2017 IL App (1st) 150890-U
No. 1-15-0890
Order filed May 1, 2017

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 11 CR 05770
v.	)	
	)	Hon. Timothy Joseph Joyce,
JEFFERY HESTER,	)	Judge presiding.
	)	
Defendant-Appellant.	)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment affirmed over defendant's challenge to the sufficiency of the evidence to sustain his convictions; defendant's aggravated unlawful use of a weapon convictions were not entered pursuant to an unconstitutional provision of the statute.

¶ 2 Following a bench trial, defendant Jeffery Hester was found guilty of one count of armed habitual criminal (AHC), two counts of unlawful use or possession of a weapon by a felon (UUWF), and three counts of aggravated unlawful use of a weapon (AUUW). After merging the counts, the trial court sentenced defendant to eight years' imprisonment and three years of mandatory supervised release on the AHC conviction. On appeal, defendant challenges the

sufficiency of the evidence to prove him guilty beyond a reasonable doubt. He also contends that we should vacate his convictions under section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute (Counts 7 and 8) and remand for resentencing in light of *People v. Burns*, 2015 IL 117387, which clarified that under *People v. Aguilar*, 2013 IL 112116, all of section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute is facially unconstitutional. Defendant further maintains that although several alleged errors in the trial court may not independently constitute grounds for reversal, their cumulative effect deprived him of a fair trial.

¶ 3 Defendant was charged by information with the following 11 counts for events occurring in the late evening hours of March 14, 2011: Count 1 - AHC (720 ILCS 5/24-1.7(a) (West 2010)); Count 2 - armed violence, possession of less than 15 grams of heroin while armed with a dangerous weapon (720 ILCS 5/33A-2(a) (West 2010) and (720 ILCS 570/402(c) (West 2010)); Count 3 – UUWF, a firearm (720 ILCS 5/24-1.1(a) (West 2010)); Count 4 – UUWF, firearm ammunition (720 ILCS 5/24-1.1(a) (West 2010)); Count 5 - AUUW, possession of a firearm in a vehicle (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)); Count 6 - AUUW, possession of a firearm on or about his person (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)); Count 7 - AUUW, possession of a firearm on or about his person without a firearm owners identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)); Count 8 - AUUW, possession of a firearm in a vehicle without a FOID card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)); Count 9 - AUUW, possession of a firearm on a public street (720 ILCS 5/24-1.6(a)(2), (3)(A) (West 2010)); Count 10 - AUUW, possession of a firearm on a public street without a FOID card (720 ILCS 5/24-1.6(a)(2), (3)(C) (West 2010)); and Count 11 - possession of less than one but more than 15 grams of heroin (720 ILCS 570/402(c) (West 2010)).

¶ 4 The State nol-prossed the AUUW charges that did not require a FOID card (Counts 5, 6, and 9) and a trial proceeded on the remaining counts.

¶ 5 At trial, Chicago police officer Lawrence Kerr testified that at about 11 p.m. on March 14, 2011, he was on duty in an unmarked police vehicle with Officers Bentley, Alonso, and Findysz. As the police vehicle approached 88th Street and Bishop Avenue, Officer Kerr observed a vehicle at the intersection turn right onto 88th Street without stopping at a stop sign. Once the sole occupant of the vehicle pulled over after about 100 to 150 feet, the officers activated the police vehicle's emergency equipment and then exited the vehicle. Officer Kerr, who was dressed in plain clothes, approached the stopped vehicle first and shined his flashlight inside. As Officer Kerr reached the rear driver's side, defendant opened the front driver's side door about two feet and turned to look at him. Officer Kerr then observed a semiautomatic handgun in defendant's lap and alerted his partners that there was a gun in the vehicle. After defendant then slammed the door shut and drove away, the officers pursued him in the police vehicle.

¶ 6 Officer Alonso was driving, Officer Kerr was on the front passenger's side, and Officers Findysz and Bentley were in the back. When Officer Kerr heard an officer say, "he just tossed it out the window," Officer Alonso "slammed on the breaks" and Officers Findysz and Bentley "jumped out." Officers Kerr and Alonso continued to pursue defendant in the police vehicle until he stopped and ran towards the back porch of a nearby building. Officer Kerr chased defendant on foot and detained him after observing defendant hand a plastic bag containing a white substance to a woman on the porch at the top of the stairs. The woman ran into the apartment and tossed the bag into a kitchen cabinet. Once Officer Alonso caught up and took control of defendant, Officer Kerr searched the kitchen cabinet and recovered a plastic sandwich bag

containing 18 zip-lock baggies containing a white powdery substance, and a slightly larger plastic bag filled with a white powdery substance. Officer Kerr could not determine which of the two bags defendant had handed the woman. When Officer Findysz arrived on the scene, he showed Officer Kerr a handgun that he had recovered, which Officer Kerr recognized as the gun he had seen on defendant's lap.

¶ 7 Regarding the speed of the vehicles, on cross-examination Officer Kerr testified that they "weren't going that fast during the whole pursuit."

¶ 8 Chicago police officer Chris Findysz testified that he was assigned to the gang enforcement division on the night in question. As the officers approached the intersection of 88th and Bishop, he was seated on the driver's side in the back of the police vehicle. After defendant pulled over and the officers exited the vehicle, Officers Kerr and Alonso were the first to approach. Because Officer Kerr headed to the driver's side, Officer Findysz went around to the passenger's side. As Officer Kerr approached the vehicle with his flashlight, Officer Findysz heard him say that defendant had a gun in his lap and then the vehicle "took off." After pursuing defendant for about a minute, Officer Findysz observed an arm holding a firearm in its hand protrude from the driver's side window of defendant's vehicle. The firearm went "flying onto the street and actually [went] flying against the curb down 88th Street." Over defense counsel's hearsay objection, Officer Findysz testified that Officer Alonso said, "gun, gun, he's throwing a gun." Officer Alonso then immediately stopped the police vehicle, letting Officers Findysz and Bentley out. Officer Findysz went to where he had seen the firearm slide and stop, and then recovered a .40 caliber blue steel Smith and Wesson, which was loaded with 12 live rounds.

¶ 9 On cross-examination, Officer Findysz testified that he did not see a gun on defendant's lap as he approached the vehicle and he was on the passenger side by the trunk when Officer

Kerr indicated defendant had a gun on his lap. When defendant threw the weapon out of the window, he was driving at about 20 miles per hour. No more than 30 seconds elapsed between when defendant threw the weapon and when Officer Findysz recovered it from within an area of about 50 feet, which he searched with his flashlight. His partner inventoried the weapon. On redirect-examination, Officer Findysz clarified that he recovered the weapon and its slide in two separate pieces and that he was with Officer Alonso when he inventoried the weapon under the number 12266120. On recross-examination, Officer Findysz testified that although he recovered a weapon that was not intact, he had not observed "something thrown from that car and fall into pieces."

¶ 10 The State introduced several exhibits into evidence, including certified copies of two prior UUWF convictions, and an Illinois State Police certification indicating that, as of May 12, 2011, defendant had never been issued a FOID card. The parties stipulated that a forensic chemist would testify that 7 of the 18 baggies weighed 1.1 grams and tested positive for heroin. The other bag of powder substance weighed 22.8 grams and "there was no scheduled substance found in that one bag."

¶ 11 After the State rested, defendant moved for a directed finding on all charges. The trial court granted defendant's motion regarding the possession of a controlled substance charge, (Count 11) and the armed violence charge (Count 2), which was predicated on it.

¶ 12 The defense called Chicago police officer Joel Bentley, who testified that he was in the rear passenger seat of the police vehicle on the night in question. As the officers pursued defendant, both vehicles were "going the same speed" of about 30 to 40 miles per hour, and they were about 57 feet behind his vehicle when Officers Findysz and Alonso indicated that defendant had pitched a weapon. The police vehicle then stopped immediately and Officers Bentley and

Findysz exited the vehicle in what Officer Bentley described as a high crime area. Officer Bentley did not "see anything go out of the car," but he "thought [he] heard something hit the street and like kind of hit the pavement." The two officers searched with flashlights for about 10 to 15 seconds before Officer Bentley observed a slide for a Smith and Wesson MP .40 and the gun part to which the slide attaches. They put the pieces together and then went to assist Officers Kerr and Alonso.

¶ 13 On cross-examination, Officer Bentley testified that he could not see defendant's lap when he approached defendant's vehicle from the passenger side during the traffic stop.

¶ 14 Prior to announcing guilt, the trial court found that Officers Kerr, Findysz, and Bentley testified credibly and then addressed several of defendant's factual arguments. The court "believe[d] Kerr and Findysz' testimony and Bentley's that somebody said he's pitched [the gun] out the window or threw it out the window or words to that effect." Under the circumstances, the court did not anticipate that the officers would "recall with specificity precisely what they or some other officer in the car said when they observed the gun going out the window." The trial court inferred that the firearm split into two pieces when it "was thrown from the car," and that it was functional before defendant threw it. The court reasoned that the recovered weapon was loaded and that it did not "seem that anybody would go to the trouble of loading a gun that wasn't a gun because it was in two separate pieces." Further, the fact that, although not mentioned in their police report, Officers Findysz and Bentley testified that they found the weapon in two pieces bolstered their credibility. The trial court found defendant guilty of AHC (Count 1), UUWF (Counts 3 and 4), and AUUW without a FOID card (Counts 7, 8, and 10).

¶ 15 Defendant filed a motion for a new trial, which the court denied. After merging Counts 3, 4, 7, 8, and 10 into Count 1 (AHC), the trial court sentenced defendant to eight years' imprisonment and three years of mandatory supervised release.

¶ 16 On appeal, defendant first maintains that the State failed to prove him guilty beyond a reasonable doubt because the evidence was insufficient to show that he possessed a firearm. Where, as here, a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). A reviewing court may not overturn a conviction based on insufficient evidence unless the proof is so unreasonable, improbable or unsatisfactory that a reasonable doubt exists. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007); *People v. Smith*, 2015 IL App (1st) 132176, ¶ 24.

¶ 17 A defendant is guilty of AHC if he "receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times" of a qualifying felony, including UUWF. 720 ILCS 5/24-1.7(a), (a)(2) (West 2010); *People v. White*, 2015 IL App (1st) 131111, ¶ 20. A defendant commits AUUW under section 24-1.6(a)(1), (a)(3)(C), if he knowingly carries a firearm on his person or in any vehicle, outside the home, without also possessing a valid FOID card. 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010); *People v. Williams*, 2015 IL 117470, ¶ 14. A defendant is guilty of AUUW under section 24-1.6(a)(2), (a)(3)(C) if he knowingly carries or possesses a firearm on or about his person upon any public way without having been issued a FOID card. 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010). If a defendant knowingly possesses a firearm or any firearm ammunition on or about his person, after having been convicted of a felony, he commits the felony offense of UUWF. 720 ILCS 5/24-1.1(a) (West 2010).

¶ 18 Here, the evidence presented at trial showed that defendant, who had two prior felony convictions for UUWF, possessed a firearm in a vehicle on a public street in Chicago, Illinois, without ever having been issued a FOID card. Officer Kerr testified that he saw the gun on defendant's lap during a traffic stop. Officer Findysz testified that as the officers pursued defendant in the police vehicle, he observed an arm holding a firearm in its hand protrude from the driver's side window of defendant's vehicle and that a firearm went flying into the street and against the curb. No more than 30 seconds later, Officer Findysz recovered a .40 caliber blue steel Smith and Wesson, which was loaded with 12 live rounds, from where he had seen the firearm slide and stop. An Illinois State Police certification showed, as of May 12, 2011, a FOID card had not been issued to defendant. We find that the evidence was sufficient to prove beyond a reasonable doubt that defendant was guilty of AHC and that he violated the relevant portions of the AUUW and UUWF statutes. Accordingly, we affirm the judgment of the circuit court.

¶ 19 Defendant nevertheless maintains that the officers materially contradicted each other and that their testimony was so unreasonable, improbable, and unsatisfactory that no reasonable trier of fact could have found the proof beyond a reasonable doubt. Although we address defendant's individual contentions below, we do not find the alleged inconsistencies and contradictions to be material where the record clearly reflects that Officer Kerr identified the gun, which Officer Findysz recovered within seconds of witnessing defendant throw a gun out of his car window, as the gun he saw on defendant's lap during the preceding traffic stop. See *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67 ("precise consistency as to collateral matters is not required to establish guilt"). Moreover, we find that the issues defendant raises concern questions that were for the trial court to resolve, and amount to an improper request that we substitute our judgment for that of the trier of fact. See *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009).

¶ 20 Defendant argues Officer Findysz's testimony that he did not see a gun on defendant's lap as he approached the vehicle during the traffic stop undermines Officer Kerr's testimony that a gun was on defendant's lap at the time. However, because Officer Findysz approached the vehicle from the passenger side and was by the trunk when Officer Kerr warned the officers about the gun, we find that the trial court could reasonably infer that Officer Findysz was unable to see what defendant had in his lap from his vantage point. See *People v. Spivey*, 351 Ill. App. 3d 763, 771 (2004) (despite discrepancies between the officers' testimony, the trial court did not misconstrue the evidence where the officers were "testifying from their recollection from two different perspectives"). Thus, the trial court was not required to find that Officer Findysz contradicted Officer Kerr's testimony that defendant had a gun on his lap.

¶ 21 Defendant asserts that the officers' credibility was undermined because while Officer Kerr testified that an officer said "he just tossed it out the window," Officer Findysz testified that Officer Alonso specified, "gun, gun, he's throwing a gun." Regardless of the difference between the officers' recollections of what was said, Officer Findysz testified that he saw an arm holding a firearm in its hand protrude from the driver's side window of defendant's vehicle and then saw a firearm go "flying onto the street." Defendant hypothesizes that Officer Findysz testified that he observed defendant throw a firearm out of the window because the other officers had already indicated that defendant had a gun. In addressing the issue, the trial court noted that it believed the officers' testimony and that it would not expect the officers to recall exactly "what they or some other officer in the car said when they observed the gun going out the window." Accordingly, defendant's argument amounts to an improper request that we contradict the trial court's credibility determination based on pure conjecture. See *People v. Steidl*, 142 Ill. 2d 204, 226 (1991) ("determination of the weight to be given to witnesses' testimony, their credibility,

and the reasonable inferences to be drawn from the evidence are the responsibility of the fact finder"). Defendant's argument fails.

¶ 22 Defendant contends that Officer Findyz's estimate that the officers pursued defendant's vehicle at about 20 miles per hour materially conflicts with the testimony of Officer Bentley that they were traveling between 30 and 40 miles per hour. Defendant argues speed was material because the total possible area where the gun could have landed increased with defendant's speed. However, Officer Findysz testified that he observed the "firearm go flying onto the street," that it went "flying against the curb down 88th Street," and that he recovered the firearm from where he had seen it slide and stop. Thus, the surface area where the weapon *could* have landed is irrelevant. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) ("the testimony of a single witness, if positive and credible, is sufficient to convict").

¶ 23 Next, defendant suggests that fingerprint testing should have been conducted because the high-crime nature of the area supports the inference that the broken firearm was already in the street. He argues that because the weapon on defendant's lap and the weapon that went "flying" were intact, the State failed to show that the broken firearm that was recovered was the same weapon defendant possessed. However, "in weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Jackson*, 232 Ill. 2d at 281.

¶ 24 Here, in drawing the inference that the firearm split into two pieces when it went "flying onto the street," the trial court reasoned that the recovered weapon was loaded and that it did not "seem anybody would go to the trouble of loading a gun that wasn't a gun because it was in two separate pieces." The court found that the testimony of Officers Findysz and Bentley that they

recovered the weapon in two pieces, even though that fact was not in the police report, bolstered their credibility. Moreover, Officer Kerr, whom the trial court also found credible, identified the recovered weapon as the weapon that was in defendant's lap during the traffic stop. Thus, the trial court could reasonably infer that defendant possessed an intact firearm in his vehicle, which broke into two pieces when it went "flying onto the street," and we are not persuaded by defendant's argument.

¶ 25 Defendant argues that, in light of his experience with the police and his criminal background, it is highly unlikely that he would have opened the door as the police officers approached during the traffic stop. Any inquiry into defendant's motive for not removing the gun from his lap and the officer's line of sight would be speculation on our part. In reviewing the sufficiency of the evidence, we must afford great deference to the trial court, which heard the evidence and observed the witnesses. See *People v. Austin*, 349 Ill. App. 3d 766, 769 (2004) (declining to speculate regarding the defendant's motives for keeping the gun in his hand during a traffic stop). Thus, we decline to improperly speculate regarding the effect of defendant's criminal history on his actions as defendant requests.

¶ 26 In his final challenge to the sufficiency of the evidence, defendant notes that the trial court did not find him guilty of the narcotics possession charges and argues that the various factual issues discussed above suggest that the officers tried to connect the gun to defendant in the same way they "attempted to connect a baggie of narcotics to him." Defendant's argument misconstrues the trial court's basis for finding reasonable doubt in the narcotics related charges. The court found defendant not guilty of those charges because Officer Kerr could not identify whether the bag defendant gave the woman was the bag which tested positive for heroin or the bag which was found not to contain a controlled substance. Thus, the record does not support the

implication asserted by defendant that the court found him not guilty based on alleged officer misconduct.

¶ 27 In sum, defendant's observations regarding the officers' testimony do not dispute the material evidence presentenced by the State, and we conclude that the trial court did not err in finding defendant guilty beyond a reasonable doubt.

¶ 28 Defendant next contends his convictions under section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute (Counts 7 and 8) are unconstitutional pursuant to *People v. Burns*, 2015 IL 117387, which clarified that under *People v. Aguilar*, 2013 IL 112116, all of section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute, and not just the Class 4 version of the offense, is facially unconstitutional. We disagree with defendant's application of the holding in *Burns.*

¶ 29 In *Burns*, our supreme court explained that the facial unconstitutionality of section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute was not limited to the Class 4 version of the offense because it constituted a flat statutory ban on " 'the possession and use of an operable firearm for self-defense outside the home' and, as such, it 'amount[ed] to a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court.' " *Burns*, 2015 IL 117387, ¶ 25 (quoting *In re Jordan G.*, 2015 IL 116834, ¶ 13; *Aguilar*, 2013 IL 112116, ¶ 21). Although defendant argues that the same reasoning should be applied to section 24-1.6(a)(1), (a)(3)(C), which requires an individual to obtain a FOID card, our supreme court has held that requiring an individual to obtain a FOID card prior to exercising that personal right is not a flat out ban. *People v. Mosley*, 2015 IL 115872, ¶ 50. Accordingly, defendant's convictions for AUUW under section 24-1.6(a)(1), (a)(3)(C) are not facially unconstitutional. See *id.* (finding sections 24-1.6(a)(1), (a)(3)(C) and 24-1.6(a)(2), (a)(3)(C) to be facially constitutional). Because the

convictions are not facially unconstitutional under *Burns*, we need not address defendant's argument that if the trial court had relied upon them in imposing sentence, it would have considered improper sentencing factors.

¶ 30 Defendant further maintains that although the errors alleged on appeal may not independently constitute grounds for reversal, their cumulative effect deprived him of a fair trial. Defendant's contentions of individual error are based entirely upon a reiteration of his arguments that the evidence was not sufficient to prove him guilty beyond a reasonable doubt. Because we have found that the trial court did not err in any of the manners contended on appeal, defendant has not alleged any basis from which to find "cumulative" errors entitle him to a new trial.

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.