2018 IL App (1st) 160246-U

No. 1-16-0246

Order filed May 31, 2018

Fourth 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. 14 CR 9683
	)	
TAURHERN GILL,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to convict defendant of attempted armed robbery, including that he possessed a firearm during the offense. Fines and fees corrected.

¶ 2 Following a 2015 bench trial, defendant Taurhern Gill was convicted of attempted armed robbery and sentenced to nine years' imprisonment with fines and fees. On appeal, defendant contends that his conviction should be reduced to attempted aggravated robbery because the evidence was insufficient to prove beyond a reasonable doubt that he possessed a firearm during

the offense. He also seeks presentencing detention credit to certain fines. For the reasons stated below, we correct the order assessing fines and fees and otherwise affirm.

¶ 3 Defendant was charged with attempted armed robbery for allegedly demanding money from David Montoya while armed with a firearm on or about May 16, 2014. He was also charged with aggravated unlawful restraint for allegedly knowingly detaining Montoya on the same date while using a firearm.[1]

¶ 4 At trial, David Montoia[2] testified that he was leaving his home on the afternoon in question when two men came out of the "derelict" building next door. One of them approached Montoia and asked him for money, and he replied that he had none. The other man, who Montoia identified at trial as defendant, approached Montoia "with a gun" in hand and repeated the demand. Montoia grabbed defendant's hand and grappled with him. Montoia described the gun as a large black "automatic" rather than a revolver, and felt during the struggle that the gun was heavy. When someone else approached, defendant let go of Montoia and fled with the other man, still carrying the gun. Montoia called the police, who came to the scene. He identified the first man, who police had detained nearby, and then identified defendant from a photographic array at the police station. On cross-examination, when counsel showed Montoia photographs of two objects, he testified regarding each that the gun "looked like that type" or "that kind of a gun."

¶ 5 Counsel's investigator testified for the defense that the photographs shown to Montoia depicted two air-powered BB guns, and that the BB guns were advertised as replicas of firearms.

[1] Jovan Manning was charged with the same offenses, but his trial was severed from defendant's. This record does not indicate the disposition of Manning's case, except that defense counsel referred in sentencing arguments to "the other defendant who did plead guilty in this case."

[2] Although the charging instrument spells the victim's name as "Montoya," he testified at trial that his name is spelled as "Montoia."

¶ 6 Following closing arguments, the court found defendant guilty of attempted armed robbery and not guilty of aggravated unlawful restraint. The court noted that Montoia believed the object he struggled for was a "real gun," and he did not testify to seeing "any of the indicia that would suggest that it was not a real gun, such as an orange stopper."

¶ 7 In his posttrial motion, defendant challenged the sufficiency of the evidence. In relevant part, he challenged Montoia's identification of the attempted robber's handheld object as a firearm. He noted Montoia's testimony that two BB guns were possible objects used by the attempted robber, and argued "there was no specific testimony as to how [Montoia] would have known that the object in question was a firearm *** and no weapon was recovered." Following arguments, the court denied the motion. It noted that there is no legal requirement that a witness be an expert in firearms to identify an object as a firearm. It found that Montoia's identification of defendant's handheld object as a gun or firearm was credible, and was not impeached by his cross-examination testimony that the photographed BB guns were "that type of gun" or the like.

¶ 8 Following a sentencing hearing, the court found defendant to be a mandatory Class X offender and sentenced him to nine years' imprisonment with fines and fees. The mittimus and order assessing fines and fees both reflected 578 days of presentencing detention, but no credit was granted against the fines. Defendant made no written or oral postsentencing motion.

¶ 9 On appeal, defendant contends that his conviction should be reduced to attempted aggravated robbery because the evidence was insufficient to prove beyond a reasonable doubt that he possessed a firearm during the offense. He initially argued that his conviction should be reduced to attempted robbery. However, he concedes in his reply brief (as the State argues in its brief) that attempted aggravated robbery is a lesser-included offense of attempted armed robbery.

¶ 10 On a claim of insufficient evidence, we must determine whether, considering 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. *Gray*, 2017 IL 120958, ¶ 35. We will not substitute our judgment for that of the trier of fact regarding witness credibility or the weight of the evidence. *Gray*, 2017 IL 120958, ¶ 35. The positive and credible testimony of a single witness is sufficient to convict, even if contradicted by the defendant. *Gray*, 2017 IL 120958, ¶ 36. Eyewitness testimony may be found insufficient only if the record compels the conclusion that no reasonable person could accept the testimony beyond a reasonable doubt. *Gray*, 2017 IL 120958, ¶ 36. Similarly, the trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. The trier of fact is not required to disregard inferences that flow normally from the evidence, or to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, or to find a witness not credible merely because a defendant says so. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60; *Gray*, 2017 IL 120958, ¶ 35. We will reverse a conviction only if the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Gray*, 2017 IL 120958, ¶ 35.

¶ 11 A person commits attempted armed robbery when he takes a substantial step towards committing robbery–knowingly taking property from the person or presence of another by use of force or by threatening imminent use of force–while armed with a firearm. 720 ILCS 5/8-4(a),

18-1(a), 18-2(a)(2) (West 2014). For purposes of this statute, a "firearm" is defined in section 1.1 of the Firearm Owners Identification Card Act 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" except for BB guns firing "a single globular projectile" of no more than 0.18 inches at less than 700 feet per second, paintball guns, flare guns, nail and rivet guns, and antique firearms designated by the State Police. 720 ILCS 5/2-7.5 (West 2014) (citing 430 ILCS 65/1.1 (West 2014)).

¶ 12 Our supreme court has repeatedly addressed the issue of the sufficiency of the evidence from which a trier of fact may infer that an object used in a crime was a gun or firearm. In *People v. Ross*, 229 Ill. 2d 255, 273-76 (2008), it rejected a presumption that an object appearing to be a gun is a loaded and operable gun, instead finding that a trier of fact may infer from trial evidence that an object was a dangerous weapon. In *People v. Washington*, 2012 IL 107993, ¶ 36, it found that a victim's unimpeached testimony may be sufficient evidence that a defendant was armed with a gun during his offense. Given the victim's "unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a real gun." *Washington*, 2012 IL 107993, ¶ 36. The *Washington* court affirmed a conviction for (in relevant part) armed robbery when the victim had a clear view of the object pointed at him and testified that it was a gun, when no gun or gunlike object was recovered and when the defense argued insufficient evidence of a gun or firearm from the absence of a recovered object. *Washington*, 2012 IL 107993, ¶¶ 10-11, 15-18, 34-37. Most recently, in *People v. Wright*, 2017 IL 119561, ¶¶ 71-73, 76, *petition for cert. filed*, No. 17-7609 (2018), our supreme court considered whether its rationale in *Washington*, considering a version

of the armed robbery statute referring to a "dangerous weapon," applies to the present statute concerning a "firearm." Our supreme court concluded that it does apply. "In finding that the evidence proved that the defendant in *Washington* possessed 'a dangerous weapon,' we relied on the testimony of a single eyewitness and concluded that a rational trier of fact could infer from the testimony that the defendant possessed a 'real gun.' Our disposition is controlled by the same rationale here." *Wright*, 2017 IL 119561, ¶ 76. In *Wright*, three witnesses described the object at issue as a gun, and two of them testified to experience or familiarity with guns and gave a further description of the gun. *Wright*, 2017 IL 119561, ¶ 76. Thus, our supreme court found the evidence of armed robbery to be sufficient. *Wright*, 2017 IL 119561, ¶ 77.

¶ 13 Here, considering the evidence in the light most favorable to the State as we must, we cannot conclude that a rational trier of fact would not have found that defendant was armed with a firearm during the attempted robbery. Montoia repeatedly referred to the object that defendant pointed at him, and he struggled for, as a gun. Moreover, he described that gun as a large black automatic that felt heavy during the struggle. We find that, under *Washington* and *Wright*, a trier of fact may reasonably infer from such evidence that the object at issue was a firearm.

¶ 14 In challenging such a conclusion, defendant raises various arguments. He notes Montoia's testimony that two BB or air guns "looked like that type" or was "that kind of a gun." We do not consider Montoia's clear testimony that defendant pointed and struggled for a gun to be impeached by his testimony that photographs of two nonfirearms resembled that gun. As a defense witness established, the nonfirearms at issue were advertised to be replicas of–that is, were *intended* to resemble–firearms. Stated another way, when Montoia not only viewed but felt the weight of the object at issue and testified firmly that it was a gun, we need not raise to the

level of reasonable doubt defendant's claimed possibility that the object was not a firearm. As we have previously stated, we need not elevate all *possible* explanations consistent with innocence (or, in this case, insufficiency of a particular element of the offense) to the level of reasonable doubt.

¶ 15 Defendant also argues that there was no evidence that Montoia had experience with firearms. Montoia indeed did not testify to having either familiarity or unfamiliarity with firearms. However, our supreme court's decision in *Washington* makes no reference to its victim testifying to any experience or familiarity with firearms in affirming the armed robbery conviction therein. *Washington*, 2012 IL 107993, ¶¶ 10-11, 18-19, 35. We disagree with defendant's argument that "*Washington*'s analysis is of little value here" merely because *Washington* concerned dangerous weapons rather than firearms. *Wright* endorses the analysis in *Washington* and makes no effort to distinguish *Washington*. While *Wright* referred to its witnesses' experience with firearms–two of three witnesses, we note–we see nothing in *Wright* requiring or mandating that a victim or witness must have such experience for a trier of fact to properly infer that an object at issue was a firearm.

¶ 16 Lastly, while defendant argues that the trial court shifted the burden to him to disprove that he had a firearm during the attempted robbery, we find that the court merely applied the law set forth in *Washington* and its progeny. As stated above, we conclude that the trial evidence was sufficient to convict defendant of attempted armed robbery beyond a reasonable doubt.

¶ 17 Defendant also contends that presentencing detention credit must be applied to his fines, and the State agrees that he is entitled to this relief. Defendant acknowledges forfeiting this claim by not raising it in the trial court. However, the State does not argue defendant's forfeiture as

grounds for us to not review his claim. The State has thereby forfeited the forfeiture issue, and we will consider this claim. *People v. Smith*, 2018 IL App (1st) 151402, ¶ 7.

¶ 18 Defendant's 578 days of presentencing custody entitle him to up to $2890 credit against his fines at the statutory $5 per day. 725 ILCS 5/110-14(a) (West 2014). The parties correctly agree[3] that two of defendant's assessments have been held to be fines rather than fees and thus defendant is due $65 credit: $50 for the court system and $15 for State Police operations. 55 ILCS 5/5-1101(c); 705 ILCS 105/27.3a(1.5) (West 2014); *Smith*, 2018 IL App (1st) 151402, ¶ 14.

¶ 19 Accordingly, we direct the clerk of the circuit court to correct the fines and fees order to reflect $65 credit. The judgment of the circuit court is otherwise affirmed.

¶ 20 Affirmed, fines and fees order corrected.

[3] The State notes that our supreme court has granted leave to appeal in *People v. Clark*, 2017 IL App (1st) 150740-U, *appeal allowed*, No. 122495 (Sep. 27, 2017). However, the State merely suggests that we "may wish to hold this matter in abeyance pending" a supreme court decision in *Clark*, and otherwise agrees that defendant is entitled to relief. We see no reason to hold this case in abeyance.