2017 IL App (1st) 163083-U

SIXTH DIVISION
March 31, 2017

No. 1-16-3083

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re Luis F., a Minor,	)	Appeal from the Circuit Court
	)	of Cook County.
Respondent-Appellant	)	
	)	
(The People of the State of Illinois,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 16 JD 2000
	)	
Luis F.,	)	Honorable
	)	Stuart F. Lubin,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** We reverse respondent's adjudication of delinquency for aggravated unlawful use of a weapon for possessing a firearm without being issued a FOID card, because the State presented insufficient evidence that respondent was not issued a FOID card. We affirm respondent's other adjudications of delinquency for aggravated unlawful use of a weapon and unlawful possession of a firearm. However, under one-act, one-crime principles, only one of respondent's remaining adjudications can stand. We remand the case to the trial court to determine which one of

respondent's adjudications is the most serious, and vacate the less serious adjudication. Affirmed in part and reversed in part; cause remanded.

¶ 2 Following a hearing, the trial court adjudicated minor-respondent, Luis F., to be a ward of the court based on two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (3)(C), (3)(I) (West 2016)) and one count of unlawful possession of a firearm (UPF) (720 ILCS 5/24-3.1(a)(1) (West 2016)). The trial court sentenced defendant to 18 months of probation. On appeal, respondent contends the evidence was insufficient to support his delinquency adjudications because the State failed to prove that he ever possessed a gun. In the alternative, he claims one of his AUUW convictions should be vacated because the State did not sufficiently prove he was not issued a Firearm Owner's Identification Card (FOID card). Respondent also contends, under one-act, one-crime principles, that the trial court should have only adjudicated him delinquent as to one, instead of three, counts. We affirm in part, reverse in part, and remand with directions.

¶ 3 BACKGROUND

¶ 4 The State filed a petition for adjudication of delinquency charging the 17-year-old-minor-respondent, Luis F., with two counts of the offense of AUUW and one count of UPF. The relevant events allegedly occurred on September 4, 2016. With respect to the AUUW allegations, the State claimed that respondent was not issued a FOID card and knowingly carried a firearm when he was not on his own land, home, or place of business (count I); and that respondent was under 21 years of age when in possession of a handgun while not engaging in lawful activities under the Wildlife Code (count II). As to the UPF count, the State alleged that respondent, being under the age of 18, knowingly possessed a firearm that could be concealed upon his person. The following evidence was adduced at respondent's adjudicatory hearing.

¶ 5 Chicago Police Officer Zagorski testified that he had been an officer for four years, and at around 12:45 p.m. on September 4, 2016, he and his partner were traveling in an unmarked car to the 4800 block of West Armitage to respond to a call. As the officers headed west on Armitage, Officer Zagorski, who was driving, noticed a white sedan with a broken tail light using the west alley of North Cicero. Officer Zagorski then turned on his emergency equipment when he saw the sedan fail to obey a stop sign near the corner of Dickens and La Crosse. The sedan did not stop immediately, but ultimately stopped about halfway down the block past the stop sign.

¶ 6 Zagorski testified that he parked his car two feet behind the sedan. The sedan was illuminated by two spotlights from Zagorski's car and streetlights. Zagorski approached the driver's side of the vehicle. He smelled alcohol and saw clear plastic cups with brown liquid. All five passengers disclosed their names. Zagorski returned to his car, where he and his partner processed the names of the sedan's occupants, and Zagorski learned that respondent was 17 years old.

¶ 7 While at his car, Zagorski saw respondent, who was sitting behind the driver, lower his body out of sight two to three times, as if respondent was moving towards his feet. None of the other passengers made any noticeable movements, and Zagorski did not see respondent make such movements before. Zagorski returned to the sedan, and ordered all of its passengers to exit. Zagorski then performed a search of the immediate area where respondent's hands were accessible, and uncovered a handgun holding seven live rounds from beneath the driver's seat. No other objects were found underneath the driver's seat. Zagorski also testified that respondent failed to present a FOID card, respondent was not engaged in wildlife activities, and the gun was not recovered from respondent's residence.

¶ 8 On cross-examination, respondent highlighted that there were three other teenagers in the back of the sedan, and that Zagorski never saw any objects in respondent's hand. Zagorski also recalled that respondent was wearing shoes with laces, but could not remember whether they were tied after respondent exited the sedan.

¶ 9 Zagorski was the only witness who testified. The trial court denied respondent's motion for a directed finding, and the defense rested. At closing arguments, respondent presented a theory that he was unaware that there was a handgun in the sedan, and that when he bent forward he was just tying his shoes. At the conclusion of the hearing, the trial court found respondent guilty of all counts but did not indicate that any of the charged offenses would merge. Following a dispositional hearing, the court sentenced defendant to 18 months' probation. This appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, respondent contends that the evidence was insufficient to prove he possessed a gun, and that the evidence does not show he knew there was any gun in the sedan. Respondent contends that Officer Zagorski never saw the gun in his hands, there were four other passengers in the sedan, and that his gestures towards his feet are not enough to conclude he knew about the gun.

¶ 12 When presented with a challenge to the sufficiency of the evidence, we must consider 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." (Emphasis added.) *In re W.C.*, 167 Ill. 2d 307, 336 (1995). Reasonable inferences drawn from the evidence are the responsibility of the trier of fact, and where, as here, a criminal conviction is based solely on circumstantial evidence, we may not set it aside unless the evidence is so

improbable or unsatisfactory that there remains a reasonable doubt of the respondent's guilt. *Id.* This court may not retry the accused. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* at 211. Moreover, a finder of fact is not required to accept any possible explanation compatible with an accused's innocence and elevate it to the status of reasonable doubt. *People v. Herrett*, 137 Ill. 2d 195, 206 (1995). Finally, the testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

¶ 13 Under section 24-1.6(a)(1), (3)(C) of the Criminal Code of 2012 ("Code"), a person commits the offense of AUUW by knowingly possessing "any pistol, revolver, * * * or other firearm" without having been issued a currently valid FOID card. 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2016). With certain exceptions not relevant here, section 24-1.6(a)(1), (3)(I) prohibits a person under the age of 21 from possessing a handgun. 720 ILCS 5/24-1.6(a)(1), (3)(I) (West 2016). Finally, section 24-3.1(a)(1) of the Code states that a person commits the offense of UPF when he is "under 18 years of age and has in his possession any firearm of a size which may be concealed upon the person." 720 ILCS 5/24-3.1(a) (West 2016).

¶ 14 Although Officer Zagorksi did not see respondent holding or otherwise possessing the gun, the State presented sufficient evidence to allow a rational trier of fact to conclude that respondent possessed a handgun beyond a reasonable doubt. The State can establish possession by proffering testimony demonstrating either actual or constructive possession. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Actual possession describes when the "defendant exercised some form of dominion over the unlawful substance" (*People v. Scott*, 152 Ill. App. 3d 868, 871 (1987)), whereas constructive possession occurs "where there is no actual, personal, present

dominion over contraband, but defendant had knowledge of the presence of the contraband, and had control over the area where the contraband was found." *People v. Hunter*, 2013 IL 114100, ¶ 19. Control over contraband can be established if found on premises under the defendant's control (*People v. Nettles*, 23 Ill. 2d 306, 308-09 (1961)), or when "circumstantial evidence supports an inference that the defendant intended to control the contraband inside" (*People v. Tates*, 2016 IL App (1st) 140619, ¶ 20). Although the knowledge element can be inferred from circumstantial evidence, a defendant's presence in a car where there is weapon, by itself, does not justify an inference of knowledge. *People v. Hampton*, 358 Ill. App. 3d 1029, 1033 (2005). Rather, knowledge can be inferred "from several factors, including: (1) the visibility of the weapon from defendant's location in the vehicle, (2) the amount of time in which defendant had an opportunity to observe the weapon, (3) gestures or movements made by defendant that would suggest an effort to retrieve or conceal the weapon, and (4) the size of the weapon." *People v. Ingram*, 389 Ill. App. 3d 897, 900 (2009).

¶ 15 Officer Zagorski testified that, while in his car parked behind the sedan, he observed respondent sitting behind the driver's seat but he lost sight of respondent two to three times because respondent lowered his body while appearing to reach towards his feet. No other occupants made similar gestures. Upon searching the area underneath the driver's seat, Officer Zagorski recovered a gun the size of his hand. Respondent's movements and the gun's location suggest respondent was trying to hide the gun. Taken together, a rational factfinder could infer that respondent knew of the presence of a weapon, and intended to exercise control over it.

¶ 16 Respondent cites to multiple cases where the court found defendant, as a vehicle occupant, lacked knowledge of the presence of contraband. In each of these cases, the court reversed convictions for contraband possession because the defendant, who was either borrowing

a car or was a passenger, denied knowledge of the contraband's presence and the State failed to show the contraband was visible to the defendant. *People v. Bailey*, 333 Ill. App. 3d 888, 889, 892 (2002) (noting the defendant's lack of movement indicating knowledge of contraband); *People v. Crowder*, 4 Ill. App. 3d 1079, 1081-82 (1972) (mentioning that there was no evidence of defendants' gestures that could circumstantially establish knowledge); *People v. Huth*, 45 Ill. App. 3d 910, 912-16 (1977); *People v. Gore*, 115 Ill. App. 3d 1054, 1057-58 (1983). Here, in contrast, respondent's gestures in the sedan allow for a reasonable inference that he knew of the firearm in front of him.

¶ 17 Respondent also cites cases to support his argument that he lacked exclusive and immediate control over the area where the firearm was found, but they are distinguishable. In *People v. Millis*, 116 Ill. App. 2d 283, 285-88 (1969), the court decided the defendant did not possess an empty beer can, found next to her feet in an automobile, because other passengers admitted to consuming the beer and there was no evidence that defendant took actions to establish control over the beer can. In *People v. Boswell*, 19 Ill. App. 3d 619, 620-23 (1974), the court found that a defendant's presence in a vehicle of four occupants, where contraband was tossed out the door during movement, was insufficient to support a finding of possession because the State presented no evidence that the defendant exercised control over the contraband, and other vehicle occupants could have disposed of the contraband. Again, respondent's case is different from these cases because respondent's gestures, and the absence of similar gestures by other sedan occupants, supports the inference that respondent was hiding the firearm, and therefore intended to exercise control.

¶ 18 Respondent next contends that the evidence was insufficient to support his adjudication for AUUW predicated upon the non-issuance of a valid FOID card. 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2016). The State confesses error. We agree with the parties.

¶ 19 AUUW occurs when the accused knowingly possesses a firearm without having been issued a currently valid FOID card. 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2016). However, a person possessing a firearm is not required to possess a FOID card at the same time because "the unlawful use of weapons statute only contemplates that a FOID card has been issued to that individual." *People v. Holmes*, 241 Ill. 2d 509, 522 (2011). At trial, the State only presented evidence that respondent did not show a FOID card to Officer Zagorski upon arrest. It never presented any evidence that respondent was not issued a currently valid FOID card, and therefore failed to show these elements beyond a reasonable doubt. As a result, we must reverse respondent's adjudication of delinquency for AUUW involving the issuance of a FOID card.

¶ 20 Finally, both parties also agree that one of the two remaining convictions should be vacated under the one-act, one-crime rule. This rule applies to juvenile proceedings (*In re Samantha V.*, 234 Ill. 2d 359, 378 (2009)), and prohibits multiple convictions "that are based upon precisely the same single act." *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). When "a defendant is convicted of two offenses based upon the same single physical act, the conviction for the less serious offense must be vacated." *Id.* To determine which offense is the more serious, a reviewing court ordinarily compares the relative punishments imposed for each offense, but if the degree of the offenses and their sentencing classifications are identical, we may also consider which conviction has the more culpable mental state. *People v. Artis*, 232 Ill. 2d 156, 170-71 (2009). If, however, we cannot determine which offense is the more serious of the two or more convictions based on a single physical act, we must remand the cause to the trial

court for that determination. *Id.* at 177. On appeal, application of the one-act, one-crime rule is reviewed *de novo*. *Johnson*, 237 Ill. 2d at 97. Although respondent never brought the one-act, one-crime rule to the trial court's attention, he still may contest the matter on appeal because "it is well established that a one-act, one-crime violation affects the integrity of the judicial process" and therefore amounts to plain error. *In re Samantha V.*, 234 Ill. 2d at 378.

¶ 21 Both parties correctly assert the trial court misapplied the one-act, one-crime rule. Respondent's two remaining convictions are AUUW for being under 21 and possessing a handgun (720 ILCS 5/24–1.6(a)(1), (3)(I) (West 2016)), and UPF for being under 18 and possessing a handgun capable of concealment. 720 ILCS 5/24–3.1(a) (West 2016). The State never apportioned its charges to different discrete acts, but instead simply alleged in each charge that respondent possessed a firearm. Where recovery of a handgun from under a vehicle's passenger seat resulted in multiple firearm possession convictions against a defendant, the convictions were "clearly premised on the same physical act of possessing the handgun on or about his person." *Johnson*, 237 Ill. 2d at 85-86, 97-98. Without any indication that each charge applied to a separate physical act, the multiple convictions cannot stand. We must therefore determine which conviction is the more serious offense. See *Artis* 232 Ill. 2d at 170-71.

¶ 22 Respondent and the State, however, disagree about which conviction is less serious and should be vacated. Both AUUW and UPF are Class 4 felonies punishable by one to three years' imprisonment. 720 ILCS 5/24-1.6(d)(1) (West 2016); 720 ILCS 5/24-3.1(a) (West 2016); 730 ILCS 5/5-4.5-45(a) (West 2016). In addition, they also have the same mental state of knowledge. See 720 ILCS 5/24-1.6(a)(1), (3)(I) (West 2016); 720 ILCS 5/24-3.1(a)(1) (West 2016); 720 ILCS 5/4-2 (West 2016). The State argues that the AUUW offense is more serious because it contains the word "aggravated," whereas respondent contends that the trial court

should decide which offense is more serious. Legislative intent, found "in the plain language of statute" and the severity of punishment, determines which crime is less serious. *Johnson*, 237 Ill. 2d at 97. Although the State identifies a textual indication that one conviction is more serious than the other, legislative intent cannot be narrowed down to just one indicator, and the court should "consider the relevant statutes as a whole and in context." *Id.* at 98. Therefore, we must remand respondent's adjudication to the trial court to determine which conviction is less serious. See *Artis*, 232 Ill. 2d at 177.

¶ 23 CONCLUSION

¶ 24 The evidence was sufficient to support respondent's delinquency adjudications for UPF and one count of AUUW. The evidence was insufficient to support respondent's delinquency adjudication of AUUW, involving non-issuance of a FOID card, as the State did not present evidence that respondent was not issued a FOID card. Further, under the one-act, one-crime rule, only one of respondent's adjudications may stand. Therefore, we: (1) reverse respondent's AUUW conviction for non-issuance of a FOID card; and (2) remand for the trial court to determine which of respondent's remaining two delinquency adjudications is more serious, and to vacate the less serious delinquency adjudication. We affirm the judgment of the trial court in all other respects.

¶ 25 Affirmed in part; reversed in part; cause remanded.