FIRST DIVISION
DATE: AUGUST 22, 2011

No. 1-10-1663

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. 09 CR 22453
	)	
VERDEL THOMAS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred in the judgment.

O R D E R

Held: The defendant's conviction and sentence for being an armed habitual criminal were affirmed where the State presented sufficient evidence to convict, prosecutorial closing argument did not invalidate the conviction, and the armed habitual criminal statute violates neither the Second Amendment nor the *ex post facto* clause.

¶ 1 The defendant, Verdel Thomas, appeals from his conviction for violating the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2008)). On appeal, the defendant argues that (1) the State presented insufficient evidence to convict him, (2) his conviction is invalid due to improper closing argument by the State, (3) his conviction must be vacated because the armed habitual criminal statute violates the Second Amendment, and (4) his conviction must be vacated because the statute violates the *ex post facto* clause. For the reasons that follow, we affirm the judgment of the trial court.

¶ 2 The first witness to testify at the defendant's bench trial, Detective Michael Andruzzi, recalled that he was part of a team that executed a search warrant in the residence where the defendant and a gun were found. When he entered the residence, Andruzzi encountered the defendant, an adult woman, and a child. Andruzzi testified that, after detaining the occupants of the residence, he conducted a search of the "first bedroom on the left side of the living room." In that room, he found "numerous articles of male clothing in the closet," including a "T-shirt with the defendant's picture airbrushed on it," numerous pairs of male shoes," and "[p]ersonal pictures of the defendant *** on the dresser." Andruzzi said that he also found a loaded handgun, with ammunition, between the mattress and box spring in the bedroom.

¶ 3 After finding the gun, Andruzzi arrested the defendant and took him to a police station, where the defendant was given *Miranda* warnings but, according to Andruzzi, chose to speak with police. Andruzzi testified that, during that conversation, the defendant admitted having recently purchased the gun for $300 and having moved into the searched residence one week beforehand. On cross-examination, Andruzzi agreed that he found no proof of the defendant's residence (such as mail or a lease) during the search and that police did not produce a written memorialization of the defendant's statement so that the defendant could sign it.

¶ 4 After the parties stipulated as to the defendant's history of two prior felony convictions, one for armed robbery and one for unlawful use of a weapon by a felon, the State rested its case.

¶ 5 Testifying on his own behalf, the defendant explained that he did not live in the residence at which the police found him but that he was there visiting his girlfriend and child. The defendant further explained that the residence was occupied by two women, but he acknowledged that there were men's clothes and shoes in a bedroom closet in the home. The defendant denied owning the weapon Andruzzi found and denied having any clothes at the residence. He also denied having made any statements to police.

¶ 6 During closing argument, defense counsel argued, among other things, that Andruzzi's testimony regarding the defendant's admission was not credible, because it was not accompanied by

any written record of the admission. During the State's rebuttal, the following exchange took place:

> "The detectives did take a statement after the defendant was Mirandized, and all the statements that the defendant made are in all the police reports.
>
> [DEFENSE COUNSEL]: Objection, your Honor. There is no evidence of that.
>
> [STATE'S ATTORNEY]: Your Honor, Counsel is arguing that the officers did not write it down. The indication is that –
>
> THE COURT: I understand the distinction. I understand. Write it down for him to sign or write it down in reports. I understand the difference. Go ahead."

¶ 7 After hearing argument, the trial court found as follows:

> "It comes down to the credibility of [the defendant] against that of Officer Andruzzi, who testified. I find Officer Andruzzi to be credible and compelling, credible beyond a reasonable doubt. There will be a finding of guilty."

The trial court sentenced the defendant to 78 months' imprisonment, and the defendant filed this timely appeal.

¶ 8 The defendant's first argument on appeal is that the State produced insufficient evidence to support his conviction. "When reviewing the sufficiency of the evidence in a criminal case, 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 crime beyond a reasonable doubt." *People v. Ross*, 407 Ill. App. 3d 931, 934, 947 N.E.2d 776 (2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365 (1999)). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487 (2008). "A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given each witness's testimony." *Ross*, 407 Ill. App. 3d at 935 (citing *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388 (2009), and *People v. Ross*, 229 Ill. 2d 255, 272, 891

N.E.2d 865 (2008)).

¶ 9 "A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of" certain enumerated offenses. 720 ILCS 5/24-1.7 (West 2008). The defendant does not dispute that he had the requisite prior convictions at the time he was alleged to have possessed the handgun here. Instead, he argues that the evidence was insufficient to prove that he actually possessed the firearm.

¶ 10 "To establish guilt on a theory of constructive possession of a firearm,"–the theory both parties assume to be at play here--"the State must prove: (1) that defendant had knowledge of the presence of the weapon; and (2) that defendant exercised immediate and exclusive control over the area where the weapon was found." *Ross*, 407 Ill. App. 3d at 935. "A trier of fact is entitled to rely on reasonable inferences of knowledge and possession." *Ross*, 407 Ill. App. 3d at 935.

¶ 11 Here, there was ample evidence from which the trial court reasonably could have inferred that the defendant had knowledge and control of the weapon. On the issue of knowledge, Andruzzi testified that the defendant actually admitted to police that he had purchased the gun. Although the defendant asks us to disregard Andruzzi's testimony, the trial court's decision to follow Andruzzi's account is precisely the type of credibility determination our standard of review dictates we must defer to on appeal. Further, the defendant's reasons for discrediting Andruzzi's testimony–Andruzzi's failure to support his testimony with a written record of the defendant's confession, Andruzzi's failure to find items (such as mail) indicating the defendant's residence at the searched premises, and a minor discrepancy in Andruzzi's recollection of where he found the residents in the home–are not so persuasive as to convince us that the trial court's evaluation was not rational. We therefore defer to the trial court's determination that Andruzzi's testimony established beyond a reasonable doubt the defendant's knowledge of the gun's presence.

¶ 12 As for the defendant's control of the gun, the defendant offers that the gun was in a place accessible to everyone, and thus not within his exclusive control, because it was "simply between

a mattress and boxspring and not hidden some place inaccessible." To support this point, the defendant attempts to create a contrast by citing two decisions in which constructive possession was found where ammunition was hidden in ceiling tiles (*People v. Bui*, 381 Ill. App. 3d 397, 420, 885 N.E.2d 506 (2008)) or where a gun was hidden in a hole in a wall (*People v. Trask*, 167 Ill. App. 3d 694, 708-09 (1988)). However, we see no real distinction between those hiding places and the under-the-mattress location at issue here. Further, as the State observes in its brief, constructive possession may be established by evidence that "[c]onstructive possession may exist even where an individual is no longer in physical control ***, provided that he once had physical control *** with intent to exercise control in his own behalf, and he has not abandoned them and no other person has obtained possession." *People v. Adams*, 161 Ill. 2d 333, 345, 641 N.E.2d 514 (1994). The evidence of the defendant's admission that he purchased the gun, combined with the evidence of his admission that he lived in the premises where it was found, that the gun was hidden, and that the gun was hidden in a room near male clothing, very strongly support the inference that the defendant obtained the gun, hid it in his bedroom, and never abandoned possession of it. Based on that evidence, we find no reason to disturb the trial court's determination that the State proved the defendant's guilt beyond a reasonable doubt.

¶ 13 The defendant's second argument on appeal is that his conviction must be reversed because it was spurred by improper closing argument from the State. A prosecutor is afforded wide latitude in making closing arguments. *People v. Blue*, 189 Ill. 2d 99, 127, 724 N.E.2d 920 (2000). In closing arguments, the State may comment on the evidence and all of the reasonable inferences arising from the evidence. *Blue*, 189 Ill. 2d at 127. Closing arguments are to be viewed in their entirety, and any allegedly improper argument must be viewed in its context within the closing argument as a whole. *Blue*, 189 Ill.2d at 128. Further, as the State observes in its brief, "[e]ven if a prosecutor's closing remarks are improper, they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161 (1993).

¶ 14 Here, the defendant takes issue with the prosecutor's statement that the defendant's statements were memorialized in police reports. Even if we were to assume that this remark mischaracterized the evidence adduced at trial, we agree with the State that the remark did not cause substantial prejudice such that, absent the remarks, the outcome of the defendant's trial would have been different. "[I]n a bench trial, the court is presumed to consider only competent evidence in making a finding." *People v. Simac*, 161 Ill. 2d 297, 311, 641 N.E.2d 416 (1994). Here, the record not only fails to rebut the presumption that the trial court considered only competent evidence–it actually actively supports that presumption. In response to the defendant's objection, the trial judge noted the distinction between the defendant's statement being signed and its being repeated on a police report, thus demonstrating that he understood defense counsel's point that police had failed to obtain a written confession from the defendant. Further, in announcing his ultimate guilty finding, the trial judge explained that his determination distilled to a credibility contest between police and the defendant. These comments demonstrate an understanding both of the evidence and of the defendant's argument, and they show that any misrepresentation in the State's argument did not affect the ultimate disposition of the defendant's case. Accordingly, we reject the defendant's argument that his conviction must be reversed due to improper closing argument from the State.

¶ 15 The defendant's third argument on appeal is that the armed habitual criminal statute violates the second amendment to the U.S. Constitution. The defendant points out that, in its recent decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the United States Supreme Court interpreted the second amendment "right of the people to keep and bear Arms" (U.S. Const. Amend. 2) as an individual right, and he argues that the armed habitual criminal statute infringes on that right by criminalizing a felon's mere exercise of the right.

¶ 16 This argument, and arguments like it, have arisen with some frequency following the Supreme Court's *Heller* and *McDonald* decisions. Among the first Illinois cases to consider *Heller*- and *McDonald*-based arguments were those that considered, and rejected, the argument that those

decisions rendered unconstitutional Illinois' criminalization of aggravated unlawful use of a weapon. In the first of those decisions, *People v. Dawson*, 403 Ill. App. 3d 499, 934 N.E.2d 598 (2010), we explained that *Heller* and *McDonald* applied "only to a ban on handgun possession in a home," and therefore did not extend second-amendment protection to firearm possession outside the home. *Dawson*, 403 Ill. App 3d at 508. Based on that interpretation of *Heller* and *McDonald*, we rejected the argument that the second amendment prohibited laws against firearm possession outside the home. *Dawson*, 403 Ill. App. 3d at 510. We followed *Dawson*'s reasoning in two later decisions. See *People v. Williams*, 405 Ill. App. 3d 958, 940 N.E.2d 95 (2010), and *People v. Aguilar*, 408 Ill. App. 3d 136, 944 N.E.2d 816 (2011), *leave to appeal allowed*, 949 N.E.2d 1099 (2011).

¶ 17 Since those decisions, this court has also had occasion to address *Heller*- and *McDonald*-based challenges to the armed habitual criminal statute. In *People v. Ross*, 407 Ill. App. 3d 931, 947 N.E.2d 776 (2011), the defendant was arrested and police then found a handgun in the car he had been driving; the defendant argued that his subsequent conviction for being an armed habitual criminal violated the second amendment. In response, this court noted the *Heller* majority's statement that " 'nothing in [its] opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill' " (*Ross*, 407 Ill. App. 3d at 940 (quoting *Heller*, 554 U.S. at 626-27)), the *McDonald* majority's repetition of the same statement (*Ross*, 407 Ill. App. 3d at 942 (quoting *McDonald*, 130 S.Ct. at 3047)), and the *Heller* majority's qualification that "certain classes of people may be disqualified from the exercise of second amendment rights" (*Ross*, 407 Ill. App. 3d at 941 (citing *Heller*, 554 U.S. at 635). We explained that we would follow the Supreme Court's rulings as the " 'final arbiter of the United States Constitution' " (*Ross*, 407 Ill. App. 3d at 941 (quoting *Morisette v. Briley*, 326 Ill. App. 3d 590, 593, 761 N.E.2d 333 (2001) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))), and we therefore held that the armed habitual criminal statute did not violate the second amendment. This court repeated *Ross*'s reasoning in a later case, *People v. Coleman*, 409 Ill. App. 3d 869, 948 N.E.2d 795 (2011), in which the defendant was found walking outside carrying a handgun and raised

the same challenge to the armed habitual criminal statute.

¶ 18 We acknowledge that the defendants in *Ross* and *Coleman* were found possessing firearms outside their homes, while the defendant here was convicted of possessing a handgun inside his home. This distinction might seem meaningful at first glance, because, as this court has consistently observed, *Heller* and *McDonald* both emphasized that the second amendment protects individuals' rights to bear arms in their homes. However, as this court has also noted, the *Heller* and *McDonald* decisions were careful to explain that that generally applicable individual right could be limited in specific circumstances, such as when asserted by felons. The Supreme Court, as the final arbiter of the meaning of the U.S. Constitution, has expressly stated that the second amendment right to bear arms may be limited by laws forbidding felons from possessing firearms, and in fact that *Heller* and *McDonald* should not be read to cast doubt on such laws. Based on the Supreme Court's statement, we must reject the defendant's argument that a statute criminalizing a felon's possession of a handgun, even in his home, violates the second amendment as interpreted in *Heller* and *McDonald*.

¶ 19 The defendant's final argument on appeal is that the armed habitual criminal statute violates the constitutional prohibition against *ex post facto* laws. He asserts that, at the time he was convicted of one of the two prior felonies that qualified him as an armed habitual criminal, the offense of armed habitual criminal did not exist, and he argues that, as applied to him, the statute thus operated to criminalize conduct that occurred before it was enacted.

¶ 20 Like the defendant's second-amendment argument, this argument too has been considered and rejected by this court. As we explained in *Ross*, the armed habitual criminal statute does not punish a defendant "for offenses he committed before it was enacted but, instead, punishe[s] him for the separate offense of possessing a firearm *after* having been convicted of" the predicate offenses. *Ross*, 407 Ill. App. 3d at 944. We repeated this explanation in *People v. Coleman*, 409 Ill. App. 3d 869, 880, 948 N.E.2d 795 (2011), and we adopt it once again to reject the defendant's *ex post facto* argument in this case.

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.