

No. 1-14-3584

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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. 13 CR 15136
)	
THOMAS HERNANDEZ,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant was proven guilty beyond a reasonable doubt of aggravated unlawful use of a weapon by the credible, unimpeached testimony of a police officer who observed defendant carrying and then tossing away a semiautomatic handgun.
- ¶ 2 Following a bench trial, defendant Thomas Hernandez was convicted of aggravated unlawful use of a weapon and sentenced to 15 months in prison. On appeal, defendant contends the evidence was insufficient to establish his guilt where the police officer's testimony regarding

defendant's possession of the gun was incredible and where the person at whom defendant purportedly pointed the gun testified that defendant was not the person who wielded the gun. We affirm.

¶ 3 Defendant was charged by information with six counts of aggravated unlawful use of a weapon. At defendant's bench trial, Chicago Police Officer Shanahan testified that at about 11:49 p.m. on July 28, 2013, he was on routine patrol in an unmarked vehicle with Officer Stanley. Shanahan was driving east on 64th Street near California Avenue when he observed a black Cadillac Escalade parked on California with its rear door open. Shanahan did not see anyone in or near the vehicle. From a distance of about 25 feet, Shanahan observed three men at the northwest corner of 64th and California. The area was well lit. One man, a slim Hispanic with shorter hair and dark clothing, threw a beer bottle at another male Hispanic who was five or six feet away; the bottle struck the second man in the right arm. Shanahan later determined that the man whose arm was struck was Eduardo Gamez. Shanahan also saw a third male Hispanic, who was holding a firearm in both hands extended out in front of him. At trial, Shanahan identified defendant as the man he saw holding the firearm. Defendant stepped from the street curb to the sidewalk and walked toward Gamez, pointing the gun at him. Defendant was behind Gamez. Nothing was blocking Shanahan's view of defendant. He observed defendant pointing the gun at Gamez for "[j]ust a second or two."

¶ 4 Shanahan then activated his vehicle's emergency lights. Defendant ran northbound on California and retreated behind a tree. The man who threw the bottle ran southbound across California. The Escalade drove off southbound on California. Shanahan turned north onto California from 64th Street and chased defendant. The vehicle was "right beside [defendant] pretty much." He observed defendant throw the gun underhand with his right hand at a wrought

iron fence at about 6352 South California. The weapon struck the fence and fell behind it. Shanahan never lost sight of the weapon from the time he saw defendant holding it until defendant discarded it. Defendant "gave up" and was arrested about six houses north of the location where he threw the gun. In less than a minute, Shanahan walked from where defendant was arrested to where the gun had been thrown, jumped the fence, and retrieved the black semiautomatic handgun. It was chambered and loaded.

¶ 5 Shanahan then went back to the corner and met with Gamez, who was in the company of Officers Marshall and Medina. The officers conducted a showup. Gamez identified defendant as one of the men who had attacked him and as the man who had pointed the gun at him. Shanahan identified defendant in court as the man Gamez had identified at the scene. Officer Stanley showed the recovered weapon to Gamez. At trial, the gun and three live rounds were produced and the parties stipulated the gun was the weapon Shanahan had recovered. After defendant was arrested and brought back to the station, Shanahan spoke with him. Defendant stated he was born on December 9, 1989.

¶ 6 The State offered in evidence a certified letter from the State Police stating that Thomas Hernandez with a date of birth of December 9, 1989, had never been issued an Illinois firearm owner's identification (FOID) card. The State rested its case in chief.

¶ 7 Eduardo Gamez testified for the defense. On July 28, 2013, he went to the bus stop on 63rd Street at California and waited for a bus. Two or three men whom Gamez had never seen before got out of a black Escalade and approached Gamez. Then about eight or ten other people "started jumping out of different cars." They were all looking for him. They were gang members. Gamez is a member of the Latin Kings. He "got into a fight" with the two or three men who approached him first, and "a lot of bottles" of beer were thrown at him. Gamez crossed 63rd

Street westbound and ran south on the west side of California toward 64th Street. About eight or ten people were chasing him and he was fighting them. He would run, then stop and fight, and then run again. When he crossed an alley as he ran toward 64th Street, one of the men from the Escalade pulled out a gun for about two seconds. The man was the same height as Gamez and had light skin and long hair. Gamez could not really tell the man's race or nationality, but he thought the man was Mexican. When Gamez got to the corner of 64th and California, he ran out of breath. His hand was broken by one of the bottles thrown at him. They were still throwing bottles at him at the corner. The same light-skinned man with the long hair was just behind Gamez. He pulled out the gun for the second time and held the gun at the back of Gamez's head. Gamez went down, with his face downward. Then the police showed up with their lights and sirens. Gamez stayed there, but everybody else ran away. A short time later the police brought someone back to Gamez in their car. The man they brought back was defendant. Gamez testified that he told the officers defendant was the man who had the gun. But that was not true. He said he told that to the officers because "I was just mad that it happened to me and they said they found a gun on him." The officer showed Gamez the gun and he identified it as the one defendant had pointed at him. At trial, defendant was pointed out to Gamez and he was asked whether defendant was the man with the gun on July 28, 2013. Gamez testified it was not the same man.

¶ 8 On July 29, 2013, the day following the incident, Gamez went to the police station with his brother and signed a form in which he declined to prosecute anyone for the offense of aggravated assault. Gamez admitted that in 2012 he was convicted of possession of a controlled substance, and in 2005 he was convicted of unlawful use of a weapon by a felon. He did not want to testify at defendant's trial.

¶ 9 The parties stipulated that the recovered gun was tested and "there were no prints found on that gun comparable or suitable for comparison." The parties rested and closing arguments were heard. The court summarized the testimony and then stated:

"Fairly simple situation in this particular case. The situation becomes complicated by Mr. Gomez [*sic*], who is there. His story somewhat aligns with the officer in that there's a bottle thrown and there's guns in the area, but he specifically says the defendant is not the person in question with that gun.

I had extreme difficulty with Mr. Gomez's [*sic*] testimony in this case. Finding of guilty."

¶ 10 The court entered a guilty finding on all counts. Defendant was sentenced to 15 months in prison on count 2, charging him with aggravated unlawful use of a weapon in that he carried on his person a firearm and had not been issued a currently valid FOID card. The remaining counts merged with count 2.

¶ 11 On appeal, defendant contends that the evidence was not sufficient to establish his guilt beyond a reasonable doubt because Eduardo Gamez testified defendant was not the man who pointed the gun at him, defendant's fingerprints were not found on the recovered handgun, and Officer Shanahan's version of events was incredible and improbable.

¶ 12 When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, the critical inquiry on review is limited to 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. Jordan*, 218 Ill. 2d 255, 269 (2006). "Once a defendant has been found guilty of the crime charged, the factfinder's role

as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard of review does not allow a reviewing court to substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Where the identification of the defendant constitutes the central question in a criminal prosecution, the testimony of even a single witness who had an ample opportunity to observe is sufficient to support a conviction. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007).

¶ 13 Defendant contends that a reasonable doubt of defendant's guilt was raised by the trial testimony of Eduardo Gamez that defendant was not the man who pointed a gun at him. Officer Shanahan testified that after defendant was arrested and returned to where Gamez was being interviewed by other officers, a showup was conducted, and Gamez identified defendant as the man who had pointed the gun at him. At trial, Shanahan identified defendant as the man Gamez had identified at the scene. Gamez's testimony also established that at the showup conducted at the scene immediately after defendant was arrested and the gun was recovered, Gamez identified defendant as the man who pointed the gun at him. At trial, however, Gamez recanted his earlier identification and testified defendant was not the man who aimed the gun at him. Consequently, the trier of fact was faced with two contradictory versions. In a bench trial, the trial judge has the responsibility to determine the credibility of the witnesses, to weigh the evidence, and to resolve any conflicts in the evidence. *People v. Little*, 322 Ill. App. 3d 607, 618 (2001). "When contradictory testimony which could support conflicting conclusions is given at a bench trial, we will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *People v. Hayashi*, 386 Ill. App. 3d 113, 123 (2008). Here, the trial court

found Shanahan to be a credible witness. The trial court judge settled the contradiction in testimony in the State's favor, stating specifically that he had a problem with Gamez's testimony. It is not our function to resolve the contradictory testimony where the trial court was in a superior position to do so. *Jordan*, 218 Ill. 2d at 269.

¶ 14 Regardless of what Gamez claimed he saw or did not see, the trial court's finding is supported by the testimony of Shanahan. Defendant contends Shanahan's testimony was flimsy and improbable and notes that Shanahan's initial observation of defendant lasted only one or two seconds. However, although it was nighttime, the intersection at 64th and California was lit by street lights, and Shanahan's degree of attention was high when he saw defendant pointing the gun at Gamez. As a police officer witness, Shanahan's degree of attention would be high and greater than that of an average citizen witnessing a crime. See *People v. Stanley*, 397 Ill. App. 3d 598, 611 (2009). Shanahan testified he never lost sight of the black semiautomatic handgun defendant was pointing at Gamez until defendant threw it away. The officer saw defendant discard the gun. In less than a minute after defendant was apprehended just a few houses further north, Shanahan returned to where defendant had flung the gun and recovered it. Identification of defendant by the single witness, Shanahan, was sufficient to support a conviction where defendant was viewed under circumstances permitting a positive identification. *People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010), citing *People v. Rincon*, 387 Ill. App. 3d 708, 723 (2008).

¶ 15 Defendant maintains that Shanahan's testimony contained "massive flaws" in describing how he pursued defendant while driving in the wrong lane of traffic at a speed up to 25 miles per hour and while maintaining sight of the gun in defendant's hand the entire time. Whether Shanahan's testimony was flawed and improbable was a determination to be made by the trier of

fact, whose responsibility it was to assess witness credibility, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the testimony. *People v. Billups*, 384 Ill. App. 3d 844, 846 (2008). We find that defendant's attack on Shanahan's credibility does not raise a reasonable doubt of his guilt.

¶ 16 Defendant observes that the State failed to call at trial either Officer Stanley, Shanahan's partner, "to corroborate Shanahan's fantastical version of events," or the officers who conducted the showup identification. However, the testimony of even a single eyewitness is sufficient to sustain a conviction. *People v. Doll*, 371 Ill. App. 3d 1131, 1136 (2007). The credibility of an identification witness and the weight accorded his testimony rests with the trier of fact. *People v. Tabb*, 374 Ill. App. 3d 680, 692 (2007). As we have noted earlier, Officer Shanahan testified that he did not lose sight of defendant from when defendant ran from the corner to when he was apprehended a short distance away after having discarded the handgun. Shanahan's testimony was positive and credible, and it was sufficient to support defendant's conviction. Moreover, the State is not required to call every witness to a crime in order to sustain its burden of proof. *People v. Puente*, 125 Ill. App. 3d 152, 157 (1984). The State was under no duty to call Stanley as a witness if it could meet its burden of proof without his testimony. *Id.*

¶ 17 Defendant also argues that his conviction is rebutted by the physical evidence because his fingerprints were not found on the gun. The parties stipulated that the gun was tested, but that no prints suitable for comparison were found. The lack of physical evidence does not raise a reasonable doubt where an eyewitness has positively identified defendant as the perpetrator of the crime. *People v. Reed*, 396 Ill. App. 3d 636, 649 (2009), citing *People v. Clarke*, 391 Ill. App. 3d 596, 610 (2009).

1-14-3584

¶ 18 Viewed in the light most favorable to the State, the evidence presented at trial was not so improbable or unsatisfactory that it created a reasonable doubt as to defendant's guilt. For the reasons stated above, we affirm the judgment of the trial court.

¶ 19 Affirmed.