

2018 IL App (1st) 152005-U
No. 1-15-2005
Order filed January 19, 2018

Fifth Division

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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 12936
)	
WILLIAM MEJIA,)	Honorable
)	Timothy J. Chambers,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction for aggravated unlawful use of a weapon reduced to lesser-included offense of possession of a stun gun without a valid Firearm Owner's Identification card over his contention that the State failed to prove him guilty beyond a reasonable doubt; sentence for aggravated unlawful use of a weapon vacated; remanded for resentencing.
- ¶ 2 Following a bench trial, defendant William Mejia was convicted of one count of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(2), (3)(C) (West 2012)) and sentenced to one year probation. On appeal, defendant contends his conviction for AUUW

should be reversed because the State failed to prove him guilty beyond a reasonable doubt. We agree that, in this case, the State failed to prove the charged statutory aggravating factor of possessing a firearm without a valid firearm owner's identification (FOID) card. We thus reduce defendant's conviction to the lesser-included offense of possession of a stun gun without a valid FOID card, vacate his conviction for AUUW, and remand for resentencing.

¶ 3 Defendant went to trial on two counts of AUUW. Relevant here, in Count 1, defendant was charged with "knowingly carry[ing] or possess[ing] on or about his person a stun gun, upon any public street * * * ha[ving] not been issued a currently valid firearm owner's identification card" in violation of section 24-1.6(a)(2), (3)(C) of the Illinois Criminal Code of 2012 (720 ILCS 5/24-1.6(a)(2), (3)(C) (West 2012)). The aggravating factor set forth in section (a)(3)(C) applies if the "person carrying the *firearm* has not been issued a currently valid firearm owner's identification card." (Emphasis added.) 720 ILCS 5/24-1.6(a)(3)(C) (West 2012).

¶ 4 At trial, Chicago police officer Kenneth Golden testified that, on June 20, 2013, he and his partner were patrolling the area of Monticello Park. While driving, Golden noticed defendant drinking from a clear plastic cup on the parkway in front of the park, which led him to believe defendant was drinking on a public way. Golden approached defendant and saw two bottles of Malibu Rum and empty clear plastic cups on the parkway. He asked defendant if he had been drinking, and defendant replied "just a little bit." Golden arrested defendant for drinking alcohol on a public way.

¶ 5 Pursuant to the arrest, Golden searched defendant's person. He retrieved a "black object encased in a Velcro container" from defendant's right shorts pocket. Inside the container was a "black box, approximately the size of a cigarette box that contains 20 cigarettes." The box had

“two prongs in it and on one side what looked like a light ball in the middle of that and one side it also had what looked like a switch or a trigger.” When Golden flipped the switch, “a light came on” and there was an “electrical arc” or “spark” that went from prong to prong. These factors led Golden to believe that the object was a stun gun. Based on his law enforcement experience, Golden described a stun gun as “a device that emits an electrical charge from prong to prong, which means it can incapacitate the motor neurons or the functionality of a human being.”

¶ 6 Golden handled stun guns during his career as a law enforcement officer and had the opportunity to see them “affect the human nervous system.” He believed the stun gun recovered from defendant to be “functional” and inventoried it. Golden determined defendant did not have a valid FOID card. He did not test the stun gun himself or send it to the lab for additional testing. Golden testified that there are multiple models of stun guns and he was not familiar with them all.

¶ 7 The parties stipulated to a certification form from the Illinois State Police certifying that, as of August 14, 2014, defendant had never been issued a valid FOID card. The court denied defendant’s motion for a directed finding and subsequently found defendant guilty of AUUW.¹ The court denied defendant’s motion for a new trial and sentenced him to one year of probation. This appeal followed.

¶ 8 On appeal, defendant argues (1) the State failed to prove the aggravating factor of AUUW when it did not present any evidence that defendant possessed a firearm and (2) the State failed to prove him guilty beyond a reasonable doubt of AUUW where it failed to prove the stun

¹ It was clarified at a later hearing that defendant was found guilty of Count 1 and not guilty of Count 2.

gun was ever capable of disrupting a person's nervous system so as to render the person incapable of normal human functioning. Defendant requests we reverse his conviction.

¶ 9 When reviewing 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. It is the fact finder's responsibility "to determine the credibility of witnesses, to resolve any conflicts in the evidence and to draw reasonable inferences from the evidence." *People v. Teague*, 2013 IL App (1st) 110349, ¶ 26. The reviewing court will not substitute its judgment for that of the trier of fact on issues pertaining to the credibility of witnesses or the weight of the evidence. *Id.*

¶ 10 A defendant may be convicted based entirely on circumstantial evidence, provided that the elements of the crime charged are proven beyond a reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). The trier of fact, however, need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *Id.* It is sufficient if all the evidence taken together proves the defendant's guilt beyond a reasonable doubt to the fact finder's satisfaction. *Id.* We will reverse a conviction only 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).

¶ 11 To sustain defendant's conviction of AUUW as charged in Count 1, the State was required to prove that defendant knowingly "carrie[d] or possesse[d] on or about his [] person, upon any public street * * * any pistol, revolver, stun gun or taser or other firearm;" and "ha[d] not been issued a currently valid Firearm Owner's Identification Card." 720 ILCS 5/24-1.6(a)(2), (3)(C) (West 2012).

¶ 12 Section (a)(3) of the AUUW statute presents 10 factors which, if present, render possession of any “pistol, revolver, stun gun or taser or other firearm” as described in section (a)(1) or (a)(2) a violation of the AUUW statute. 720 ILCS 5/24-1.6(a)(1), (a)(2), (a)(3) (West 2012). The aggravating factor charged here was under section (a)(3)(C): “the person possessing the firearm has not been issued a currently valid Firearm Owner’s Identification Card.” 720 ILCS 5/24-1.6(a)(3)(C) (West 2012).

¶ 13 Defendant contends, and the State correctly concedes, that the State failed to prove the charged statutory aggravating factor of possessing a firearm without a valid FOID card (720 ILCS 5/24-1.6(a)(3)(C) (West 2012)), as the definition of “firearm” does not include a stun gun. “Firearm,” as used in the AUUW statute, is defined with reference to section 1.1 of the Firearm Owners Identification Card Act (the FOID Act). 720 ILCS 5/2-7.5 (West 2012). The FOID Act defines “firearm” as “any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas.” 430 ILCS 65/1.1 (West 2012).

¶ 14 The AUUW statute defines “stun gun or taser” as:

“(i) any device which is powered by electrical charging units, such as, batteries, and which fires one or several barbs attached to a length of wire and which, upon hitting a human, can send out a current capable of disrupting the person’s nervous system in such a manner as to render him incapable of normal functioning or (ii) any device which is powered by electrical charging units, such as batteries, and which, upon contact with a human or clothing worn by a human, can send out current capable of disrupting the person’s nervous system in such a manner as to render him incapable of normal functioning.” 720 ILCS 5/24-1(a)(10) (West 2012); 720 ILCS 5/24-1.6(b) (West 2012).

¶ 15 As the parties correctly point out, a stun gun does not fit the definition of “firearm” as it does not expel projectile(s) by way of explosion, gas, or any other means. Therefore, the section

(a)(3)(C) aggravating factor that defendant possessed a “firearm” without a valid FOID card when he was only charged with possessing a stun gun was not, and could not, be proven. Accordingly, defendant’s conviction for AUUW, as charged, cannot stand.

¶ 16 The State argues we should not reverse defendant’s AUUW conviction, but rather should reduce it to a misdemeanor violation of the FOID Act, specifically for possession of a stun gun without a valid FOID card in violation of section 65/2(a)(1) of the Act. 430 ILCS 65/2(a)(1) (West 2012). Defendant agrees that a violation of section 65/2(a)(1) is a lesser-included offense of AUUW but argues his conviction should be reversed because the State did not prove beyond a reasonable doubt that the device he possessed was a stun gun “capable of disrupting the person’s nervous system in such a manner as to render him incapable of normal functioning,” as defined in section 24-1(a)(10) of the Criminal Code of 2012 (720 ILCS 5/24-1(a)(10) (West 2012)).²

¶ 17 Appellate courts have the authority “to reverse a conviction while at the same time ordering the entry of a judgment on a lesser-included offense.” *People v. Rowell*, 229 Ill. 2d 82, 97 (2008). “[A] defendant may be convicted of an offense not expressly included in the charging instrument if that offense is a lesser-included offense of the crime expressly charged.” *Id.* Further, pursuant to Illinois Supreme Court Rule 615(b)(3), when a lesser-included offense is involved, we may reduce the degree of the offense of which a defendant was convicted when an element of the greater offense is not proved beyond a reasonable doubt. *Id.* at 98.

¶ 18 A defendant may only be convicted of an uncharged offense “if it is a lesser-included offense of a crime expressly charged in the charging instrument, and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the

² The FOID Act defines “stun gun or taser” as set forth in section 24-1 of the Criminal Code of 2012. 430 ILCS 5/1.1 (West 2012).

greater offense.” (Internal quotation marks and citations omitted.) *People v. Kennebrew*, 2013 IL 113998, ¶ 27. When determining whether an uncharged offense not considered by the trial court is a lesser-included offense of a charged offense, we employ the charging instrument approach. *Id.* ¶¶ 32, 53. Under this approach, an offense is a lesser-included offense “if every element of the uncharged offense is contained in the indictment or if any element not listed in the indictment can be reasonably inferred from the indictment allegations.” *Id.* ¶¶ 34, 37. The approach ensures that the defendant had sufficient notice of the uncharged offense, as allegations regarding each element of the uncharged offense were included in the charge or can reasonably be inferred from the allegations. *Id.* ¶ 53. Once the reviewing court has determined there is a lesser-included offense, then it must look at the evidence at trial to determine whether the evidence was sufficient to uphold a conviction on the lesser-included offense. *Id.* ¶ 30. “The indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations.” *Id.*

¶ 19 Pursuant to section 65/2(a)(1), a person violates the FOID Act when he acquires or possesses a stun gun within this state without having in his possession a FOID card previously issued in his name by the Department of State Police under the provisions of the Act. 430 ILCS 65/2(a)(1) (West 2012). A first violation of this section of the Act is a Class A misdemeanor. 430 ILCS 65/14(b) (West 2012).

¶ 20 In Count 1 of defendant’s two-count information for AUUW, the State charged that defendant “possessed on or about his person a stun gun” and “had not been issued a currently valid firearm owner’s identification card.” Accordingly, each element of the uncharged offense of possession of a stun gun without a valid FOID card was contained within the AUUW charge.

Thus, a misdemeanor violation of the FOID Act for possessing a stun gun without a valid FOID card is, as the parties agree, a lesser-included offense of AUUW as charged here.

¶ 21 Further, viewed in the light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that defendant possessed a stun gun without a valid FOID card. Defendant challenges only his possession of a “stun gun,” having stipulated that he had never been issued a FOID card in Illinois. The FOID Act uses the same definition of “stun gun” as set out in the AUUW statute. 430 ILCS 65/1.1 (West 2012); 720 ILCS 5/24-1(a)(10) (West 2012). Thus, the State had to prove defendant possessed a device capable of disrupting a person’s nervous system in such a manner as to render him incapable of normal functioning. 720 ILCS 5/24-1(a)(10) (West 2012); 720 ILCS 5/24-1.6(b) (West 2012).

¶ 22 The evidence at trial established that, pursuant to a valid search of defendant incident to arrest, Officer Golden recovered what he believed was a stun gun. The object was a black box, approximately the size of a package of cigarettes. The box had “two prongs in it and on one side what looked like a light ball in the middle of that and one side it also had what looked like a switch or a trigger.” Golden flipped the switch on the box and there was a light and an “electrical arc” or “spark” that went from prong to prong.

¶ 23 Golden explained that a stun gun is “a device that emits an electrical charge from prong to prong, which means it can incapacitate the motor neurons or the functionality of a human being.” He further testified that he was familiar with stun guns from his role as a law enforcement officer and knew them to have the “capability of affecting the human nervous system.” Golden believed, based on his experience, that the recovered item was a stun gun and that it was “functional.” Golden’s testimony was sufficient to establish that defendant possessed

a stun gun as defined in the Act. *Siguenza-Brito*, 235 Ill. 2d at 228 (testimony of a single witness, if credible and positive, is sufficient to sustain a conviction, even when contradicted by the defendant).

¶ 24 Defendant points out that the stun gun, or a picture of the device, was not entered into evidence. But physical evidence connecting a defendant to a crime is not required to establish guilt where, as here, testimony is sufficient to prove guilt beyond a reasonable doubt. *People v. Williams*, 182 Ill. 2d 171, 192 (1998). Defendant argues that without proof that the device recovered from defendant was at least designed to render a human incapable of normal functioning, the State did not prove the device was a stun gun. He argues the court improperly assumed that all devices that emit electrical charges from prong to prong are so designed. But the State was not required to prove the stun gun was fully operational, *i.e.*, that it was “capable of disrupting [a] person’s nervous system in such a manner as to render him incapable of normal functioning.” 720 ILCS 5/24-1(a)(10) (West 2012); *People v. Martinez*, 285 Ill. App. 3d 881, 884 (1996) (defendant’s conviction for unlawful use of a weapon was sustained even though the stun gun admitted into evidence was inoperable).

¶ 25 We find that any rational trier of fact could have found from Golden’s testimony regarding his experience with stun guns and his opinion that the device recovered from defendant was in fact a “functional” stun gun and thus capable of disrupting a person’s nervous system so as to render the person incapable of normal human functioning, that defendant possessed a “stun gun,” as defined by statute, without a valid FOID card. Accordingly, we reduce defendant’s conviction of AUUW to the lesser-included offense of possession of a stun gun without a valid

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FOID card (430 ILCS 65/2(a)(1) (West 2012)), vacate defendant's sentence for AUUW, and remand for resentencing on possession of a stun gun without a valid FOID card.

¶ 26 Conviction reduced and sentence vacated. Cause remanded for resentencing.