2012 IL App (1st) 103698-U

THIRD DIVISION
July 18, 2012

No. 1-10-3698

**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).

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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. 10 CR 8201 |
| | ) | |
| DAVID CLARK, | ) | The Honorable |
| | ) | James B. Linn, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Evidence was sufficient to support defendant's conviction for aggravated robbery beyond a reasonable doubt even though at trial one victim recanted his preliminary hearing testimony, and the other victim had not ever been cooperative with the prosecution.

¶ 2 Following a bench trial, David Clark, the defendant, was found guilty of two counts of aggravated robbery, and, based on his criminal background, was sentenced to a six-year Class X

prison term. On appeal, defendant contends that he was not proved guilty beyond a reasonable doubt.

¶ 3 During a preliminary hearing on April 21, 2010, Darrell Garner testified that he and his friend, Robert Shaw, were standing on the street and talking in the area of 5558 West Washington when defendant drove up and robbed them of money at gun point, at around noon on April 14, 2010. A Caucasian woman with blond hair was a passenger in the car. At trial, defense counsel disclosed that the woman was Kimberly Jenning (or Jennings). The car was registered to her. The record contains a photograph of a black gun, and a photograph of a silver Hyundai.

¶ 4 At trial on August 18, 2010, Garner recanted his prior testimony and testified instead that the State had coached him to identify the defendant and to testify the way he had at the preliminary hearing. Garner further testified that he did not identify a woman on the scene because he had not seen her. The State elicited evidence of Garner's criminal convictions.

¶ 5 Robert Shaw did not cooperate with the State and did not appear at the preliminary hearing. At trial on September 10, 2010, Shaw testified that he was alone when a blue car pulled up and the driver displayed a gun. A white woman with blond hair was sitting in the passenger's seat. Shaw ran when he saw the gun. Shaw told the police that he thought they had come for drugs. When shown the photograph of the silver Hyundai, Shaw testified that the actual car was a darker blue. When shown a photograph of the gun, Shaw identified it as the same gun that the driver had pulled out. Shaw initially testified that he never talked to police after the incident, but he then corrected himself and testified that he identified Jennings and a light-complected man on the scene and told

police that he guessed they were coming to buy drugs. When Shaw was asked if he saw the light-complected gun man in court, Shaw said, "I plead the Fifth." The court told Shaw that it was not his case, that he did not have that right, and that the court was "getting a little aggravated." Shaw then said, "I don't see him though." The court said that was different, admonished Shaw about talking about the fifth amendment, and then asked Shaw, "What's so funny?" The assistant State's Attorney then requested a brief break.

¶ 6 Several Chicago police officers testified at trial. Officer Mark Gordon stopped the car defendant was driving, a silver Hyundai with a temporary license plate, because he had seen it make an illegal right turn. Defendant did not immediately stop the car. When defendant finally stopped the car, defendant fled on foot, and Gordon chased and caught him. Gordon might have lost sight of defendant for a second during the chase, but he did not see defendant toss a gun or any money. Nor was a weapon or any cash found on defendant's person. When Gordon returned to the location of the car, the car and the woman were gone. Garner identified defendant in the presence of sergeants at the scene as defendant sat in the back seat of Chicago police officer Conrad Jones' vehicle. Garner pointed at defendant and said, "'that's him.'" Chicago police officer Timothy Gilliland found the Hyundai, which was parked at 219 North Mayfield, searched it, and discovered a black metal BB gun in the trunk. The BB gun looked like a replica of a firearm.

¶ 7 The trial court observed that "some kind of agenda" had developed, "things like this happen in court, things change and people take a rhythm in the street, whether they are pressured or gotten to on different ways ***." The court observed that, pursuant to section 115-10.1 of the Code of

Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2010)), preliminary hearings "preserve" and "lock in testimony to make sure it's reliable and to be available later at trial." The court described Garner and Shaw as "not the sharpest knives in the drawer." The court observed that, shortly after the complaint was made, Garner testified under oath at the preliminary hearing and identified defendant, but Garner did not identify the woman and explained why not. The court found that to be "compelling." The court found that Garner and Shaw had not had time "to *** manufacture a story on the street." The court stated that it believed the testimony from the preliminary hearing and that it was "convincing and persuasive beyond a reasonable doubt."

¶ 8 On appeal, defendant contends that he was not proved guilty beyond a reasonable doubt because Garner recanted his prior testimony, and both Garner and Shaw testified at trial that defendant was not the offender. Defendant acknowledges that a prior inconsistent statement can be sufficient to support a conviction, but he argues that the trial court should not have believed Garner's prior statement over his trial testimony and Shaw's trial testimony, which, along with their criminal backgrounds and drug-dealing, greatly reduced the credibility of the prior inconsistent statement. Defendant observes that Garner has two convictions for felony retail theft, which involves dishonesty. Defendant argues that he has been incarcerated and was never out "on the street" to "manufacture a story," contrary to the belief of the trial court. Shaw never wanted to participate in the prosecution, did not testify at the preliminary hearing, and did not establish that any property was taken from him. Garner explained why his preliminary hearing testimony was inaccurate. Defendant maintains that the trial court arbitrarily chose to believe the recanted preliminary hearing testimony

of Garner instead of the consistent trial testimony of Garner and Shaw.

¶ 9 The trier of fact evaluates the credibility of the witnesses and resolves inconsistencies in the evidence. *People v. Clarke*, 391 Ill. App. 3d 596, 610 (2009). A criminal conviction will not be disturbed unless the evidence was so improbable or unsatisfactory that it raised a reasonable doubt of the defendant's guilt. *Clarke*, 391 Ill. App. 3d at 610. The issue on appeal is whether, after viewing the evidence in the light most favorable to the State, *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Clarke*, 391 Ill. App. 3d at 610. When assessing evidence that can produce conflicting inferences, the fact finder is not required to look for all possible explanations consistent with innocence and elevate them to the level of reasonable doubt. *People v. Digirolamo*, 179 Ill. 2d 24, 45 (1997); see also *People v. Slinkard*, 362 Ill. App. 3d 855, 858 (2006) (State's evidence need not exclude every possible doubt). Evidence of a recanted prior inconsistent statement is reviewed like all other trial evidence. *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998).

¶ 10 Here, the trial court believed evidence establishing that defendant was guilty. Pursuant to that evidence, defendant took money from both Garner and Shaw while indicating that he was armed with a weapon and threatening to use force. Both Garner and Shaw saw that defendant was armed with a weapon, which was recovered by the police and identified by Shaw as the weapon used during the offense. The victims identified defendant at the scene almost contemporaneously with the crime, following a brief chase. The trial court was not required to look for all possible explanations consistent with innocence and elevate them to the level of reasonable doubt, such as the failure to

find guns or significant sums of cash on defendant's person or in the driver's area or passenger's area of the car. See *Digirolamo*, 179 Ill. 2d at 45; see also *Slinkard*, 362 Ill. App. 3d at 858. The trial court reasonably could have found that defendant's female companion had time to stash the gun inside the trunk and to dispose of the stolen cash. Although Garner testified at trial that the State had coached him at the preliminary hearing, he also indicated at trial that he did not identify the woman who was on the scene because he had not seen that woman, which belies his claim that he was coached at the preliminary hearing. Shaw inappropriately invoked the fifth amendment during his trial testimony and also inappropriately laughed about it. The trial court believed that there had been some collusion to lie at trial, and as a consequence believed Garner's testimony (despite his criminal record) from the preliminary hearing and his identifications of defendant as the offender at the scene and during the preliminary hearing. We are unimpressed with defendant's suggestion that a story could not have been manufactured because he was incarcerated. The trial court reasonably could have inferred that defendant, despite his incarceration, had a means of communicating with Garner and Shaw to induce them to refuse to incriminate him. Viewed in the light most favorable for the State, the evidence that the trial court found to be credible was not so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt.

¶ 11 The cases cited by defendant are distinguishable. For example, in *People v. Arcos*, 282 Ill. App. 3d 870, 871 (1996), the appellate court held that the trial court should not have convicted the defendant because the trial court found that the sole witness was "thoroughly disreputable" and could not be believed. Thus, the trial court found that the sole witness was completely disreputable but

the trial court relied on the prior statement of that disreputable witness as proof of the defendant's guilt beyond a reasonable doubt. Those are "two logically incompatible conclusions." *People v. Thomas*, 354 Ill. App. 3d 868, 878 (2004). In the present case, the trial court's description of Garner and Shaw as not the sharpest knives in the drawer was consistent with its conclusion that Garner's prior testimony was believable, because Garner and Shaw would not have been bright enough to fabricate a different story so soon after the crime. In *People v. Reyes*, 265 Ill. App. 3d 985, 986-87, 990 (1993), which defendant also cited, the eyewitnesses were looking through the tinted windows of a car at night to see what was happening 30 feet away, which the appellate court described as a "less than ideal vantage point." One of the eyewitnesses testified that she had consumed 15 beers at a party before she saw the crime, and she testified at trial that she had misunderstood a question at the grand jury. Furthermore, the grand jury testimony did not provide detailed accounts, but rather one-word answers. *Id.* at 989. In the present case, Garner's testimony at the preliminary hearing was more detailed than the grand jury testimony in *Reyes*, he was in close proximity to defendant during the crime, and there was no testimony that he had consumed alcoholic beverages or had any difficulty seeing defendant or a less than ideal vantage point. We have considered, and rejected, defendant's arguments on appeal.

¶ 12 The judgment of the circuit court is affirmed.

¶ 13 Affirmed.