

No. 1-10-2410

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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 6895
)	
THADDEUS MCNEIL,)	Honorable
)	Victoria A. Stewart,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concur in the judgment.

ORDER

¶ 1 *Held:* The State presented sufficient evidence to sustain defendant's conviction under the armed habitual criminal statute. Defense counsel was authorized to stipulate to the admission of testimony on defendant's behalf. Defendant's conviction did not violate the one-act, one-crime doctrine.

¶ 2 Following a bench trial, defendant Thaddeus McNeil was convicted of being an armed habitual criminal and was sentenced to ten years' imprisonment. On appeal, defendant claims: (1) the State did not prove him guilty beyond a reasonable doubt in that the State failed to establish the chain of custody for the gun found in defendant's possession; and (2) that his

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convictions on fifteen counts arising out of his arrest violated the one-act, one-crime doctrine.

For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with violating the armed habitual criminal statute (720 ILCS 5/24-1.7(a) (West 2008)) and multiple counts of aggravated and ordinary unlawful use of a weapon (720 ILCS 5/24-1.6, 24-1.1(a) (West 2008)) following a traffic stop. Defendant filed a combined motion to quash arrest and motion to suppress the gun recovered at the time of his arrest. The State and defense counsel initially agreed that they would proceed with a bench trial immediately following the court's ruling on the motion. However, on the day of the hearing, defendant informed the court that he would proceed with the hearing but wished to set the trial for another day.

¶ 5 The following evidence was adduced at the hearing on defendant's motion. Defendant testified that he made a left-hand turn onto Cermak Road and observed a police car speeding up behind him. Defendant pulled over after seeing the police car activate its siren and lights. Defendant realized that the officer was pulling him over and turned onto a side street. Defendant testified that he asked the officer why he was being pulled over, but the officer "really didn't say much" in response. The officer grabbed the door handle and opened defendant's door. At that time, defendant testified that he asked the officer for a "white shirt," meaning a supervising officer. Defendant testified that the officer reached in and grabbed him by his shirt and pulled him out of the vehicle. Defendant testified that he never made any movements to his waistband nor did he drop anything when he got out of the car.

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¶ 6 Defendant testified that the officer brought him to the back of the car and searched him. The officer's partner then recovered a gun from beneath the driver's seat. Defendant acknowledged that the gun had been in the car while he was driving, but it was not visible to the naked eye. Defendant testified that the officers never showed him a warrant to search his car.

¶ 7 Defendant was then taken into custody. While at the police station, defendant told the officer that he was arrested because he was black and driving a nice car. Defendant also admitted that he told the officer, "I had the mother fuckin' pistol on me."

¶ 8 In response, the State called the arresting officer, identified only as Officer Theodore, to testify on the motion to suppress. Theodore testified that he was driving behind defendant's car when he observed it disobey a red light as it turned onto a side street. Theodore testified that he followed defendant onto the side street and turned on his siren and lights.

¶ 9 Theodore testified that as he approached the driver's side door, he observed defendant make movements with his hands toward his waistband. Further, Theodore testified that he asked defendant to show him his hands but defendant refused to do so. Theodore testified that at that point he ordered defendant out of his vehicle because he feared for his life. As defendant got out of the vehicle, the officer testified that a fully-loaded ammunition magazine dropped from defendant's waistband to the ground. Defendant was then taken into custody. Theodore further testified that a fully-loaded black handgun was found on the floor on the driver's side of the car. On redirect examination, Theodore also testified that defendant admitted that he "had the mother fuckin' pistol on [him]" at the time of his arrest.

¶ 10 Defendant then called his wife, Ebony McNeil, as a rebuttal witness. McNeil testified

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that on the night of defendant's arrest, she was sitting in the passenger seat of defendant's car. She testified that Theodore told defendant that he was being pulled over for running a red light. McNeil testified that Theodore asked defendant to step out of the car and that at that time she did not see defendant drop a magazine clip to the ground. Ebony testified that up until the point that defendant was pulled over, she had not seen defendant commit any traffic or criminal violations. After each side had rested, the trial court denied defendant's motion to quash arrest and suppress the evidence. The court then proceeded with the trial. It read the fifteen-count indictment to defendant and entered a plea of not guilty on each count. The court then admonished defendant on his right to a jury trial, which defendant waived. The court asked for any stipulations in the case. The State asked that the court "incorporate the testimony of Officer Theodore from the motion to quash." The State also presented two certified copies of defendant's previous convictions. Defense counsel agreed to the stipulations.

¶ 11 Defendant then interrupted the proceedings, again indicating that he did not want to proceed with the trial. The following colloquy then occurred:

"THE COURT: I have entered a plea of not guilty on those charges. I have entered a jury waiver, sir, which means you will not have a jury on this matter.
*** [A]nd now, you're doing a formal stipulation to the testimony that I heard in the motion to suppress which means that all of the witnesses and all of the testimony of yourself, your wife, as well as the police officer that I heard in the motion to suppress are effective now for the trial. Do you understand that?
DEFENDANT: Yes.

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THE COURT: Do you understand the trial is now over, sir?"

¶ 12 The court then began to issue its ruling. Defense counsel interrupted and asked for an opportunity to present a closing argument. Defense counsel then argued that defendant could not be convicted because “no gun was inventoried, and there is no chain of custody and there is no stipulation in the chain of custody.” Defense counsel also noted that the officer who recovered defendant’s gun did not testify.

¶ 13 In response, the State argued that it was sufficient to present testimony about the gun and that it was not required to enter the gun into evidence to prove its case. Thus, because the gun was not introduced, chain of custody was not a relevant concern in this case. Nevertheless, even if the gun were introduced at trial, the State would only have to establish that it was in the same or substantially the same condition that day as it was when it was recovered to satisfy the chain of custody. The State argued that it sufficiently met its burden when the officer testified to finding a gun as well as two separate loaded magazines in the vehicle.

¶ 14 After hearing all the evidence, the trial court found defendant guilty of violating the armed habitual criminal statute (720 ILCS 5/24-1.7(a) (West 2008)), and also convicted him of three counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (West 2008)) and two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1 (West 2008)). The court explained that it considered all of the witnesses’ testimony and found only Theodore’s testimony to be credible. The court further found the testimony of defendant and McNeil to be inconsistent. The court specifically found that a weapon was recovered from under defendant’s seat. As such, the court concluded that “it is sufficient as a matter of law that defendant possessed the firearm

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and that he has two prior felony convictions to which [he has] stipulated.”

¶ 15 Defendant filed a motion for a new trial and was represented by new counsel at the hearing. At the hearing, defense counsel argued that: the trial court did not properly weigh all of the evidence; the chain of custody of the gun was never established; defendant was denied his sixth amendment right to confront his accuser; and the testimony considered by the trial court exceeded the scope of the stipulation as the parties only stipulated to Theodore’s testimony. Defendant’s motion was denied.

¶ 16 At the sentencing hearing, the court explained that the armed habitual criminal offense was a Class X felony, punishable by six to thirty years’ imprisonment. Considering defendant’s prior convictions and probation violations, the trial court sentenced defendant to ten years’ imprisonment on that charge. This timely appeal followed.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant first contends that the State failed to prove him guilty beyond a reasonable doubt “because the State failed to present a foundation for the chain of custody and the admission of the weapon underlying his conviction.” When a defendant challenges the sufficiency of the evidence to sustain his conviction, the appropriate standard is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the State satisfied its burden of proving the essential elements of the crime beyond a reasonable doubt. People v. Pollack, 202 Ill. 2d 189, 217 (2002). We will only reverse a conviction under these circumstances where the evidence is so unreasonable, improbable or unsatisfactory that it justifies a reasonable doubt of defendant’s guilt. People v. Wheeler, 226 Ill.

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2d 92, 115 (2007). A reviewing court should not retry a defendant when considering a sufficiency of the evidence challenge. Id. at 114.

¶ 19 However, a challenge to the adequacy of the chain of custody is not a question of the sufficiency of the evidence. People v. Woods, 214 Ill. 2d 455, 471 (2005). A chain of custody is used to lay a proper foundation for the admission of evidence. Id. Accordingly, a defendant's assertion that the State has presented a deficient chain of custody for evidence is a claim that the State has failed to lay an adequate foundation for that evidence. Id. For example, where an item has readily identifiable and unique characteristics, and its composition is not easily subject to change, an adequate foundation is laid by testimony that the item sought to be admitted is the same item recovered and is in substantially the same condition as when it was recovered. Id. Here, the State never attempted to introduce the gun into evidence. Rather, the State sought to prove that defendant illegally possessed a gun through the officer's testimony. Thus, any discussion of the chain of custody is inapplicable in this case. Woods, 214 Ill. 2d at 471.

¶ 20 To the extent that defendant is challenging the sufficiency of the officer's testimony to sustain his conviction, we conclude that it was sufficient. To prove someone guilty of being an armed habitual criminal, the State must present evidence that he "receives, sells, possesses, or transfers any firearm" after having been convicted of at least two triggering offenses, including convictions for unlawful use of a weapon and felony drug offenses. 720 ILCS 5/24-1.7(a)(1) (West 2008), People v. Nesbit, 398 Ill. App. 3d 200, 209 (2010). Defendant stipulated to the admission of his prior convictions for unlawful use of a weapon and felony drug possession, both of which are of the type that satisfy the second prong of the armed habitual criminal statute.

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¶ 21 As to the element of possession of a firearm, the State may prove that defendant had either actual or constructive possession of the firearm. Nesbit, 398 Ill. App. 3d at 209. To establish constructive possession, the State must prove that the defendant had knowledge of the presence of the firearm and had immediate and exclusive control over the area where it was found. People v. Ingram, 389 Ill. App. 3d 897, 900 (2009). Knowledge may be inferred from several factors, including: (1) the visibility of the weapon from defendant's location in the vehicle, (2) the amount of time in which defendant had an opportunity to observe the weapon, (3) gestures or movements made by defendant that would suggest an effort to retrieve or conceal the weapon and (4) the size of the weapon. Nesbit, 398 Ill. App. 3d at 210. The trier of fact is responsible for determining the witnesses' credibility, weighing their testimony, and deciding on the reasonable inferences to be drawn from the evidence. Id.

¶ 22 In this case, Theodore testified that during the traffic stop, he noticed defendant making movements with his hands from the steering wheel to the waistband of his pants. Defendant did not comply with Theodore's order to show his hands. After Theodore ordered defendant out of the car, defendant dropped a loaded magazine from his lap. Theodore's partner then discovered a gun on the floor under defendant's seat. These facts are sufficient to allow the inference that defendant knew the gun was under his seat and that he was in constructive possession of it. See Nesbit, 398 Ill. App. 3d at 210. Moreover, on redirect, Theodore testified that defendant admitted to him, "I had the mother fuckin' pistol on me."

¶ 23 Although defendant argues that Theodore's testimony cannot support his conviction where it was refuted by the defense witnesses' more credible testimony, it is for the trier of fact

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to assess the credibility of the witnesses, determine the weight to be given to their testimony, and to draw reasonable inferences from the evidence. People v. Tenney, 205 Ill. 2d 411, 428 (2002).

“Testimony may be found insufficient *** only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt.” People v. Cunningham, 212 Ill. 2d 274, 279 (2004).

¶ 24 As such, keeping in mind that we view the evidence and testimony provided in a light most favorable to the State, Theodore’s statements directly supporting defendant’s conviction of being an armed habitual criminal “could reasonably be accepted by the fact finder *** as true beyond a reasonable doubt.” Cunningham, 212 Ill. 2d at 285.

¶ 25 Although he does not specifically raise the issue on appeal, defendant suggests in his preceding argument that he was not adequately admonished with regards to the proffered stipulation of evidence. The gist of defendant’s argument is that he was denied his sixth amendment right to confront his accuser. Our supreme court has held that a defendant does not have the exclusive right to waive his right to confrontation. People v. Clendenin, 238 Ill. 2d 302, 319 (2010). Rather, defense counsel may generally waive a defendant’s right of confrontation by entering into an evidentiary stipulation where two elements are met: (1) the defendant does not object; and (2) the decision to stipulate is a matter of trial tactics and strategy. Clendenin, 238 Ill. 2d at 319 (citing People v. Campbell, 208 Ill. 2d 203, 217 (2003)).

¶ 26 However, there is an exception to this general rule, but it is warranted only in those instances where: (1) the State’s entire case is presented by stipulation and defendant fails to preserve a defense; or (2) the stipulation concedes the sufficiency of the evidence to support a

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conviction. Id. Because these specific circumstances effectively transform a stipulation into a plea of guilty, Campbell held that in such cases, a defendant must be personally admonished about a stipulation and must personally agree to it. Id. at 321. Here, defendant suggests that he was entitled to personally waive his right to confrontation under the first exception.

¶ 27 In People v. Rowell, the court clarified what it means for a stipulation to be tantamount to a guilty plea. People v. Rowell, 229 Ill. 2d 82 (2008). There, the defendant argued he was entitled to receive an admonishment and personally waive his confrontation right because the State's entire case against him was presented by stipulation. Id. In rejecting the assertion that this alone rendered the stipulation equivalent to a plea of guilty, the court reaffirmed that under the first exception, the State's entire case must have been presented by stipulation and the defendant must not have presented or preserved a defense. Id. at 102. That is, the test is conjunctive, requiring both elements to be present before admonishments and a personal waiver is required. Clendenin, 238 Ill. 2d at 322. Although the State's entire case in Rowell was presented by stipulation, the defendant preserved a defense by arguing that the evidence was insufficient to support a conviction and that the charging instrument was deficient. Id. (citing Rowell, 229 Ill. 2d at 102). Because the defendant preserved a defense, the stipulation was not tantamount to a guilty plea and "Campbell did not require the trial court or counsel to admonish defendant and ensure that the stipulation was part of the record." Id.

¶ 28 Similarly, in this case, although the State presented its entire case by way of stipulated testimony and prior convictions, defendant presented a defense at trial. At trial, defense counsel argued,

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“[defendant] cannot be convicted of [sic] this case because the officer who recovered the gun did not testify. There is no gun, no gun was inventoried, and there is no chain of custody and there is no stipulation in the chain of custody. There can be no conviction in this case and I would ask you to acquit him.”

That is, he argued that the State failed to prove that the gun recovered was the same one used to convict him, which, as we have explained above, is an argument without merit. Thus, defendant’s argument does not meet both prongs of the exception and the stipulation was not tantamount to a guilty plea that defendant was entitled to waive personally.

¶ 29 As such, defense counsel had the authority to enter into the stipulation, effectively waiving defendant’s right to confrontation. Defendant expressly agreed to the entry of the stipulation at trial, which was a matter of trial strategy and, thus, defendant’s sixth amendment right was not violated. *Id.*

¶ 30 Defendant’s second argument on appeal is that the trial court violated the one-act, one-crime doctrine by convicting him on multiple counts arising out of the same physical act. The one-act, one-crime doctrine prohibits multiple convictions based on “precisely the same physical act.” *People v. Nunez*, 236 Ill. 2d 488, 494 (2010). To remedy such a violation, sentence should be imposed on the more serious offense and the conviction for the less serious offense should be vacated. *People v. Koteru*, 2012 IL App (1st) 100951 (citing *People v. Artis*, 232 Ill. 2d 156, 170 (2009)). In determining which offense is more serious, we “compare the relative punishments prescribed by the legislature for each offense” because the General Assembly likely assigned the greater punishment to the offense it deemed more serious. *Id.*

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¶ 31 In this case, defendant was convicted under the armed habitual criminal statute, three counts of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon by a felon. All of the convictions were based on his possession of the handgun discovered pursuant to the traffic stop and arose out of the same physical act.

¶ 32 However, the transcript of the sentencing hearing and the mittimus reflect that judgment and sentence were entered only on the conviction for armed habitual criminal, the most serious of the offenses, in accordance with the one-act, one-crime doctrine. Although the trial court did not expressly vacate the other convictions, it also did not enter judgment on those convictions.

Nevertheless, to the extent that the convictions for aggravated and ordinary unlawful use of weapon remain, they are hereby vacated pursuant to our authority under Supreme Court Rule 366. People v. Cunningham, 365 Ill. App. 3d 991, 994 (2006).

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm defendant's conviction and sentence and vacate the convictions for ordinary and aggravated unlawful use of a weapon.

¶ 35 Affirmed in part, vacated in part.