

No. 1-15-1568

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 11567
	)	
MALCOLM TOLIVER,	)	Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE MIKVA delivered the judgment of the court.  
Presiding Justice Pierce and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *Held:* The evidence presented at trial was sufficient to prove defendant guilty beyond a reasonable doubt of aggravated unlawful use of a weapon.

¶ 2 Defendant Malcolm Toliver was convicted in a bench trial of aggravated unlawful use of a weapon (AUUW) and sentenced to 30 months of felony probation. On appeal, Mr. Toliver challenges the sufficiency of the evidence. For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 Mr. Toliver was initially charged with six counts of AUUW. A codefendant, Cornell Reed, was charged with nine counts of AUUW and one count of unlawful use of a weapon by a

felon. Mr. Reed's case was disposed of prior to Mr. Toliver's trial. The State proceeded to trial against Mr. Toliver on three of the counts charging AUUW.

¶ 5 At trial, Cody Haywood testified that around 11:30 p.m. on May 12, 2013, his cousin, Lisa Bronson, drove him to a Food 4 Less store in her white minivan. There were two other passengers in the car that Mr. Haywood did not "really know." In court, Mr. Haywood identified Mr. Toliver as one of these passengers and said that the other passenger was a man who went by the name "Corn." According to Mr. Haywood's testimony, Mr. Toliver sat in the front seat and Mr. Haywood and Corn sat in the back seat.

¶ 6 After the group shopped, they headed back to the minivan. According to Mr. Haywood, the front passenger door was unlocked, so he asked Mr. Toliver to go into the van and unlock the rest of the doors. As Mr. Toliver was stepping into the van, Mr. Haywood "saw him pass Corn a gun." When Mr. Haywood saw the gun, he walked back into the store and alerted security. Eventually, the police arrived at the scene.

¶ 7 Mr. Haywood acknowledged on direct examination that he was currently in the custody of the Cook County Department of Corrections. He stated that the prosecutor had not made any threats or promises about what would happen to him if he testified at Mr. Toliver's trial. However, the prosecutor did inform him that he would be released from custody once his testimony was completed.

¶ 8 On cross-examination, Mr. Haywood clarified that he was in custody because he was being held for contempt of court for previously "not showing up" to testify in Mr. Toliver's trial. He stated that the only thing he knew about Corn was his nickname. Mr. Haywood also explained that he was standing on the passenger side of the minivan when the others were attempting to get in. He admitted on cross-examination that he saw Mr. Toliver with the gun "for

about two seconds.” Mr. Haywood also acknowledged that he had not seen the gun before that point.

¶ 9 On redirect examination, Mr. Haywood stated that nothing was blocking his view when he saw Mr. Toliver pass the gun to Corn. He also testified that the prosecutor had not told him he had to testify in any specific way to be released from custody.

¶ 10 The trial court asked Mr. Haywood to stand up and demonstrate what he “saw the defendant do.” Mr. Haywood answered, “He just lifted out his shirt and he passed it.” Mr. Haywood stated that Mr. Toliver had the gun in his pants, and that after he passed it to Corn, Corn put it in his own pants. In response to further cross-examination by defense counsel, Mr. Haywood agreed that he was standing behind Mr. Toliver when he “saw him,” and stated, “I seen him take it out his pants and gave it to him”; and clarified that the gun had been in the front of Mr. Toliver’s pants.

¶ 11 Chicago Heights police officer Malone testified that about 11:35 p.m. on May 12, 2013, he and his partner responded to a call of a suspicious white minivan and possible subject with a gun outside of the Food 4 Less store. When the officers arrived in their squad car, Mr. Toliver was in the front passenger seat of a white minivan in the parking lot. The officers exited their car and approached the minivan. While Officer Malone spoke with the driver, his partner spoke with one of the passengers. Officer Malone then went inside the store and had a conversation with Mr. Haywood. By the time he returned to the parking lot, at least three other officers had responded and were escorting Mr. Toliver and other individuals from the minivan.

¶ 12 Chicago Heights police detective Fenimore testified that when he arrived at the Food 4 Less around 11:35 p.m. on May 12, 2013, he saw Mr. Toliver in the front passenger seat of a white minivan parked directly in front of the store entrance. Detective Fenimore stated that four

other officers had responded to the scene. After Officer Malone went inside of the store, Detective Fenimore asked Mr. Toliver and the backseat passenger, who was later identified as Cornell Reed, to exit the minivan and walk to the back of it for a pat-down. Mr. Toliver complied, but Mr. Reed moved a cell phone from his left hand to his right, turned his back to Detective Fenimore, and started to back out of the minivan. Detective Fenimore testified that it looked as if Mr. Reed was reaching in his waistband, so he gave Mr. Reed several orders to show his hands. When Mr. Reed failed to comply, Detective Fenimore “went hands on” for his own safety. Detective Fenimore grabbed Mr. Reed’s hoodie, removed him from the minivan, and placed him on the ground. Detective Fenimore and another officer handcuffed Mr. Reed. Detective Fenimore then searched Mr. Reed and found a .357 revolver loaded with four live rounds tucked into the right side of Mr. Reed’s waistband. In court, Detective Fenimore identified the gun that he recovered from Mr. Reed’s waistband.

¶ 13 Chicago Heights police sergeant Robles testified that, in the early morning hours of May 13, 2013, he advised Mr. Toliver of his *Miranda* rights and then interviewed him at the police station. Sergeant Robles testified that Mr. Toliver told him that he was walking to the store when he came across his friend, Cornell Reed, who was in a white minivan. Mr. Reed agreed to give Mr. Toliver a ride to the Food 4 Less. While they were inside the minivan, Mr. Reed passed a gun to Mr. Toliver and Mr. Toliver put it underneath his seat. Mr. Toliver related that “by that time the police had showed up and ended up arresting them.” According to Sergeant Robles, Mr. Toliver told Sergeant Robles that his fingerprints would be on the gun because he held it.

¶ 14 On cross-examination, Sergeant Robles acknowledged that Mr. Toliver told him he put the gun under the driver’s seat and that Mr. Toliver did not say that it was his gun or that he kept the gun.

¶ 15 With no objection by Mr. Toliver, the State introduced a certification from the Illinois State Police stating that Mr. Toliver had never been issued a Firearm Owners Identification (FOID) card.

¶ 16 Defense counsel made a motion for a directed finding, which the trial court denied. Mr. Toliver then rested without testifying or presenting any witnesses or other evidence.

¶ 17 The trial court found Mr. Toliver guilty on three counts of AUUW, merging two of the counts into the count that charged Mr. Toliver with carrying a firearm in a vehicle without having been issued a FOID card. In announcing its decision, the court commented specifically on the credibility of Mr. Haywood as follows:

“He is here in custody in that the State has filed a contempt of court petition against him. Does that mean he is not credible? No. The Court does not find he is not credible. He does not know anybody in this case. He does not have any bias the Court sees. He answered the questions. He indicates he saw what he saw and based on what he saw, he goes inside the store obviously and is concerned that someone [is] in this vehicle with a weapon.”

¶ 18 Defense counsel filed a motion for a finding of not guilty or a new trial, which the trial court denied. The trial court sentenced Mr. Toliver to 30 months of felony probation.

¶ 19 JURISDICTION

¶ 20 Mr. Toliver was sentenced on April 14, 2015, and timely filed his notice of appeal on May 11, 2015. This court has jurisdiction under article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 21

ANALYSIS

¶ 22 On appeal, Mr. Toliver challenges the sufficiency of the evidence to sustain his conviction. When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution, and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are decisions to be made by the trier of fact, and a reviewing court will not substitute its own judgment on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 23 Reversal is justified only where the evidence is “so unsatisfactory, improbable or implausible” that it raises a reasonable doubt as to the defendant’s guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Where a guilty finding depends on eyewitness testimony, a reviewing court, keeping in mind that it was the fact finder who saw and heard the witnesses, must decide whether any fact finder could reasonably accept a witness’s testimony as true beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). It is for the finder of fact to judge how flaws in a witness’s testimony affect credibility. *Cunningham*, 212 Ill. 2d at 283.

¶ 24 Mr. Toliver argues that he was not proved guilty beyond a reasonable doubt because the State’s evidence provided two “irreconcilably conflicting narratives.” Mr. Toliver observes that, while Mr. Haywood’s testimony was that Mr. Toliver handed a gun to Mr. Reed as they were re-entering the minivan after they were done shopping, his own statement to the police was that Mr. Reed handed Mr. Toliver a gun while they were still on their way to the store. Mr. Toliver argues, “Since the evidence does not establish whether that brief moment [when Mr. Toliver

touched the gun] occurred **on the way** to the store or **after leaving** the store, and since it does not establish whether the gun was handed **by** [Mr.] Toliver or **to** [Mr.] Toliver, it was insufficient to prove felony gun possession beyond a reasonable doubt.” (Emphasis in original.) Mr. Toliver asserts that both versions of events presented at trial cannot be true, that Mr. Haywood was an extremely reluctant witness “who just wanted to tell a story and go home,” and that because Mr. Haywood was standing behind Mr. Toliver, he could not have seen Mr. Toliver hand a gun to Mr. Reed. Mr. Toliver also points out that, under either scenario, he only touched the gun for a “brief moment” or a “matter of seconds.”

¶ 25 Mr. Toliver’s arguments about what Mr. Haywood could have seen and why he testified, and the conflicts between what Mr. Haywood said he saw and what Mr. Toliver said he did, are all matters of credibility that are for the trial court to resolve in its role as trier of fact. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). Here, the trial court heard Mr. Haywood’s testimony and Sergeant Robles’ recitation of Mr. Toliver’s confession and was well aware of any inconsistencies, as well as the circumstances surrounding Mr. Haywood’s appearing as a witness and where he said he was standing. In closing arguments, defense counsel argued that Mr. Haywood could not have seen Mr. Toliver take a gun from the front of his pants from his vantage point behind Mr. Toliver and reminded the court that Mr. Haywood was testifying as a result of being held in custody because he had failed to appear in response to a subpoena. In finding Mr. Toliver guilty, the trial court specifically addressed the contempt of court petition and found Mr. Haywood credible despite the circumstances of his appearance at trial. We will not substitute our judgment for that of the trial court on credibility questions. *Brooks*, 187 Ill. 2d at 131.

¶ 26 A person commits the offense of AUUW, as charged in Mr. Tolliver’s case, when he

knowingly carries a firearm in a vehicle and has not been issued a currently valid FOID card. 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2012). Evidence as to each of these elements was presented at trial in the instant case. Mr. Toliver does not dispute the evidence that he had never been issued a FOID card. Mr. Haywood testified that when Mr. Toliver was stepping inside the minivan, he saw Mr. Toliver take a gun from his pants and hand it to Mr. Reed. This testimony alone was sufficient to prove knowing possession of a firearm in a vehicle.

¶ 27 Mr. Toliver argues that Mr. Haywood's testimony fatally conflicts with his own statement as to what occurred. Mr. Toliver told Sergeant Robles that "when they were inside the van, Mr. Reed had passed a gun to him and he had put it underneath the seat" and "that his fingerprints would be on the gun because he held it." This statement does not preclude the trial court's acceptance of Mr. Haywood's testimony. It is possible that Mr. Haywood did not see the conduct Mr. Toliver described. It is also possible that Mr. Toliver gave his statement to police so that he could explain his fingerprints on the gun and what he reported is not what actually happened.

¶ 28 Mr. Toliver stresses that, according to both his statement and Mr. Haywood's testimony, he held the gun for a very short time. However, Mr. Toliver does not suggest that the State is required to prove that he possessed the gun for any minimum amount of time. See *People v. Love*, 404 Ill. App. 3d 784, 788 (2010) (actual possession is shown where the defendant exercises "some form of dominion" over contraband (quoting *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987))).

¶ 29 Despite the "conflicting narratives" Mr. Toliver has identified, we find that the evidence supporting Mr. Toliver's conviction could reasonably be accepted by the fact finder who saw and heard the witnesses testify. See *Cunningham*, 212 Ill. 2d at 285. Having heard all the evidence,



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the trial court was convinced of Mr. Toliver's guilt beyond a reasonable doubt. After reviewing the evidence in the light most favorable to the prosecution, which we must, we conclude that the evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to Mr. Toliver's guilt. *Slim*, 127 Ill. 2d at 307. Accordingly, Mr. Toliver's challenge to the sufficiency of the evidence fails.

¶ 30

#### CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 32 Affirmed.