

2018 IL App (1st) 160341-U

No. 1-16-0341

Order filed June 15, 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. 14 CR 21553
)	
ANDREW BROWN,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for armed robbery with a dangerous weapon other than a firearm reduced to robbery and remanded for resentencing where there was no evidence that the weapon was, or could have been, used as a bludgeon.

¶ 2 Following a bench trial, defendant Andrew Brown was convicted of two counts of armed robbery with a dangerous weapon other than a firearm, specifically, a bludgeon, and sentenced to concurrent terms of nine years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because there was no evidence that the

weapon was, or could have been, used as a bludgeon. We agree, and therefore reduce defendant's convictions to robbery and remand the case for resentencing.

¶ 3 Defendant and codefendants Brandon Betties and Kevontay Montgomery were charged with three counts each of armed robbery with a firearm, and armed robbery with a dangerous weapon other than a firearm, specifically, a bludgeon. They were also charged with six counts of aggravated unlawful restraint. All three defendants were tried jointly.

¶ 4 At trial, Alicia Whittington testified that about 11 p.m. on September 27, 2014, she and her sister Courtney Whittington were standing on the street next to her cousin's parked car, while her cousin, Kenosha Bell, sat in the driver's seat, retrieving an item. A red Dodge Avenger drove towards them, pulled over, and parked about eight feet away. Alicia heard a man in that car say "can he go with us." Alicia, who was on her phone, looked up and saw codefendant Betties, wearing an "84 jogging suit," exit the passenger side of the red car with a gun in his hand. Alicia knew it was a gun because she had seen guns on television. She testified "I'm not an expert on guns or anything, but I mean, I know a gun when I see a gun."

¶ 5 Betties approached Courtney and took her phone from her hand. Defendant then exited the red car and went directly to the passenger side of Kenosha's car. Defendant took items from Courtney, Kenosha, and the inside of Kenosha's car. Alicia observed Kenosha retrieve an item from inside her bra and hand it to defendant. Defendant reached into the back of Kenosha's car and took a purse. Betties approached Alicia, pointed the gun touching her chest, and took her phone, money, and items from her pocket. Betties began to walk away, but returned, "put the gun to [Alicia's] head," and requested the pass code for her phone, a Boost Max ZTE. Alicia repeatedly gave him the wrong code because she was nervous, and asked if she could enter the

code for him because she was scared. After she entered the code, defendant and Betties returned to the red car and drove away. Alicia could see a third man sitting in the back seat of the red car, but he never exited the vehicle. As the red car drove away, Alicia observed that it had an Iowa license plate with the letters CVU.

¶ 6 Alicia called the police, and when Officer Josephs arrived 10 minutes later, she told him what happened and gave him a description of the car. While the women continued speaking with Josephs, he asked if they could go with him to identify the three men. Josephs drove the women to a location where Alicia identified the red Dodge Avenger. She also identified defendant and Betties, and recognized that the third man was still wearing the same gray hoodie she previously saw him wearing while he sat in the car. Alicia's phone was returned to her at the police station.

¶ 7 Courtney Whittington testified substantially the same as Alicia that they were standing in the street when a red car with Iowa license plates pulled up and parked behind her cousin's car. Courtney, who was on her phone, heard a man in the red car say "can I go?" Courtney looked up and observed Betties exit the passenger side of the red car wearing a jogging suit with colorful numbers on it. Betties approached Courtney, pointed a gun at her stomach and chest area, and said "give me your stuff." Betties grabbed Courtney's Samsung phone from her hand. Betties then approached Alicia, and Courtney heard him ask for her password.

¶ 8 Defendant exited the driver's door of the red car, approached Courtney, and began searching her pockets. He initially took her cigarettes, government phone, charger, keys, and \$12. He kept the charger and money, but returned the other items. Defendant then walked to the front passenger door of Kenosha's car, and Courtney observed Kenosha giving him her property. Defendant also reached into the back seat of the car and took additional items. Defendant and

Betties returned to the red car and drove away. Similar to Alicia, Courtney testified that they went to a location with the police where she also identified the red car, defendant, and Betties.

¶ 9 Officer Josephs testified that he responded to the scene about 11:30 p.m. The victims gave him a description of the three men and the red Dodge Avenger with Iowa license plates. Josephs relayed that information over the radio. About 11:45 p.m., Josephs was notified that police had stopped the red vehicle, and he drove the victims to that location. The victims identified the defendants during a show-up.

¶ 10 Chicago police officer Renault testified that about 11:45 p.m. on September 27, he assisted with a traffic stop of a red vehicle with Iowa license plates that matched a description he had received. Renault detained Betties. Other officers detained defendant and Montgomery. No weapons were found on any of the men. Renault searched the vehicle and recovered a Samsung cell phone and a Boost Maximum phone, which was identified by one of the victims.

¶ 11 On cross-examination, Renault acknowledged that no weapons were recovered from the red vehicle, and he did not observe any of the defendants throw any items out of the vehicle. No weapons or proceeds from the robbery were found on defendant.

¶ 12 Following the State's case, the trial court acquitted Montgomery of all counts. The court also granted defendant and Betties' motions for directed findings to all counts, except for the two counts of armed robbery with a dangerous weapon other than a firearm as to Alicia and Courtney.

¶ 13 Codefendant Betties presented a stipulation, adopted by defendant, that Chicago police detective John Gillespie interviewed Alicia and Courtney during a follow-up investigation, and neither woman stated that the man who took their phones was wearing a number 84 on the front

of his shirt. Courtney also stated that that same man went through her pockets and removed a \$5 bill and two \$1 bills. In addition, Courtney told Gillespie that the second offender who exited the driver's seat of the car was wearing a white T-shirt and blue hat, he took her cell phone and charger, and removed her keys and threw them on the ground.

¶ 14 The trial court found that Alicia and Courtney were “very high quality witnesses.” The court further found that in regards to the object held by the offender, “the matter and the gesticulation described by the witnesses is indicative of its use in a threatening manner.” The court stated that although it found that the object was not a gun, “at a minimum, one would have to view it in light of the way it was menaced as a bludgeon.” The trial court found defendant and Betties guilty of two counts of armed robbery with a dangerous weapon other than a firearm, specifically, a bludgeon.¹ The court sentenced defendant to concurrent terms of nine years' imprisonment.

¶ 15 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because there was no evidence that the weapon was, or could have been, used as a bludgeon, and the weapon was not introduced into evidence at trial. Defendant argues that there was no evidence that the weapon had any physical characteristics suggesting that it could be used as a bludgeon, such as its weight, size, or material composition. He points out that neither victim described the weapon at all. Defendant argues that the trial court's finding that the object was “menaced as a bludgeon” was against the manifest weight of the evidence. He asserts that this court should reduce his convictions to robbery, and remand his case for resentencing.

¹ Codefendant Betties' appeal is pending before this court in case number 1-16-0646. He is not a party to this appeal.

¶ 16 The State responds that the trial court made a reasonable inference that the defendants used the threat of an object as a bludgeon to rob Alicia and Courtney. The State argues that because the trial court found that the weapon was not a firearm, evidence of its weight and composition was not needed to show that it was a firearm used as a bludgeon. The State claims that the defendants used the weapon as a clear threat to the women given that it was pointed at their head, chest and stomach areas, which contain vital organs.

¶ 17 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 18 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). However, merely because the trier of fact accepted certain testimony or made inferences based on the evidence does not guarantee the reasonableness of those decisions. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A conviction will be reversed where the evidence is so unsatisfactory, improbable, or unreasonable that there exists a reasonable doubt of the defendant's guilt. *Id.*

¶ 19 To prove the defendants guilty of armed robbery in this case, the State was required to show that they knowingly took cell phones, money, and other items from Alicia and Courtney, by the use of force or by threatening the imminent use of force while being armed with a dangerous weapon other than a firearm, specifically, a bludgeon. 720 ILCS 5/18-2(a)(1) (West 2014).

¶ 20 The term “dangerous weapon” is not defined in the armed robbery statute, but instead, has been derived from common law. *People v. Hernandez*, 2016 IL 118672, ¶ 12. Our supreme court recognized that appellate court decisions have refined the common law definition of “dangerous weapon” by dividing such objects into three categories: “(1) objects that are dangerous *per se*, such as loaded guns; (2) objects that are not necessarily dangerous, but were actually used in a dangerous manner during the robbery; and (3) objects that are not necessarily dangerous, but may become dangerous when used in a dangerous manner.” *Ross*, 229 Ill. 2d at 275.

¶ 21 Although there is not a mandatory presumption that any gun is a dangerous weapon, the trier of fact may infer the dangerousness from the evidence. *Id.* at 275-76. The State may therefore prove that a gun is a dangerous weapon by presenting evidence that it was loaded and operable, or that it was used or capable of being used as a club or bludgeon. *Id.* at 276.

¶ 22 In *Ross*, the court held that the evidence was insufficient to prove that the pellet gun used in the offense was a dangerous weapon where the State never presented the gun or a photograph of the gun at trial, there was no evidence it was loaded, there was no evidence it had been brandished as a bludgeon, and there was no evidence regarding its weight or composition. *Id.* at 276-77. The supreme court found that the trial court had incorrectly based its ruling on the

subjective feelings of the victim, rather than the objective nature of the gun. *Id.* at 277. Accordingly, it affirmed this court's order directing the trial court to enter a conviction for simple robbery and to resentence the defendant on the lesser offense. *Id.*

¶ 23 Similarly, in *Harris*, this court held that the evidence was insufficient to prove that the gun used during the offense was a dangerous weapon, specifically, a bludgeon, where the State did not proffer the gun at trial, there was no evidence it was loaded, there was no evidence it was used or brandished as a bludgeon, and there was no evidence regarding its weight or composition. *Harris*, 2015 IL App (1st) 133892, ¶¶ 31-32. This court expressly found that there was “no evidence that the weapon was a heavy, metal object from which it could be inferred that it was capable of being used as a bludgeon.” *Id.* ¶ 32. Consequently, this court concluded that the trial court's finding that the weapon was metallic and a bludgeon, based on its viewing of a surveillance video, was not supported by the evidence. *Id.* ¶ 33. We therefore reversed the armed robbery conviction and remanded the cause to the trial court with directions to enter a conviction for simple robbery, and to impose an appropriate sentence. *Id.* ¶ 37.

¶ 24 Here, the record reveals that, even when viewed in the light most favorable to the State, the evidence did not establish that the alleged weapon was, or could have been, used as a bludgeon. No weapon was recovered in this case, and therefore, the State did not present the weapon or a photograph of it at trial. The only evidence regarding the weapon came from the testimony of Alicia and Courtney. Alicia testified that she knew the weapon in Betties' hand was a gun because she had seen guns on television. She testified “I'm not an expert on guns or anything, but I mean, I know a gun when I see a gun.” Courtney also testified that Betties had a gun. However, there was absolutely no testimony or other evidence presented regarding the size,

weight, material composition, or any other characteristics of that weapon. Thus, the State presented no evidence that the weapon was a heavy, metal object from which it could be inferred that it was capable of being used as a bludgeon. *Ross*, 229 Ill. 2d at 277; *Harris*, 2015 IL App (1st) 133892, ¶¶ 29-32.

¶ 25 Nor does the record show that the weapon was brandished as a bludgeon during the robbery. In *People v. Thorne*, 352 Ill. App. 3d 1062, 1064 (2004), the victim testified that during the robbery, the defendant “put a gun on his back” and then “pointed the gun to his head.” This court found that there was no evidence that the gun had been used in a dangerous manner, specifically, as a bludgeon, during the robbery. *Id.* at 1072-73. Nor was there any evidence that the gun was a heavy metal object that was capable of being used as a bludgeon. *Id.* at 1073. Accordingly, this court reversed the armed robbery conviction and remanded the case to the trial court to enter a conviction for robbery. *Id.* at 1073-74.

¶ 26 Here, Alicia testified that Betties pointed the gun at her, touching her chest, while he took her phone, money, and other items from her pocket. Betties began to walk away, but returned, and “put the gun to [Alicia’s] head,” while he requested the pass code for her phone. Courtney testified that Betties pointed the gun at her stomach and chest area while demanding her property and grabbing her phone from her hand. The trial court found that the defendants used the weapon “in a threatening manner,” and on that basis, inferred that “it was menaced as a bludgeon.” The record reveals, however, that in light of the testimony from the victims, this inference was not reasonable. *Ross*, 229 Ill. 2d at 272. Similar to *Thorne*, the victims in this case testified that Betties pointed the gun at them. They did not testify that he brandished it as a bludgeon.

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Accordingly, the trial court's inference that the weapon "was menaced as a bludgeon" was not reasonable based on the evidence.

¶ 27 We therefore reverse defendant's convictions for two counts of armed robbery with a dangerous weapon other than a firearm, and remand this case to the trial court with directions to enter convictions for two counts of simple robbery, and to resentence defendant accordingly.

¶ 28 Reversed; remanded with directions.