2018 IL App (1st) 160245-U
Order filed: August 17, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-16-0245

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 559 (01)
	)	
PHILLIP MCABEE,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence was sufficient to sustain defendant's guilt of aggravated unlawful use of a weapon and unlawful use of a weapon by a felon. Where prior predicate felony was not a forcible felony, and convictions upon which judgment had been entered were Class 3 rather than Class 2 felonies, we remanded the case to enter judgment upon a merged Class 2 felony count and correct the mittimus.

¶ 2 Following a bench trial, defendant-appellant, Phillip McAbee, was found guilty of two counts of unlawful use of a weapon by a felon (UUWF) and four counts of aggravated unlawful

use of a weapon (AUWF), and sentenced to concurrent terms of three years' imprisonment on the two UUWF counts. On appeal, defendant contends that: the evidence was insufficient to find him guilty of the charges beyond a reasonable doubt; his convictions for the UUWF charges should be reduced from Class 2 to Class 3 felonies; and he should be resentenced because the predicate offense was not a forcible felony. The State agrees that the convictions for UUWF upon which judgment had been entered are Class 3 felonies, but contends that we should remand to the circuit court to enter judgment on one merged count of Class 2 aggravated unlawful use of a weapon (AUUW). For the reasons below, we affirm the guilty findings, remand this cause to the circuit court to enter judgment on one merged count of AUUW, and direct the clerk of the circuit court to correct the mittimus.[1]

¶ 3 Defendant and codefendant, Martez Albea, were arrested after the police dispersed a crowd which had gathered on the night of December 23, 2014.

¶ 4 Defendant was charged, in relevant part, with two counts of UUWF and four counts of AUUW.[2] The UUWF counts alleged that he possessed a firearm (count 1) and ammunition (count 2) after being convicted of the felony of aggravated battery in circuit court case number 05 CR 15236. The AUUW counts (counts 5 through 8) alleged that he carried a loaded uncased firearm on or about his person while on a public street in violation of 720 ILCS 5/24-1.6(a)(2), (a)(3)(A) (West 2016), not on his own land, or in his own abode, or in a fixed place of business in violation of 720 ILCS 5/2401.6(a)(1) (West 2016), when he was not issued a valid concealed-

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

carry license or firearm owner's identification (FOID) card in violation of 720 ILCS 5/2401.6(a)(3)(C) (West 2016). Each AUUW count sought a Class 2 felony sentence based on the felony conviction in circuit court case number 05 CR 15236. The same information charged codefendant with four counts of AUUW.

¶ 5 Defendant was tried in October 2015, separately from codefendant.

¶ 6 Chicago police officer, Maria Ramirez, testified that she and Officer Jose Alvarez, while on patrol on December 23, 2014, responded to a call at about 9:15 p.m. Upon arriving at 3648 West Fifth Avenue, Chicago, Officer Ramirez saw a crowd of about 100 people standing on the street. When Officer Ramirez stopped the police car, defendant looked in her direction and "made eye contact." She exited the car, and defendant turned and fled. It was nighttime, but the area was lit by streetlamps. Officer Ramirez pursued defendant and, when she was about ten feet behind him, with his right hand he pulled a "black blue-steel handgun" from his rear waistband, and threw the gun near a parked vehicle. Nobody was standing near the parked vehicle, and nothing else was on the ground in the area. Officer Alvarez immediately recovered the weapon, a loaded Glock 22 .40-caliber semi-automatic handgun which held 16 live rounds, and she showed it to Officer Ramirez. Officers Ramirez and Alvarez continued to pursue defendant, but lost sight of him.

¶ 7 A short time later, Officer Ramirez received a radio call to proceed to a nearby location. When she arrived there, Officer Ramirez saw that defendant had been detained by other officers. Defendant was arrested and brought to the police station, where Officer Ramirez learned

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[2] Counts 3 and 4 were *nolle prossed* prior to trial.

defendant's address. Defendant was not on his own land or abode when Officer Ramirez first saw him, nor when he was detained.

¶ 8 On cross-examination, Officer Ramirez testified that several other officers were already present when she and Officer Alvarez responded to the call. Codefendant fled with defendant after both had made eye contact with Officer Ramirez, and she had pursued both of them. Codefendant also discarded a firearm during the pursuit. Officer Ramirez recovered that firearm, but could not recall its type, other than it was a handgun. She lost sight of defendant and codefendant shortly after the guns were recovered. Officer Ramirez and Officer Alvarez immediately recovered the guns, and showed them to each other. Other officers detained codefendant.

¶ 9 On redirect examination, Officer Ramirez testified that defendant was wearing a black and maroon hooded sweater and white jeans, and that codefendant was not dressed like defendant. Defendant was detained about one block from where he threw the gun.

¶ 10 Officer Paul Woods testified that, on December 23, 2014, at about 9:12 p.m., he saw defendant running alone. He detained defendant based on police radio reports which described a man fleeing nearby with a gun.

¶ 11 The parties stipulated that Officer Alvarez would testify that he recovered a .40-caliber Glock 22 firearm, a magazine, and 16 bullets. The officer secured the gun until it was given to another officer to inventory. The parties also stipulated that defendant had a prior conviction for aggravated battery in circuit court case number 05 CR 15236. The State entered into evidence, without objection, a certification from the Illinois State Police that defendant had never been

issued a FOID card or a concealed-carry license.

¶ 12 Jamaar Washington and Calvin Coleman testified for the defense that, on December 23, 2014, at around 7:30 or 8 p.m., a crowd had gathered in the street for a candlelight vigil for a recently-deceased friend. Mr. Washington and Mr. Coleman were with defendant prior to and throughout the vigil. Mr. Washington described defendant as being "somewhat of a close friend" for over a decade, and Mr. Coleman described him as being a friend for over 15 years.

¶ 13 At about 9 p.m., the police arrived at the vigil and ordered the crowd to disperse. According to Mr. Washington, the crowd "all walked away." Mr. Coleman testified that the crowd had "just walked off," though he admitted that a few people ran away. The police stopped defendant, Mr. Coleman, and a few other people, though neither defendant nor Mr. Coleman was running. Defendant was detained at the crowd scene, and Mr. Coleman saw police pat down defendant. Police also performed a pat down on Mr. Coleman, but he was released. Mr. Washington did not see codefendant at the vigil and, although Mr. Coleman saw codefendant there, Mr. Coleman testified that codefendant was not with them.

¶ 14 In closing arguments, defendant argued that Officer Ramirez was not lying but was mistaken in identifying defendant as one of the men who dropped a gun on the night in question.

¶ 15 The trial court found defendant guilty on all counts after concluding that Officer Ramirez was credible. The trial court also noted that the testimony of Officer Woods, as to apprehending defendant as he fled about one block from the original scene or the crowd location, contradicted the testimony of the defense witnesses that defendant was not fleeing when the police stopped them at the original scene. The court found that there was no misidentification, as defendant was

dressed distinctly from codefendant.

¶ 16 Defendant's posttrial motion, as amended, challenged the sufficiency of the evidence. Neither the motion, as amended, nor the oral arguments thereon, presented any contention that this was a "dropsy case," nor was there any law nor literature included which supported the theory of a dropsy case. The court denied the motion.

¶ 17 At the sentencing hearing, the State referred to defendant's 2005 conviction as "aggravated battery of a government employee." On counts 1 and 2, UUWF of a firearm and ammunition respectively, the court sentenced defendant to concurrent terms of three years' imprisonment, merging the four AUUW counts as firearm-based counts into count 1. The mittimus states that both offenses are Class 2 felonies and reflects that the AUUW counts are merged into count 1.

¶ 18 Defendant's postsentencing motion did not claim that the predicate felony offense for UUWF was not a forcible felony, nor that the UUWF counts should be Class 3 felonies. The court denied the motion on the basis that it could not impose a prison sentence of less than three years.

¶ 19 On appeal, defendant primarily contends that the evidence was insufficient to convict him beyond a reasonable doubt and argues that the testimonies of the police were not credible in part because this is allegedly a "dropsy case." "A dropsy case is one in which a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that the defendant dropped the [contraband] in plain view (as opposed to the officer's discovering the [contraband] in an illegal search)." *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) (citing G.

Chin & S. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L.Rev. 233, 248-49 (1998)).

¶ 20 On a claim of insufficient evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *Id.*; *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry a defendant; that is, we do not substitute our judgment for that of the trier of fact on witness credibility or the weight of evidence. *Gray*, 2017 IL 120958, ¶ 35. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor to find a witness not credible merely because a defendant says so. *Id*. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Gray*, 2017 IL 120958, ¶ 35.

¶ 21 The positive and credible testimony of a single witness is sufficient to convict, even if contradicted by the defendant. *Id*. ¶ 36. Similarly, a conviction will not be reversed merely because there was contradictory evidence, because the task of the trier of fact is determining if

and when a witness testified truthfully, and because minor or collateral discrepancies in testimony need not render a witness's entire testimony incredible. *Id*. ¶¶ 36, 47. When a finding of guilt depends on eyewitness testimony, we must decide whether a trier of fact could reasonably accept the testimony as true beyond a reasonable doubt. *Id*. ¶ 36. We find eyewitness testimony insufficient only when the evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id*.

¶ 22 Our courts have not looked with favor upon claims that a particular case was a "dropsy case." "Far from being contrary to human experience, cases which have come to [our supreme] court show it to be a common behavior pattern for individuals having [contraband items] on their person to attempt to dispose of them when suddenly confronted by authorities." *People v. Henderson*, 33 Ill. 2d 225, 229 (1965). This court found that such testimony—specifically, that a defendant dropped contraband while handcuffed in the back seat of a police vehicle after his search and arrest—was not contrary to human experience or incredible. *Ash*, 346 Ill. App. 3d at 816-18.

¶ 23 Here, taking the evidence in the light most favorable to the State as we must, we cannot conclude that no rational trier of fact would convict defendant of UUWF and AUUW as charged. Officer Ramirez testified that defendant, while fleeing from the scene, took a gun from his waistband and dropped it, and that Officer Alvarez immediately recovered the gun which held 16 live rounds. Officers Ramirez and Woods testified consistently that defendant was arrested about one block from where he dropped the gun. Two friends of defendant testified consistently with each other, but contrary to the police account, that defendant did not flee and was detained

at the crowd scene. The trial court was not required to find defendant's long-time friends more credible than the officers. Stated another way, the defense testimony does not compel the conclusion that no reasonable person could find Officer Ramirez credible. The court was also not required to find Officer Ramirez impeached by the fact that she recalled and could describe defendant's firearm, which her partner prominently showed her at the scene, but could not describe in detail, nearly one year later, the firearm that she had recovered from codefendant.

¶ 24 In his brief, defendant attempts to support his contention of insufficient evidence with journalistic and academic literature on the topic of "dropsy cases." However, he did not introduce such documents at trial. We must determine issues based solely on the record made in the trial court, and will not consider documents not presented at trial. *Freedman v. Muller*, 2015 IL App (1st) 141410, ¶ 21. Moreover, were we to consider these documents they, at most, speak to the general possibility of false police testimony and do not address what defendant, the officers, or the witnesses saw or did on the night in question. As stated above, neither the trier of fact, nor this court is required to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. The trier of fact was presented with the issue of the sufficiency of the evidence, heard the witnesses, considered other evidence, and reached its conclusions. We see no reason to set those conclusions aside.

¶ 25 Defendant also contends that his convictions for UUWF should be reduced from Class 2 to Class 3 felonies, and that he should be resentenced because the predicate offense of aggravated battery was not a forcible felony. The State agrees that the merged counts of UUWF upon which judgment was entered are Class 3 felonies, but contends that we should remand this

case to the trial court for judgment to be entered on one of defendant's merged counts of Class 2 AUUW.

¶ 26 As a threshold matter, we note that defendant's postsentencing motion does not raise this claim. However, defendant argues that we may consider it as a matter of plain error and trial counsel's ineffective assistance. The State does not argue defendant's forfeiture and has, thus, waived a forfeiture challenge. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 16.

¶ 27 The parties are correct that UUWF is a Class 3 felony, generally, but is a Class 2 felony if the predicate felony is a forcible felony. 720 ILCS 5/24-1.1(e) (West 2016). The parties are also correct that the State failed to show that defendant's predicate felony, aggravated battery in circuit court case number 05 CR 15236, is a forcible felony. Aggravated battery is a forcible felony only if "great bodily harm or permanent disability or disfigurement" resulted. 720 ILCS 5/2-8 (West 2016). However, the charging instrument did not allege, the State did not establish at trial, and the record does not demonstrate on appeal that defendant's aggravated battery conviction involved great bodily harm, permanent disability, or permanent disfigurement.

¶ 28 Furthermore, we agree with the State that the merged counts of AUUW are Class 2 felonies due to defendant's prior felony conviction. 720 ILCS 5/24-1.6(d)(3) (West 2016). We also agree with defendant that his count 2 UUWF conviction with respect to the use of firearm ammunition cannot be replaced by a merged count of AUUW because all the AUUW counts are for the alleged use of a firearm. Conversely, we conclude that the count 1 UUWF conviction for a firearm may also be replaced. Lastly, defendant's three-year sentence is a valid Class 2 and Class 3 felony sentence (730 ILCS 5/5-4.5-35(a) (West 2016); 730 ILCS 5/5-4.5-40(a) (West

2016)), and the parties correctly agree[3] that resentencing is unnecessary.

¶ 29 Accordingly, the judgment of the circuit court is affirmed, and the case is remanded for the circuit court to: (1) enter judgment upon a merged AUUW count in lieu of the count 1 UUWF conviction which, instead, shall merge into the selected AUUW count; and (2) issue a corrected mittimus reflecting the aforesaid and that the remaining UUWF conviction on count 2 is a Class 3 felony; and (3) that defendant is sentenced to concurrent 3-year sentences on the two convictions.

¶ 30 Affirmed and remanded with directions.

[3] In his reply brief, defendant agrees that, if we order the circuit court to substitute a merged AUUW count on count 1 with count 2 duly reflected as a Class 3 felony, resentencing is unnecessary.