within the meaning of the statutory definition. *People v. Wright*, 2015 IL App (1st) 123496, ¶ 74. The unequivocal testimony of a single eyewitness that the defendant held a gun supports a finding that the defendant was armed with an actual firearm. *Id.*; *People v. Washington*, 2012 IL 107993, ¶ 36; *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 40-52; *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007). Here, the witnesses' testimony is circumstantial evidence sufficient to establish that Shaw used a firearm during the robbery.

¶ 19 Camella, who was enrolled in gun classes at the time of trial and thus has a familiarity with guns, testified that Shaw threatened her with a "silver" or "chrome" semiautomatic gun. She clearly saw the weapon, as it was pointed at her through the gap in the window next to where she was sitting and the robbery occurred in daylight in the afternoon on "a nice day." Given the circumstances under which Camella was able to view the gun, her unequivocal testimony,

standing alone, was sufficient to support the court's finding that Shaw used a firearm during the robbery.

¶ 20 Further, Camilya, who was sitting next to Camella in the car, corroborated Camella's testimony, stating that the "gun" pointed through the window was "silver." Both Camella and Camilya further testified that Shaw, when announcing the robbery, threatened that he did not want to "shoot" or "kill" them, providing additional circumstantial evidence that Shaw had a firearm. See *People v. Toy*, 407 Ill. App. 3d 272, 289 (2011) (victim's testimony that the defendant threatened to kill her was circumstantial evidence that he was armed with a firearm). The trial court found Camella and Camilya credible and unimpeached and, on this record, we defer to the court's credibility determinations.

¶ 21 Defendant is correct that it is not his duty to disprove elements of the offense. However, the positive and credible testimony of Camella and Camilya, when viewed in the light most favorable to the prosecution, is sufficient to support finding beyond a reasonable doubt that Shaw was armed with an actual firearm as defined by the Code during the commission of the robbery. See *Malone*, 2012 IL App (1st) 110517, ¶ 52 (the testimony of a single eyewitness that the defendant was armed with "a black or black and silver gun," corroborated by a video which depicted "what appears to be an actual gun," was sufficient to support a finding that defendant was armed with a firearm); *People v. Washington*, 2012 IL 107993, ¶ 36 (where the testimony of single eyewitness that defendant held a gun to his head supported a finding that defendant was armed with an actual firearm).

¶ 22 Defendant avers that the courts in *Malone* and *Washington* erroneously relied on "precedent that analyzed the pre-amended armed robbery statute," which required a defendant be



armed with a "dangerous weapon" (720 ILCS 5/18-2 (West 1994)) rather than a "firearm," as currently required.<sup>1</sup> However, the crux of these decisions is that unequivocal and uncontroverted eyewitness testimony that a defendant held a gun is sufficient circumstantial evidence that the defendant was armed with a firearm. *Malone*, 2012 IL App (1st) 110517, ¶¶ 51-52; *Washington*, 2012 IL 107993, ¶ 36; see also *People v. Pryor*, 372 Ill. App. 3d 422, 430 (2007). Further, there is no established "minimum requirement for showing a defendant possessed a firearm." *People v. Jackson*, 2016 IL App (1st) 141448, ¶ 17. Accordingly, *Malone* and *Washington* are dispositive here.

¶ 23 We find the unequivocal and uncontroverted testimony of both Camella and Camilya, combined with the circumstances under which they were clearly able to view the weapon, is sufficient to allow a reasonable inference that the weapon was an actual firearm. See *Jackson*, 2016 IL App (1st) 141448, ¶ 15. Further, as a result, the State did not need to present a firearm in order for the trier of fact to find that Shaw possessed one. *Id.*

¶ 24 Defendant contends that the *Malone* court improperly shifted the burden of proof to the defendant when it found that the firearm element of the offense of armed robbery was proved by the absence of evidence that the object was not a real gun. Defendant mischaracterizes the court's reasoning. In *Malone*, the court found that the defendant was armed with an actual firearm based on the testimony of an eye-witness, noting "[t]here was no contrary evidence presented that the

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<sup>1</sup> Defendant makes the same argument regarding *People v. Fields*, 2014 IL App (1st) 110311, in which the court held "unequivocal testimony of a witness that defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed during a robbery." *Fields* at ¶¶ 34-37. However, on September 28, 2016, after briefing in this appeal was completed, our supreme court vacated the *Fields* decision. *People v. Fields*, 2016 WL 5899511. We therefore do not consider it.

gun was a toy gun, a BB gun, or anything other than a real gun." *Malone*, 2012 IL App (1st) 110517, ¶¶ 40-52 We do not find that *Malone* improperly shifted the burden of proof to the defendant. The absence of evidence that the object viewed by the witness was not a gun simply supported the trial court's finding that the State's witnesses were reliable. Accordingly, we reject defendant's contention that *Malone* was improperly decided.

¶ 25 We also reject defendant's reliance on *People v. Crowder*, 323 Ill. App. 3d 710, 712 (2001), which rejected the notion that "everything that looks like a gun is a gun." In *Crowder*, the only issue on appeal was whether the trial court properly dismissed the indictment on the basis that the State had destroyed the gun that formed the basis of the charges after the defendant had requested to view it. *Id.* at 711-12. *Crowder* did not involve a sufficiency of the evidence argument and is, therefore, inapplicable here.

¶ 26 Viewing the testimony of Camella and Camilya in the light most favorable to the State, we find that the uncontroverted and unequivocal testimonial evidence was sufficient to support a finding by the trial court that Shaw was armed with a firearm as defined by the Code. Accordingly, we affirm defendant's conviction for armed robbery while armed with a firearm based on a theory of accountability.

¶ 27 Defendant next contends, and the State correctly concedes, that the \$250 DNA fee and \$5 electronic citation fee were improperly assessed against him and must be vacated. Although defendant did not challenge the fines and fees order in the trial court, a reviewing court may modify a fines and fees order without remanding the case to the trial court. Ill. S. Ct. R. 615(b) (eff. August 27, 1999). Consequently, we need not consider defendant's alternative theories of

plain error or ineffective assistance of counsel. We review the propriety of the trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 28 The DNA Analysis fee is assessed when defendant submits specimens for analysis and categorization into genetic marker grouping. 730 ILCS 5/5-4-3(j) (West 2012). The supreme court has held that this fee can be assessed only on an individual whose DNA is not already on file in the State's database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). There is a presumption that a defendant's DNA is already on file where he has been convicted of a felony after the DNA requirement went into effect in January, 1998. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38; see Pub. Act 90-130 (eff. Jan. 1, 1998) (amending 730 ILCS 5/4-4-3 (West 1996)). Here, defendant had prior felony convictions in 2008 and 2010. We therefore presume defendant's DNA was already on file at the time of his present conviction, and he was thus not required to submit a specimen for DNA analysis in this case. Accordingly, the \$250 DNA assessment is hereby vacated. *Marshall*, 242 Ill. 2d at 303.

¶ 29 We also vacate the \$5 electronic citation fee because the charge applies only to traffic, misdemeanor, municipal ordinance, and conservation cases and is inapplicable to defendant's felony conviction for armed robbery. 705 ILCS 105/27.3e (West 2012); *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (\$5 electronic citation fee does not apply to felonies).

¶ 30 For the foregoing reasons, we affirm defendant's conviction for armed robbery with a firearm based on accountability and vacate the DNA fee and the electronic citation fee assessed by the trial court. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order accordingly. The judgment of the trial court is affirmed in all other respects.

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¶ 31 Affirmed.