2019 IL App (1st) 171464-U

No. 1-17-1464

SIXTH DIVISION
AUGUST 30, 2019

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.	)	Nos. 15 CR 20362
	)	15 CR 20363
MARK SILVERSTON,	)	
	)	Honorable
Defendant-Appellant.	)	James N. Karahalios,
	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the defendant's conviction for armed robbery where the State failed to prove he was armed with a dangerous weapon and remand for sentencing on his conviction for aggravated robbery.

¶ 2 Following a bench trial, the circuit court of Cook County found the defendant guilty of, *inter alia*, armed robbery and aggravated robbery and sentenced him to 10 years' imprisonment on only the armed robbery conviction. The defendant appeals, arguing the State failed to prove

he was armed with a dangerous weapon for purposes of the armed robbery statute. We vacate the defendant's conviction for armed robbery and remand the matter to the trial court for sentencing on the aggravated robbery conviction.

¶ 3 The State charged the defendant by indictment with armed robbery (720 ILCS 5/18-2(a)(1) (West 2014)), aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2014)), robbery (720 ILCS 5/18-1(a) (West 2014)), and theft (720 ILCS 5/16-1(a)(1) (West 2014)), based on his robbery of a tanning salon on October 17, 2015.[1]

¶ 4 At a bench trial, Iryna Lekhiv testified that on October 17, 2015, she was working as a sales associate at Palm Beach Tan in Arlington Heights. At approximately 1:30 p.m., when she was alone in the salon, a man (whom she identified in open court as the defendant) entered the store. Lekhiv went to the front desk to greet the defendant and as the defendant slowly approached, Lekhiv said, "Hi, how are you? What's your last name?" to which the defendant replied, "[n]o," and stepped to his right.

¶ 5 The defendant then lifted his sweatshirt to his chest to show a gun which was tucked into his waistband. He demanded money from Lekhiv, at which point Lekhiv looked for the emergency button that would alert a call center to call the police. Lekhiv testified the button, "seemed really far away," so she did not reach for it. Instead, Lekhiv opened the cash register and removed $27, which was all the money in the register. The defendant stated, "That's it?" to

[1] These charges were docketed as case No. 15 CR 20363. The State also charged defendant by indictment with residential burglary and theft for an unrelated incident, which was docketed as case No. 15 CR 20362. The two cases proceeded simultaneously. After the bench trial in case No. 15 CR 20363 in which the trial court found defendant guilty of all charges, defendant pled guilty to residential burglary in case No. 15 CR 20362. He was sentenced to 10 years' imprisonment in each case to be served concurrently. Although defendant's notice of appeal references both trial court cases, on appeal, he limits his argument to challenging the armed robbery conviction in case No. 15 CR 20363. He has, therefore, forfeited any challenge to the judgment in case No. 15 CR 20362. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

which she replied, "That's it." Lekhiv placed the money on the counter, the defendant took it, said "[h]ave a good day," and walked out.

¶ 6 Lekhiv immediately called her manager and explained what happened, saying she was "kind of shooken up." On instructions from the district manager, Lekhiv then called the police. When officers from the Arlington Heights police department arrived, Lekhiv provided them a description of the defendant and the gun.

¶ 7 One month later, Lekhiv was called to the police station to view a photographic lineup. She was shown photographs of six individuals and identified the defendant as the man who had robbed Palm Beach Tan.

¶ 8 At trial, Lekhiv testified that the defendant neither withdrew the gun from his waistband nor pointed it at her, but he did have his hand on it. Lekhiv never saw the entire gun or its barrel, but testified that only the tip was covered by the waistband. Knowing what a gun looked like, Lekhiv could tell the object was the shape of a gun and testified that it was not a revolver. Lekhiv described the gun as black in color, but could not tell whether it was metallic or plastic. While the gun looked to her like a real handgun, she could not definitively testify whether it was real or fake. When asked the size of the gun, Lekhiv testified that "it was a regular gun."

¶ 9 The defendant never told Lekhiv there were bullets in the gun. Other than demanding the money and asking whether $27 was all the money in the cash register, the defendant did not say anything to Lekhiv. While he never told Lekhiv he was going to kill her, she was in fear for her life when the defendant displayed the gun in his waistband. Lekhiv explained that she did not call the police immediately after the defendant left the tanning salon because she was in shock.

¶ 10 Footage from a surveillance camera in Palm Beach Tan was admitted into evidence and published to the trial court during Lekhiv's testimony. The video footage is consistent with Lekhiv's testimony but does not show the object in the defendant's waistband.

¶ 11 Detective Russell Mandel testified that he was assigned to investigate the armed robbery that occurred at Palm Beach Tan. On November 17, 2015, after receiving a phone call from the Wheeling police department, he began looking for the defendant as a suspect in the robbery. Once Lekhiv identified the defendant from the photo array, Mandel found the defendant's residential address which was "a couple of miles east" of Palm Beach Tan.

¶ 12 On November 18, 2015, Mandel, along with his partner and two surveillance detectives, approached the defendant at the residence, where the defendant was standing outside smoking a cigarette. Mandel informed the defendant that he was a suspect in the robbery of Palm Beach Tan and advised the defendant of his *Miranda* rights. The defendant agreed to speak with Mandel and admitted he committed the robbery at Palm Beach Tan.

¶ 13 After the defendant admitted to his involvement in the robbery, Mandel requested and obtained consent to search the defendant's bedroom so he could attempt to locate clothing and possible weapons used during the robbery. The detectives did not recover a weapon during the search but the defendant told the officers that, after he committed the robbery, he walked by a Floor & Decor store which was just east of Palm Beach Tan and discarded an "Airsoft weapon."

¶ 14 Mandel then placed the defendant under arrest and transported him to the Arlington Heights police department. There, he again read the defendant his *Miranda* rights, which the defendant waived for a second time and agreed to speak with Mandel. Mandel transcribed the defendant's verbal statement, which the defendant reviewed and signed.

¶ 15 The defendant's statement reveals that on October 17, 2015, he left his house "and set out to get money to support [his] drug addiction." The defendant walked to the Dick's Sporting Goods store on Palatine Road and stole an "Airsoft replica handgun." He then walked to Palm Beach Tan (next to Dick's Sporting Goods) and entered the business, planning to rob it.

¶ 16 The defendant stated that he approached the counter and pulled up his sweatshirt, displaying the Airsoft gun in the waistband of his pants for the clerk to see. The defendant asked the clerk for the money from the cash drawer, and the clerk complied. After leaving the store and walking back to his house, the defendant dropped the Airsoft gun near a Floor & Decor store.

¶ 17 On cross-examination, Mandel explained that an Airsoft gun is a "look-alike firearm that shoots rubber pellets." Mandel testified that despite his efforts, he was unable to recover the gun used during the robbery.

¶ 18 The State rested, and the defendant moved for a directed finding arguing that there was no evidence to establish the Airsoft gun was a dangerous weapon within the purview of the armed robbery statute.[2]

¶ 19 The trial court denied the defendant's motion, citing *People v. De La Fuente*, 92 Ill. App. 3d 525 (1981), in which this court held that an air pistol was not a dangerous weapon *per se* because it was not capable of being used dangerously within the meaning of the statute.

¶ 20 The defendant presented no evidence, and the parties adopted their arguments in relation to the defendant's motion for directed verdict as their closing arguments.

[2] With respect to the aggravated robbery charge, defense counsel stated defendant "[had] no answer" for that offense.

¶ 21 The trial court found the defendant guilty of the four charged offenses and merged the lesser offenses into the armed robbery conviction. The court noted it had considered the totality of the circumstances and explained its findings as follows:

> "We have – the only evidence that we have is the defendant's description of this as a new – newly stolen Airsoft gun, which the officer testified expels pellets or projectiles of some kind.
>
> That was tucked into his pants with the handle and possibly the trigger – trigger guard visible.
>
> The witness testified she couldn't see the barrel, but she could see more than the handle and could tell that it was not a revolver, so it's a semiautomatic.
>
> The way in which the gun was displayed was to walk in with it concealed, lift up his sweatshirt just enough that he could show this protruding object, handle[,] and possibly trigger, to the complainant, put his hand on it, pat it, tap it, rub it, whatever you want to call, and as he's doing that, he says 'Give me the money,' or, 'Give me money,' whatever.
>
> I mean, the association of that with the display of that portion of the weapon would leave a reasonable person to reasonably believe that that was a gun and that the gesturing was a sign that – sort of, 'Give me the money or else.'
>
> And the witness testified that she was scared to death – not to death, but she was scared, she was crying, she was worried about being harmed, she said. Not exactly in those words, but that was it.

> And so all of the elements are there for the armed robbery, and I am going to find him guilty of all four charges, which, of course, will merge into the most serious, which is the armed robbery."

¶ 22 The defendant filed a posttrial motion in which he sought a judgment notwithstanding the verdict or a new trial with respect to the armed robbery conviction, arguing that the State failed to prove him guilty of armed robbery. The defendant did not argue the evidence was insufficient to support the finding of guilty of the lesser offense of aggravated robbery.

¶ 23 The trial court denied the defendant's posttrial motion and sentenced the defendant to 10 years' imprisonment. The defendant moved to reconsider his sentence, which the trial court denied. This appeal followed.

¶ 24 ANALYSIS

¶ 25 We note that we have jurisdiction to review the trial court's judgment, as the defendant filed a timely notice of appeal following the denial of his motion for a new trial. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. July 1, 2017).

¶ 26 On appeal, the defendant argues the State did not prove him guilty of armed robbery because the evidence did not establish that the weapon used during the robbery was a dangerous weapon within the purview of the armed robbery statute.

¶ 27 When a defendant presents a challenge to the sufficiency of the State's evidence, "a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted; emphasis in original.) *People v. Ross*, 229 Ill. 2d 255, 272 (2008). The reviewing court does not retry the defendant, and "the trier

of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence." *Id.* The mere fact that the trier of fact accepted certain testimony or made certain inferences based on the evidence does not guarantee reasonableness of the decision. *Id.* A criminal conviction will be set aside where the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 28 The State charged the defendant by indictment with armed robbery under section 18-2(a)(1) of the Criminal Code of 2012 (Code), which provides that a person commits the offense of armed robbery when he or she knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force while "he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm." 720 ILCS 5/18-1(a), 18-2(a)(1) (West 2014); see also *People v. Thorne*, 352 Ill. App. 3d 1062, 1070 (2004).

¶ 29 Although the Code does not define the term "dangerous weapon" for purposes of the armed robbery statute (*Thorne*, 352 Ill. App. 3d at 1070), courts have found that dangerous weapons fall into three general categories: (1) objects that are dangerous *per se*, such as loaded guns; (2) objects that are not necessarily dangerous but which were actually used in a dangerous manner during the robbery; and (3) objects that are not necessarily dangerous but can be dangerous when used in a dangerous manner (*Ross*, 229 Ill. 2d at 275). Ordinarily, the question of whether an object is sufficiently susceptible to use in a manner likely to cause serious injury so that it qualifies as a dangerous weapon is one of fact. *Thorne*, 352 Ill. App. 3d at 1071.

However, the question becomes one of law where the character of the weapon is such to admit of only one conclusion. *People v. Skelton*, 83 Ill. 2d 58, 66 (1980).

¶ 30 Here, the parties' dispute turns on whether the State presented sufficient evidence to sustain the court's finding that the defendant was armed with a dangerous weapon that falls within the third category—one which is not necessarily dangerous but can be used in a dangerous manner.

¶ 31 The defendant maintains that because Lekhiv never saw the entire object, there was no evidence as to its size, weight, or composition, and the State failed to recover the gun and introduce it, or photographs of it, into evidence, the evidence was not sufficient to support a finding that the Airsoft gun could be used in a dangerous manner. We agree.

¶ 32 The principles set forth in *Thorne* are helpful to our analysis here. In that case, we addressed whether a BB gun which looked like a black pistol was a dangerous weapon within the meaning of the armed robbery statute. *Thorne*, 352 Ill. App. 3d at 1069-70. The defendant was convicted of armed robbery based on evidence that he committed a robbery while armed with a black, "hard object," identified as a Marksman .177-caliber black BB gun. *Id.* at 1066. The State did not introduce the gun or any photographs of it into evidence. *Id.* at 1073.

¶ 33 On appeal, we reversed the defendant's conviction, explaining that where an armed robbery charge is based on the use of an unloaded gun as a dangerous weapon, the State may meet its burden of proof by presenting testimony (1) as to the physical characteristics of the gun which could make it dangerous, specifically testimony as to the gun's weight or metallic nature; or (2) the gun was used in a dangerous manner, *i.e.* as a bludgeon or club. *Id.* at 1072-74. We held that the State's evidence that the gun looked like a black pistol, was "hard," and was a

Marksman .177-caliber black BB gun was insufficient to support a finding the weapon could have been used as a bludgeon or club. *Id.* at 1073. Specifically, we found the State's failure to present evidence as to the weight or composition of the object, or to introduce the object into evidence, was fatal to its case. *Id.*; see also *Ross*, 229 Ill. 2d at 276 (State may prove gun is dangerous weapon by "presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or bludgeon.").

¶ 34 Just as in *Thorne*, the State in this case failed to present evidence of the size, weight, or composition of the Airsoft gun. Nor did the State introduce the gun itself or photographs of the gun into evidence from which the court could determine its composition. Instead, the State relied solely on Lekhiv's testimony that the gun looked like a real handgun, though she could not determine if it was metal or plastic. This was insufficient to establish that the gun was capable of being used in a dangerous manner, *i.e.*, as a bludgeon. See *Skelton*, 83 Ill. 2d at 62-63 (rejecting interpretation of "dangerous weapon" that relies on the victim's subjective belief in the nature of the weapon). It follows that the State failed to prove beyond a reasonable doubt that the defendant was armed with a dangerous weapon so as to sustain his conviction for armed robbery.

¶ 35 Having concluded that the defendant's conviction for armed robbery must be vacated, we must next consider the appropriate remedy. Significantly, in addition to armed robbery, the defendant was also charged with and convicted of aggravated robbery. A person commits aggravated robbery when he or she knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force "while indicating verbally or by his or her actions to the victim that he or she is presently armed with a firearm or other dangerous weapon" even if it is later determined "he or she had no firearm or other dangerous

weapon *** in his or her possession when he or she committed the robbery." 720 ILCS 5/18-1(a), (b)(1) (West 2014).

¶ 36 Here, the evidence, when viewed in the light most favorable to the State, more than supports the court's finding that the defendant committed an aggravated robbery. Specifically, the defendant showed Lekhiv the gun in his waistband and demanded money. His actions threatened imminent force through the use of a gun, even though it was later established he was not armed with a firearm. The defendant did not contend otherwise in his posttrial motion and does not do so on appeal. In fact, before the trial court, he appeared to concede the evidence supported a conviction for aggravated robbery. Accordingly, we vacate the defendant's conviction for armed robbery and remand the matter to the trial court for sentencing on the court's finding of guilt on the aggravated robbery charge.

¶ 37 CONCLUSION

¶ 38 For the reasons stated, we vacate the defendant's conviction for armed robbery and remand the matter to the trial court for sentencing on the court's finding of guilt on the aggravated robbery charge.

¶ 39 Affirmed in part and vacated in part; cause remanded with directions.