

No. 1-14-2022

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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. 12 CR 13232
)	
BRYAN ALLEN,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Conviction affirmed. Evidence was sufficient to support conviction for unlawful use of weapon by felon.

¶ 2 Following a bench trial, defendant Bryan Allen was convicted of unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2010)) and two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2010); 720 ILCS 5/24-1.6(a)(2), (3)(C) (West 2010)) and sentenced to six years' imprisonment. On appeal, defendant contends that the evidence was not sufficient to sustain the convictions because the

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testimony of the State's sole witness defies common sense and was unworthy of belief. We affirm.

¶ 3 At trial, Officer Paul Kopacz testified that, at approximately 12:43 a.m. on July 7, 2012, he was in the area of 3901 West Madison Avenue in Chicago when he observed a group of young men, one of whom was defendant, "hanging out at Madison and Springfield." When Kopacz approached the group in his car, defendant "raised his hands and said I don't want any trouble, I don't want any trouble." As Kopacz began to open his car door, defendant fled west on Madison, passing in front of a White Castle restaurant. Kopacz pursued defendant on foot.

¶ 4 Kopacz said that, while he was pursuing defendant, he saw defendant "remove a pistol from his waistband with his right hand." Madison Avenue was "well lit with street lights" and the White Castle was also "well lit." Kopacz "clearly" saw the gun and believed it to be a black "1911 Colt pistol." Defendant turned south through the White Castle drive-through lane, where Kopacz observed him drop the firearm "at the intercom where you order the food." There were no cars present at the intercom. Defendant then turned east behind the restaurant, where a four-foot tall fence and bush row ran along the east side of the restaurant. Defendant hopped the fence and landed "directly in [Kopacz's] partners' arms, Officer Jones and Officer Hatter."

¶ 5 Kopacz returned to where he had seen defendant drop the gun and located it "at the base of the intercom where you order the food." The firearm Kopacz recovered was a loaded "German Sports Gun, 1911 style, .22-caliber pistol." Kopacz acknowledged he lost sight of the gun for "[a] few seconds" after defendant dropped it and before defendant was detained. Kopacz testified that 3850 West Adams Street is two and a half blocks, or a five minute walk, from where he first saw defendant.

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¶ 6 The State introduced a certified copy of defendant's 1998 conviction for aggravated vehicular hijacking in case No. 97 CR 23762-02. It also introduced a certification from the Illinois State Police that showed defendant had not been issued a Firearm Ownership Identification Card as of August 9, 2012. The State rested. Defendant made a motion for a directed finding, which the court denied.

¶ 7 Kanieshia Allen testified that defendant is her first cousin. On the night in question, defendant was living with Allen and her mother at 3850 West Adams Street at the corner of Adams and Springfield. He was under house arrest and wore an ankle bracelet. At midnight, Allen observed defendant across the street from her house "talking to people in the neighborhood." He was shirtless, wearing shorts and shoes. Allen had not seen defendant with a gun that day and did not see a gun sticking out of the waistband of his shorts. Allen saw two police cars she described as "not the blue and white cars, the detective cars" pull up near defendant and the group. She went inside to wake her mother, because "I thought they were going to bother [defendant]." When Allen returned "about three minutes" later, defendant, the men with whom he had been congregated, and the police were gone.

¶ 8 The parties stipulated that the records detailing the information collected from defendant's electronic monitoring equipment showed he was "within approximately 150 feet of that equipment" at 12:17 am on July 7, 2012. The records showed he went out of range of the equipment at 12:34 a.m.

¶ 9 The trial court found Allen's testimony was not "credible in any way, shape or form" and did not "believe her testimony that she was there." It found Officer Kopacz credible, noting that he "gave particular detail as to that type of gun, as to what he believed the gun was, and the gun

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was recovered a short period of time in a short proximity from where the defendant was.”

Pointing out that the electronic monitoring of defendant ended nine minutes before the police officers first saw defendant, the court concluded “I don’t believe the EHM records help the defense in this matter.”

¶ 10 The trial court found defendant guilty of one count of UUWF (720 ILCS 5/24-1.1(a) (West 2010)) and two counts of AUUW for knowingly carrying a firearm without a valid firearm owner identification (FOID) card while not in his own abode (720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2010)) and on a public street (720 ILCS 5/24-1.6(a)(2), (3)(C) (West 2010)). It acquitted defendant of the other three UUWF counts.

¶ 11 Defendant made a motion for a new trial, which the court denied. At sentencing, the court merged the two AUUW counts into the UUWF count and sentenced defendant to six years’ imprisonment.¹ The court denied defendant’s motion to reconsider sentence and defendant appealed.

¶ 12 On appeal, defendant contends that his convictions must be reversed because the testimony relied upon to convict him “defies commonsense [*sic*] and is unworthy of belief.” He argues that Officer Kopacz’s testimony that he did not see the gun until defendant removed it from his waistband was incredible, given Allen’s testimony that defendant was shirtless. According to defendant, if he actually had a gun in his waistband, Kopacz would have immediately seen it. Defendant also points out that the recovered firearm weighed two pounds. He argues that it defies common sense that a shirtless defendant could run far without a two-

¹ At sentencing, the trial court incorrectly stated the count numbers for the offenses. However, it is clear and uncontested that the court merged the two AUUW counts into the UUWF count.

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pound gun slipping from his waistband. He also claims Kopacz's testimony that defendant fortuitously jumped into the arms of Officers Jones and Hatter defies belief, especially given defendant would have had to hurdle a "sizeable" row of hedges and a fence to do so. Defendant also notes that the gun was not introduced into evidence and no physical evidence connected him to the weapon.

¶ 13 When a defendant challenges the sufficiency of the evidence, the question is whether, after reviewing 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. Brown*, 2013 IL 114196, ¶ 48. On review, all reasonable inferences from the evidence are drawn in favor of the State. *People v. Martin*, 2011 IL 109102, ¶ 15. The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving the weight of the evidence, conflicts in the testimony, or the credibility of witnesses. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). A defendant's conviction will be reversed only if the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009). "[W]here the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in view 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). The positive testimony of a single credible witness is sufficient to support a criminal conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

¶ 14 To sustain the conviction for UUWF (720 ILCS 5/24-1.1(a) (West 2010)), the State had to prove that defendant has a prior felony conviction and that he knowingly possessed a firearm.

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People v. Hill, 2012 IL App (1st) 102028, ¶ 40. To sustain the convictions for AUUW, the State was required to prove that defendant knowingly carried on or about his person, at a time when he was not on his own land (Count 7) or upon any public street (Count 9), any firearm, and he had not been issued a valid FOID card at the time. 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2010); 720 ILCS 5/24-1.6(a)(2)(3)(C) (West 2010).

¶ 15 Defendant does not challenge the evidence that he has a prior felony conviction and was never in possession of a valid FOID card. He argues only that the evidence was insufficient to show that he possessed a firearm. Possession of a weapon may be proved by showing that the defendant had actual or constructive possession of the weapon. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Evidence of constructive possession is generally circumstantial, proving that the defendant “had knowledge of the presence of the weapon and exercised immediate and exclusive control over the area where the weapon was found.” *Id.*

¶ 16 Officer Kopacz’s testimony that he saw defendant remove a gun from his waistband and toss it aside was sufficient to support a finding that defendant possessed a firearm. Here, Kopacz could clearly see defendant’s actions, as he was running only 15 feet behind defendant in “well-lit” areas. He testified very specifically that he saw defendant reach into his waistband with his right hand, produce what Kopacz believed to be a “1911 Colt pistol,” and discard the weapon near the intercom of a White Castle drive-through. When Kopacz returned “a few seconds” later to where he saw defendant discard his weapon, he recovered a “German Sports Gun, 1911 style, .22-caliber pistol.” The trial court found Kopacz to be credible, and we must defer to the trial court’s ability to see and hear Kopacz’s testimony and judge his credibility. *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001).

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¶ 17 We acknowledge that a fact finder's determination of a witness's credibility is not conclusive. *Cunningham*, 212 Ill. 2d at 280. But we disagree with defendant that Kopacz's testimony was so unbelievable that no reasonable trier of fact could have credited it. Defendant's arguments regarding the plausibility of Kopacz's testimony hinge on the fact that defendant was shirtless. Yet the only person to testify that defendant was shirtless was Allen, whom the trial court dismissed as not credible "in any way, shape or form." Here, after hearing all the testimony, the court rejected Allen's version of events and determined that defendant was in possession of a firearm when he fled from Officer Kopacz. In view of the record and the credibility determinations, we cannot say the evidence was so improbable or unsatisfactory as to render this conclusion unreasonable.

¶ 18 We also reject defendant's contention that the weight of the gun meant it would have fallen from his waistband. No evidence of the gun's weight was introduced at trial. Simply because the trial court did not draw a factual inference favorable to defendant does not mean that a reasonable doubt existed as to defendant's guilt.

¶ 19 Defendant also claims that Kopacz was impeached by his earlier testimony at a preliminary hearing, where he stated he observed defendant running toward a fence, "then started climbing, got to the top and jumped over." At trial, Kopacz testified that defendant "hopped the fence." Confronted with his alleged prior inconsistent statement on cross examination, Kopacz explained that defendant jumped over "the fence and the bushes all together" as they were "right next to each other." Photographs established that the bushes and fence are indeed right next to each other.

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¶ 20 Minor inconsistencies in a witness's testimony affect the weight of the evidence but do not automatically create a reasonable doubt of guilt. *People v. Adams*, 109 Ill. 2d 102, 115 (1985); *People v. Gill*, 264 Ill. App. 3d 451, 458-59 (1992). It is the trier of fact's prerogative to judge how flaws in part of a witness's testimony, including inconsistencies with prior statements, affect the credibility of the whole. *Cunningham*, 212 Ill. 2d at 283; *People v. Strother*, 53 Ill. 2d 95, 100-01 (1972). It is at least arguable that no inconsistency whatsoever existed between Kopacz's pretrial and trial testimony, as clearing a fence could take place in a single "hopping" or hurdling motion over the fence or by jumping and landing near the top of the fence, then "climbing, g[etting] to the top and jump[ing] over." Regardless, any inconsistency that may have existed in this testimony was fully explored at trial and argued in closing, and the trial court nevertheless found Kopacz credible. That finding was within the court's purview, and we will not revisit it. See *Strother*, 53 Ill. 2d at 100-01 (minor discrepancies in testimony taken at two different times did not destroy witness' credibility, where defense counsel explored inconsistencies on cross-examination and raised issue in closing argument).

¶ 21 Defendant also notes that the State failed to produce video surveillance footage from the White Castle drive-through where the gun was recovered or from the Pod camera located across the street from where defendant was detained, and that the State failed to produce the gun at trial. But because a single eyewitness's testimony can sustain a conviction, the State is not required to produce corroborating physical evidence. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23. The absence of physical evidence alone does not raise a reasonable doubt as to his guilt. *Id.*

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¶ 22 The evidence is sufficient to support a conviction for unlawful use of a weapon by a felon and both count of aggravated unauthorized use of a weapon. We affirm the trial court's judgment.

¶ 23 Affirmed.