

No. 1-09-1588

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**SIXTH DIVISION**  
February 4, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 5981
	)	
LARRY CHRISTOPHER,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE GARCIA delivered the judgment of the court.

Justices Cahill and R.E. Gordon concurred in the judgment.

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**O R D E R**

*HELD:* Sufficient evidence was presented that defendant committed the charged offenses while armed with a firearm. The \$200 DNA analysis fee may be assessed even if it was previously assessed in a prior conviction; as a fee, it is not subject to credit for presentencing detention. The children's advocacy center charge was erroneously assessed because it was not in effect when defendant committed his offense and, as a fine, it may not be assessed retroactively.

Following a bench trial, defendant Larry Christopher was convicted of armed robbery, aggravated kidnaping, and unlawful use of a weapon by a felon (UUWF) and sentenced to concurrent prison terms of 16, 10, and 10 years respectively, and assessed \$965 in fines and fees. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he possessed a firearm and thus his UUWF conviction must be vacated and his armed robbery conviction reduced to robbery. He also challenges two of the fines and fees assessed against him. For the reasons stated below, we vacate one of defendant's fines, but otherwise affirm the judgment of the circuit court.

The evidence at trial showed that codefendant Darnesha Simmons ran over Sheldon Watson's foot with her car in the middle of the night, offered him a ride but then drove him to an alley where defendant was waiting. Defendant pointed a black gun at Watson's face and removed him from the car. Defendant struck Watson in the face with his fists and gun. Defendant and codefendant took items from Watson's pockets, including his wallet, keys, organizer, and phone. While the items were being removed, defendant kept the gun pointed at Watson's head. At one point, defendant put the gun in Watson's mouth to force him to disclose the codes for his credit and bank cards. From the taste left in his mouth, Watson could tell the gun was metal. Defendant forced Watson back into the car and drove away. While

keeping the gun pointed at Watson, defendant kicked Watson out of the moving car. During the ordeal, Watson believed that defendant was going to shoot him. While some of Watson's property was later recovered, the gun was not.

Before we address the merits of this appeal, we consider the State's motion to strike a portion of defendant's reply brief because it contains material not in the record on appeal. Appellate defense counsel inserted in the reply brief a photograph and description of a pellet gun found for sale at a website. This court may strike any section of a brief that violates Supreme Court Rule 341 (eff. July 1, 2008) or merely disregard the offending section. *Walk v. Department of Children & Family Services*, 399 Ill. App. 3d 1174, 1180 (2010). Defendant does not deny that the photograph and description of the pellet gun are de hors the record. He argues, however, that the picture and description are not evidentiary but merely illustrate his argument that something can look like a gun yet not be a firearm as defined by statute. Defendant cites cases where only a toy gun was involved to bolster his claim that a "toy gun" may be misidentified as a real gun at trial.

While it is true that demonstrative material has no probative value in and of itself, it may serve as a visual aid. See *People v. Flores*, No. 2-08-0915, slip op. at 10 (December 22, 2010). Defendant fails to explain why demonstrative evidence has

any role to play in our review of the trial below. Trial counsel could have sought to make such a presentation to the trier of fact below. Of course, a key consideration in the admissibility of demonstrative material at the trial court is whether it fairly and accurately represents the subject matter at the relevant time. *Flores*, No. 2-08-0915, slip op. at 9; *People v. Martinez*, 371 Ill. App. 3d 363, 380 (2007). While the website description of the pellet gun is that it is made of a "polymer composite" (plastic), Watson testified he believed the gun was metal based on the metal taste it left in his mouth. The website description of the pellet gun does not say "tastes like metal." We disregard that portion of the reply brief concerning the pellet gun.

Without regard to the "demonstrative" evidence, defendant insists that the State failed to prove beyond a reasonable doubt that he used a firearm in robbing Watson. He contends his UUWF conviction must be vacated and his armed robbery conviction reduced to robbery.

When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). We do not retry the defendant, as it is the trier of fact who makes determinations regarding the credibility

of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *Jackson*, 232 Ill. 2d at 280-81. The trier of fact is not required to disregard inferences that flow normally from the trial evidence; nor is the trier of fact obliged to view the evidence consistent with innocence or elevate innocent explanations to reasonable doubt. *Jackson*, 232 Ill. 2d at 281. A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of defendant's guilt remains. *Jackson*, 232 Ill. 2d at 281.

An actual firearm is "any device \*\*\* designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," except for antique firearms, devices used for signaling or to fire industrial ammunition such as rivets, or a "pneumatic gun, spring gun, paint ball gun or B-B gun which either expels a single globular projectile not exceeding .18 inch in diameter and which has a maximum muzzle velocity of less than 700 feet per second or breakable paint balls." 430 ILCS 65/1.1; 720 ILCS 5/2-7.5 (West 2008).

However, it is sufficient to support a conviction if the object used as a weapon possessed the outward appearance and characteristics of a firearm. It is immaterial that the weapon was not loaded, had no firing pin or open barrel, or was otherwise inoperable. *People v. Williams*, 394 Ill. App. 3d 286,

289 (2009). Eyewitness testimony that a defendant brandished a gun during a robbery is sufficient to establish that the defendant was armed, even where the gun was not recovered and the witness's description of the gun was imprecise. *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007), citing *People v. Thomas*, 189 Ill. App. 3d 365, 371 (1989), and *People v. Garcia*, 229 Ill. App. 3d 436, 439 (1992). Here, Watson testified in clear fashion that defendant displayed and used a gun: pointing it at him repeatedly, bludgeoning him with it, and thrusting it into his mouth.

Defendant notes Watson's sparse description of the gun -- black and metal -- and cites *People v. Ross*, 229 Ill. 2d 255, 276-77 (2008), for the principle that the victim's subjective perceptions or feelings that the defendant had a firearm are an insufficient basis for concluding that the defendant was indeed armed with a firearm. Watson's testimony amounted to more than his subjective perception of a gun. Defendant pointed the gun to force Watson to do his bidding, going so far as to place it in Watson's mouth in an effort to force the disclosure of bank codes. Defendant repeatedly manifested a threat to shoot Watson by his acts. Defendant's acts clearly reflected that he held a gun in particular, rather than a blunt metal object in general. *Lee*, 376 Ill. App. 3d 951, 955 (2007), citing *Garcia*, 229 Ill. App. 3d at 439 (a defendant's repeated threats to shoot the

victim were circumstantial evidence that he was armed with a dangerous weapon). We are unpersuaded that we should upset the finding of the trier of fact that defendant was armed with a firearm when he robbed and beat Watson.

Defendant also contends that he was wrongly assessed two monetary penalties.

We agree with the parties that the \$30 children's advocacy center charge (55 ILCS 5/5-1101(f-5) (West 2008)) must be vacated because it was not in effect when defendant committed his offense in January 2007. Pub. Act. 95-103, eff. January 1, 2008 (adding 55 ILCS 5/5-1101(f-5)). As a fine, not a fee, the charge cannot be applied retroactively. *People v. Grayer*, 403 Ill. App. 3d 797, 798 (2010).

Defendant also contests the \$200 DNA analysis fee (730 ILCS 5/5-4-3(a), (j) (West 2008)) because he was assessed the same fee upon a prior conviction. We recently determined that the DNA fee may be assessed for any qualifying conviction or disposition, regardless of whether the fee was previously assessed. *People v. Adair*, No. 1-09-2840, slip op. at 18-20 (December 10, 2010); *People v. Williams*, No. 1-09-1667, slip op. at 12 (December 2, 2010); *People v. Bomar*, Nos. 3-08-0985 & -0986 (cons.), slip op. at 13-16 (October 15, 2010); *People v. Hubbard*, No. 1-09-0346, slip op. at 3-5 (September 17, 2010); *Grayer*, 403 Ill. App. 3d at 798-802; *People v. Marshall*, 402 Ill. App. 3d 1080 (2010), appeal

allowed, No. 110765; but see *People v. Rigsby*, No. 1-09-1461 (December 3, 2010). Defendant fails to persuade us that the cases upholding multiple DNA fees were wrongly decided. The \$200 DNA analysis fee was properly assessed upon defendant.

In the alternative, defendant contends that we should ignore the statutory language referring to the DNA analysis charge as a "fee" and conclude it is actually a fine. As a fine, it is subject to offset by the statutory credit of \$5 for each day of presentencing detention. 725 ILCS 5/110-14(a) (West 2008). He cites to *People v. Long*, 398 Ill. App. 3d 1028, 1032-34 (4<sup>th</sup> Dist. 2010), in support of his contention. See also *People v. Folks*, No. 4-09-0579 (December 28, 2010); *People v. Grubbs*, Nos. 3-09-0358 & -0564 (cons.) (November 8, 2010); *People v. Mingo*, 403 Ill. App. 3d 968, 973 (2010), and *People v. Clark*, No. 2-08-0993 (September 16, 2010) (following *Long*). However, this district has found that the DNA analysis charge is "compensatory and a collateral consequence of defendant's conviction." *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006). As a fee, not a fine, "the credit stated in section 110-14 \*\*\* cannot be applied." *Tolliver*, 363 Ill. App. 3d at 97; see *Adair*, No. 1-09-2840, slip op. at 22-23; *Williams*, No. 1-09-1667, slip op. at 11-12 (following *Tolliver*).

On this issue, the *Long* holding is limited to its facts. In *Long*, the State argued that the DNA analysis charge was a fine

and, thus, had to concede that it was subject to the credit. *Long*, 398 Ill. App. 3d at 1033-34. The State does not take that position before us. *Long* preceded our decisions in *Adair* and *Grayer*, in which we found rational bases for the State to collect DNA samples and assess the DNA analysis fee even after the same fee was assessed in an earlier conviction. *Adair*, No. 1-09-2840, slip op. at 20; *Grayer*, 403 Ill. App. 3d at 801-02. We find no basis to question the conclusion that the DNA analysis fee is compensatory, not punitive, a key factor in determining that a charge is a fee, not a fine. *People v. Graves*, 235 Ill. 2d 244 (2009); *People v. Jones*, 223 Ill. 2d 569 (2006). Lastly, *Long* noted the *Jones* court's statement that a fee or cost is intended to reimburse the State for some cost incurred in a defendant's prosecution and found that "any costs incurred by the State in relation to defendant's DNA specimen were incurred after his prosecution, conviction, and sentence." *Long*, 398 Ill. App. 3d at 1034, citing *Jones*, 223 Ill. 2d at 600. However, our supreme court has since clarified that "the most important factor is whether the charge seeks to compensate the [S]tate for any costs incurred as the result of prosecuting the defendant." (Emphasis added.) *Graves*, 235 Ill. 2d at 250.

In *Jones*, our supreme court distinguished fines from fees and costs:

" 'A "fine" is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense. [Citation.] A "cost" is a charge or fee taxed by a court such as a filing fee, jury fee, courthouse fee, or reporter fee. [Citation.] Unlike a fine, which is punitive in nature, a cost does not punish a defendant in addition to the sentence he received, but instead is a collateral consequence of the defendant's conviction that is *compensatory in nature*. A "fee" is a charge for labor or services, especially professional services.' " (Emphasis in *Jones*.) *Jones*, 223 Ill. 2d at 581, quoting *People v. White*, 333 Ill. App. 3d 777, 781 (2002).

Stated another way, a "fine" is a pecuniary punishment for a criminal conviction, payable to the public treasury, while a "fee" or "cost" seeks to recoup expenses incurred by the State or to compensate the State for some expenditure incurred as the result of prosecuting a defendant. *Graves*, 235 Ill. 2d at 250.

The DNA analysis fee does not go into the general fund of the State treasury but exclusively to the State Police laboratory, except for a \$10 portion of each fee for the clerk of the circuit court to offset her costs in implementing the DNA analysis statute. 730 ILCS 5/5-4-3(j), (k) (West 2008). The DNA analysis fee reimburses the State for the expense of operating a system under which this defendant's DNA profile was required to be processed and analyzed as a result and collateral consequence of this prosecution and conviction. We therefore find that the DNA analysis charge is indeed a fee and therefore not subject to offset by the presentencing detention credit.

Pursuant to Supreme Court Rule 615(b)(2) (eff. August 27, 1999), the \$30 children's advocacy center fine is vacated. The judgment of the circuit court is affirmed in all other respects.

Affirmed in part and vacated in part.