2018 IL App (1st) 150846-U

No. 1-15-0846

Order filed January 19, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 14656
	)	
VICTOR MONTIJO,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for possession of contraband in a penal institution where corrections officers testified that defendant dropped a shank in their presence.

¶ 2 Following a jury trial, defendant Victor Montijo was convicted of possession of contraband in a penal institution (720 ILCS 5/31A-1.1(b) (West 2012)) and sentenced to 11 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty

beyond a reasonable doubt, arguing that the testimonies of the corrections officers were "too remarkable, improbable, and serendipitous." We affirm.

¶ 3 At trial, Cook County Sheriff correctional officer Rikki Hernandez testified that, on July 1, 2013, he was on duty at the Cook County Department of Corrections (CCDOC). That day, he was assigned to work as a transportation officer, escorting prisoners within the jail. Hernandez was also assigned to conduct a "perimeter security check[ ]" within Division 10, Tier 3C. Security checks entail visual searches for contraband, such as "weapons, drugs, [or] manufactured alcohol," within the individual cells and communal areas of the tier.

¶ 4 Tier 3C was a living unit within Division 10 that housed 48 inmates. It was shaped like a horseshoe with cells along the perimeter and a dayroom area for recreation in the middle. To the left side, there was a shower area with individual shower stalls and a waist high privacy wall. The officer's area, or "inner lock," was located in the front, middle portion before the horseshoe began. Affixed to the ceiling above the inner lock area was a fisheye camera that faced the dayroom. For privacy reasons, the camera did not reach the shower area. In addition to the fisheye camera, the CCDOC had shoulder-worn and handheld cameras available for officers to use throughout their shifts.

¶ 5 Only one half of the inmates were able to freely access the communal areas at a time. Between 3:00 and 6:00 p.m., 24 inmates were allowed into the communal area, while the other 24 were locked in their cells. They then switched and the other half was able to access it between 6:00 and 9:00 p.m.

¶ 6 On July 1, 2013, at approximately 6:45 p.m., Hernandez, Officer Eric Velez, and Sergeant Ezekiel Iracheta were conducting a security check on Tier 3C. Hernandez testified he

noticed three individuals in the shower area "having what seemed to be a meeting." The three inmates were defendant, Julian Davis, and Jamie Colon. They were in their full CCDOC uniforms, did not have any shower items on them or in their area, and were away from the rest of the detainees in the communal area. The officers were about 20 feet away from the inmates and "swiftly" proceeded toward them, which only took "a couple seconds."

¶ 7 When the officers came around the wall in the shower area, defendant had his back facing Hernandez, and turned around "surprised." Hernandez directed the inmates to put their hands on the wall. He was within two feet of defendant and saw defendant grab a "metal object" from his waistband area and throw it to the ground. Hernandez ordered defendant to drop to the floor and surrender his hands, and the other two inmates did the same. Hernandez secured the object thrown by defendant, which was "a sharpened metal object with a makeshift handle with a torn bed sheet wrapped around it for a handle," commonly referred to as a "shank." Hernandez testified that shanks are used for inflicting bodily harm to individuals and/or cutting material, and are not permitted in CCDOC. Hernandez recovered the shank, placed it in an evidence bag, inventoried it, and completed an incident report. He identified People's Exhibit No. 1 as the shank he recovered on July 1, 2013.

¶ 8 Hernandez testified that neither he, Velez, nor Iracheta were using shoulder-worn or handheld cameras. Hernandez explained he did not view the video footage from the fisheye camera because he had "visually observed them." The weapon did not need to be tested for fingerprints because he "visually observed it." Hernandez did not do any investigation with regard to defendant's cell.

¶ 9 Cook County Sheriff correctional officer Eric Velez testified that, on July 1, 2013, he was working as a transportation officer in Division 10, Tier 3C. Velez was also assigned to "search" for contraband within the division. Around 6:45 p.m., Velez saw defendant and two other inmates, who were fully clothed, in the shower area, away from the rest of the inmates who were in the dayroom. The three were not cleaning themselves in the shower in any way. Velez asserted "in my experience, when inmates are separated from everyone else, they're up to no good."

¶ 10 Velez, Hernandez, and Iracheta quickly approached the inmates. Defendant turned around "surprised" and "reach[ed] for something." Velez then saw a shank, a homemade weapon sharpened to a point, fall to the ground in front of defendant. He identified People's Exhibit No. 1 as the shank he saw fall from defendant's person on July 1, 2013.

¶ 11 On cross-examination, Velez explained that a "run-in" is a "surprise search," which was what the officers conducted on July 1, 2013. Run-ins can consist of one officer or an "entire shift" of officers. Velez testified one additional officer participated in the run-in with him, Hernandez, and Iracheta. He could not remember who the fourth officer was, but stated the officer stayed in the dayroom, "making sure that the other 21 inmates in the dayroom didn't attack us."

¶ 12 Velez explained that "taser cameras" or "pin cameras" are small cameras attached to officers that are assigned by a supervisor. In 2013, each division was assigned taser cameras in a process that occurred "over time." Velez stated none of the four officers were wearing a pin camera. Velez stated that handheld cameras were located in a supervisor's office on the "opposite side of the building." He "immediately react[ed]" to the incident instead of going to get one. He denied that Iracheta had a handheld camera during the search.

¶ 13 People's Exhibit No. 1, the "shank," was entered into evidence over defendant's objection. Defendant's motion for a directed verdict was denied.

¶ 14 Cordin McBryant testified that he was a convicted felon serving an eight-year sentence in the Danville Correctional Center. Prior to serving that sentence, he was held at CCDOC. On July 1, 2013, at approximately 6:45 p.m., McBryant was "in a shower" in Division 10, Tier 3C. He described the area as "a decent enough shower where it could fit about maybe five people in it" with a privacy wall that came up to the "stomach area." McBryant was in the shower area with defendant and another individual whose name he could not remember. McBryant stated they were "actually showering" and all had on their "underwear."

¶ 15 Approximately 10 uniformed officers ran into the tier. McBryant recognized Iracheta and another officer. Iracheta had a small "hand camera" with him and the other officers all had cameras. McBryant stated, "they had a small camera in they upper left shoulder. I think so, I'm not for sure, but it was a camera on their shoulders."

¶ 16 The officers first ran into the dayroom and made all of the inmates in there lay on the floor. A "little bit" later, two officers ran into the shower area and made McBryant, defendant, and the other inmate "get out of the shower" and lay down next to each other in front of the shower wall. McBryant did not have a weapon, see defendant or the other inmate with a weapon, hear anything drop to the floor, see defendant toss anything to the floor, or see the officers retrieve a weapon. McBryant stated the officers were "video camering everybody and what they was doing" and that there was another camera located in the "officer's bubble," which was about three to four feet away from the common area.

¶ 17 On cross-examination, McBryant admitted that he was currently serving a sentence of 14 years and not 8 years, as he stated during direct examination. After the incident occurred, McBryant knew officers had recovered a shank and that "they were saying" defendant had the shank. McBryant told several inmates on the "deck" that defendant did not have a shank, but did not tell any State's Attorneys or correctional officers because "[o]fficers really doesn't believe inmates." He "figured because they had cameras on they shoulders and it's a camera in the bubble, I thought maybe it wasn't necessary." McBryant did not see the cameras recording on that day, as he "didn't see any type of red lights blinking on and off."

¶ 18 In rebuttal, the State entered into evidence People's Exhibit No. 2, a certified copy of convictions for McBryant. It indicated he was "convicted of aggravated battery discharge of a firearm and was sentenced to 14 years in the Illinois Department of Corrections on September 23rd of 2014."

¶ 19 Approximately 45 minutes into the jury's deliberations, it sent a handwritten note that read: "The jury would like to see any and all incident reports entered into evidence. I believe there is one." The court responded in writing, "You have all the evidence in the case before you. Please continue to deliberate." Approximately 27 minutes later, the jury returned a verdict finding defendant guilty of possession of contraband in a penal institution. The court denied defendant's motion for a new trial and sentenced him to 11 years' imprisonment. It denied defendant's motion to reconsider sentence. This appeal followed.

¶ 20 On appeal, defendant contends that the State failed to establish his guilt beyond a reasonable doubt because the testimony of Officers Hernandez and Velez that defendant and two other fully clothed inmates were "having a meeting" in the shower while guards who could see

the showers from their station stood idly by was incredible. He argues the circumstances in which the officers recovered the shank were too improbable to sustain his conviction.

¶ 21 On a challenge to the sufficiency of the evidence, we must determine 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 proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on issues pertaining to conflicts in testimony, the credibility of witnesses, or the weight of the evidence. *Id.* To sustain a conviction, "[i]t is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *People v. Hall*, 194 Ill. 2d 305, 330 (2000). Additionally, the trier of fact is not required to disregard inferences that normally flow from the evidence or to seek out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A conviction will be reversed if the evidence is so improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 22 To sustain defendant's conviction for possession of contraband in a penal institution as charged, the State was required to prove defendant knowingly possessed contraband, "a weapon, to wit: a sharpened metal object commonly referred to as a shank," in a penal institution, the CCDOC, regardless of the intent with which he possessed it. 720 ILCS 5/31A-1.1(b) (West 2012).

¶ 23 Knowing possession may be actual or constructive. *People v. Brown*, 327 Ill. App. 3d 816, 824 (2002). Actual possession does not require personal touching of the weapon, rather,

present personal dominion over it. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2009). Where possession is constructive, the State must prove that defendant: (1) knew of the presence of the weapon and (2) exercised immediate and exclusive control over the area where the weapon was found. *People v. Stack*, 244 Ill. App. 3d 393, 398 (1993).

¶ 24 Knowledge is often established through circumstantial evidence and rarely direct proof. *People v. Fleming*, 2013 IL App (1st) 120386, ¶ 74. The State may prove knowledge through evidence regarding defendant's acts, statements, or conduct, as well as the surrounding circumstances. *Id.* ¶ 75. "Where possession has been shown, an inference of guilty knowledge can be drawn from the surrounding facts and circumstances." *Schmalz*, 194 Ill. 2d at 82.

¶ 25 We cannot say the officers' testimony was so incredible as to raise a reasonable doubt of defendant's guilt. The evidence established that during a security check of Division 10, Tier 3C, officers Hernandez and Velez saw defendant and two other inmates, fully clothed, in the shower area, "having what seemed to be a meeting." The inmates were separated from the rest of the detainees, who were in the communal dayroom area. When the officers approached, defendant turned around "surprised," reached for his waistband, and either dropped or tossed a "shank" to the ground. Hernandez detained defendant, recovered the shank, placed it into an evidence bag, inventoried it, and completed an incident report.

¶ 26 Defendant urges that the "self-defeating" conduct described by the officers, that defendant would hide a shank while standing in a shower fully clothed, is contrary to human nature. He asserts that an inmate hiding a shank is unlikely to stand around in a shower fully clothed, with two other inmates, because this highly unusual behavior would arouse the suspicion of guards in the officer's area. Thus, the likelihood of Hernandez and Velez arriving

with "prescient timing," without other guards on the tier noticing or responding to this unusual and suspicious behavior, is "too remarkable, improbable, and serendipitous." But, it does not defy common sense that defendant would stand in the only common area where cameras did not reach if he was attempting to conceal a weapon.

¶ 27 It is also entirely probable that, as the officers testified, defendant dropped or threw the shank to the ground in their presence. Our supreme court has recognized that far from being contrary to human experience, many cases before the court have shown it to be a common behavior pattern for individuals having contraband on their person to attempt to dispose of it when suddenly confronted by authorities. *People v. Henderson*, 33 Ill. 2d 255, 229 (1965). In fact, it is common and believable for a criminal to dispose of contraband after becoming aware of police presence. *People v. Moore*, 2014 IL App (1st)110793-B, ¶ 10 (defendant's conduct in removing weapon from his waistband and kicking it under a bush while officers were nearby was consistent with his situation and not improbable). Defendant's conduct could reasonably be seen as an attempt to dispose of the shank before officers inevitably found it on his person, given they had suddenly approached him from behind.

¶ 28 Finally, defendant contends there was "scant, if any, evidence to corroborate the officers' testimony," most "significantly," no video evidence. However, physical evidence connecting a defendant to a crime is not required to establish guilt where, as here, the officers' testimony that they saw defendant reach for the shank and throw it to the ground was sufficient to prove guilt beyond a reasonable doubt. *Siguenza-Brito*, 235 Ill. 2d at 228 (testimony of a single witness, if positive and credible, is sufficient to sustain a conviction). Further, the jury was tasked with determining the credibility of the witnesses and the weight of their testimony, and its credibility

determinations are given great deference. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The jury heard the officers' testimony that they did not have cameras and McBryant's testimony that they did. But, it also heard McBryant's testimony that he did not see the cameras recording because he "didn't see any type of red lights blinking on and off" and defense counsel's vigorous argument regarding the implausibility of the officer's doing the run-in without cameras "for their own safety." It found proof beyond a reasonable doubt that defendant possessed a shank in a penal institution after considering the same arguments defendant maintains here. Given the jury's guilty finding, it necessarily credited the officers' testimony over McBryant's and counsel's argument and we cannot say it's findings were so unreasonable or unsatisfactory that we must reverse.

¶ 29 Accordingly, we affirm defendant's conviction for possession of contraband in a penal institution.

¶ 30 Affirmed.