

No. 1-11-1320

**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. 09 CR 21696
	)	
BYRON McCOMB,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice LAMPKIN and Justice GORDON concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* There was sufficient evidence that defendant committed the offense of being an armed habitual criminal when two police officers testified clearly and generally consistently to seeing defendant throw a gun from a vehicle. The armed habitual criminal statute did not constitute an *ex post facto* law as applied to defendant; though his qualifying prior offenses preceded the statute's effective date, his instant offense did not. Defendant's \$200 DNA analysis fee must be vacated as he provided a DNA sample pursuant to an earlier conviction.
- ¶ 2 Following a bench trial, defendant Byron McComb was convicted of being an armed habitual criminal and sentenced to six years' imprisonment with fines and fees. On appeal, he contends that there was insufficient evidence to convict him beyond a reasonable doubt. He also

contends that his conviction violates the constitutional prohibition of *ex post facto* laws because both of his qualifying prior convictions preceded the effective date of the armed habitual criminal statute. Lastly, he contends, and the State agrees, that his \$200 DNA analysis fee must be vacated because he provided a DNA sample pursuant to an earlier felony conviction.

¶ 3 Defendant was charged with being an armed habitual criminal for, on or about November 18, 2009, allegedly possessing a firearm after having been convicted of possession of a controlled substance with intent to deliver in case 96 CR 25058 and aggravated unlawful use of a weapon in case 02 CR 31053.

¶ 4 At trial, police officer Robert Stegmiller and Sergeant Jose Lopez testified that they and another officer were on patrol in an unmarked vehicle at about 10 p.m. on the day in question, with Sergeant Lopez driving and Officer Stegmiller in the front passenger seat. Sergeant Lopez and Officer Stegmiller saw a brown Ford Explorer with defendant in the driver's seat and two passengers. The Explorer was stopped at the curb under an elevated railway ("L") station when a man on the sidewalk approached and conversed with the front-seat passenger of the Explorer with something in his hand; Officer Stegmiller believed it to be currency. Suspecting this was a drug transaction, the officers stopped and began to approach the Explorer, but it drove away. While the third officer stayed with the man on the sidewalk, Sergeant Lopez and Officer Stegmiller pursued the Explorer.

¶ 5 About 30 to 50 feet down the street, Sergeant Lopez stopped the Explorer by driving in front of it at an angle then stopping. Officer Stegmiller testified that, as he exited the car about 15 feet away with the scene lit by streetlighting as well as the lights of the police vehicle and the Explorer, he saw defendant reach across the front passenger, open the passenger-side window, and a silver or metallic gun "flew out." Officer Stegmiller did not see the gun in defendant's hand but only when the gun came through the window; however, he did not see anything passed

between defendant and either of his passengers. Sergeant Lopez testified that he was "looking across my hood directly at the front windshield of" the Explorer when he saw defendant throw a stainless-steel gun out the open passenger-side window. Sergeant Lopez did not see the front passenger's hand near the window when the gun was thrown. While Sergeant Lopez testified that the front passenger window had been open since the suspected drug transaction, Officer Stegmiller testified that defendant opened the window just before throwing the gun. When the gun struck the pavement, it discharged. Sergeant Lopez and Officer Stegmiller removed defendant and the two passengers from the Explorer, then searched and handcuffed them. Officer Stegmiller then recovered the gun where it fell to the pavement; there were no other silver objects nearby and no bystanders in the area. The gun was loaded with four bullets.

¶ 6 On cross-examination, Officer Stegmiller and Sergeant Lopez testified that the Explorer's headlights were shining at them as they looked at the Explorer. Officer Stegmiller maintained that he was "able to see through those headlights in [his] eyes and \*\*\* could tell the defendant was making" the previously-described motion of reaching across to throw the gun out the window. Sergeant Lopez maintained on cross-examination that he exited the police vehicle while maintaining his view through the Explorer's windshield, denying that he turned to the left as he exited. The gun recovered from the pavement was not checked for fingerprints.

¶ 7 The State entered into evidence without objection defendant's convictions for possession of a controlled substance with intent to deliver in case 96 CR 25058 and for the Class 2 felony of aggravated unlawful use of a weapon in case 02 CR 31053.

¶ 8 Defendant moved for a directed verdict, arguing that Sergeant Lopez and Officer Stegmiller "were at a poor vantage point" due to the headlights in their eyes when they claimed to see defendant throw the gun from the Explorer, and noting that fingerprint evidence would have proven or disproven his possession of the gun. The court denied the motion without comment.

¶ 9 Cyrus Carey testified for the defense that he was the front-seat passenger in the Explorer driven by defendant, his cousin. Carey saw no gun in the Explorer that night, nor did he see defendant either holding or throwing a gun. He heard the gunshot but believed the sound was not nearby. After he and defendant were arrested, an officer looked at Carey and said "put the gun on him," but then "they pointed out [defendant] and put the gun on him."

¶ 10 Defendant testified that he stopped the Explorer by the L station to pick up Carey and the other passenger. Immediately after the unmarked police car stopped him, the officers removed him and the passengers from the Explorer. Defendant denied having a gun or throwing one from the Explorer, and also denied seeing anyone else in the Explorer possess or throw a gun. He denied hearing a gunshot that evening.

¶ 11 Following closing arguments, the court found defendant guilty as charged, without further findings. The court also denied without comment defendant's post-trial motion challenging the sufficiency of the evidence. The court then sentenced defendant to six years' imprisonment, with fines and fees including the \$200 DNA fee. This appeal followed.

¶ 12 On appeal, defendant first contends that there was insufficient evidence to convict him beyond a reasonable doubt of the offense of being an armed habitual criminal.

¶ 13 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. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly,

the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt.

*Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 14 Here, taking the evidence in the light most favorable to the State as we must, we find sufficient evidence that defendant possessed a firearm while having been previously convicted of two felonies qualifying him to be an armed habitual criminal. While there were minor discrepancies between the accounts of Sergeant Lopez and Officer Stegmiller, they both testified to the effect that defendant, rather than his front passenger Carey, reached across the front seat and threw the recovered gun from the Explorer's open front passenger window. We acknowledge defendant's argument casting doubt upon "dropsy" cases, but generalized suspicion of such police accounts does not necessarily rise to the level of reasonable doubt in a particular case. Lastly, while defendant notes that the Explorer's headlights were shining into the faces of the two officers, it is not so unreasonable or improbable that they saw adequately through the light that no rational finder of fact could believe their testimony.

¶ 15 Defendant also contends that his conviction violates the constitutional prohibition of *ex post facto* laws because both of his qualifying prior convictions preceded the effective date of the armed habitual criminal statute. 720 ILCS 5/24-1.7 (West 2010).

¶ 16 The armed habitual criminal statute, which took effect in 2005, prohibits receipt, sale, possession or transfer of a firearm by a person with at least two prior convictions for certain enumerated offenses including aggravated unlawful use of a weapon and any controlled substance offense constituting at least a Class 3 felony. Pub. Act 94-398, eff. Aug. 2, 2005 (adding 720 ILCS 5/24-1.7). While defendant's instant offense of possessing a firearm was committed in 2009, his two prior convictions were in 1997 for possession of a controlled

substance with intent to deliver and in 2004 for aggravated unlawful use of a weapon. This court has held that the armed habitual criminal statute does not constitute an *ex post facto* law because it punishes a defendant not for his prior convictions preceding the statute but for the new act of possessing a firearm. *People v. Black*, 2012 IL App (1st) 110055, ¶¶ 15-22; *People v. Tolentino*, 409 Ill. App. 3d 598, 606-09 (2011); *People v. Coleman*, 409 Ill. App. 3d 869, 879-80 (2011); *People v. Davis*, 408 Ill. App. 3d 747, 751-52 (2011); *People v. Thomas*, 407 Ill. App. 3d 136, 141-42 (2011); *People v. Bailey*, 396 Ill. App. 3d 459, 461-64 (2009); *People v. Leonard*, 391 Ill. App. 3d 926, 930-32 (2009).

¶ 17 In these cases, this court expressly considered and rejected contentions substantially identical to defendant's claim based on *People v. Dunigan*, 165 Ill. 2d 235 (1995). We noted that our supreme court in *Dunigan* "did not hold that habitual criminal legislation in general can never include prior convictions as elements of an offense," and that, in contrast to the statute at issue in *Dunigan*, "section 24-1.7(a) \*\*\* created a substantive offense that punishes a defendant, not for his earlier convictions, but for the new offense created therein." *Bailey*, 396 Ill. App. 3d at 464. Stated another way:

"A defendant's prior crimes count as elements of a violation of the armed habitual criminal statute, as the prior offenses establish that the defendant fits in the class of persons who must not possess firearms. The act that violates the statute, possession of a firearm by a twice-convicted felon, must take place entirely after the enactment of the armed habitual criminal statute." *Thomas*, 407 Ill. App. 3d at 142.

We see no reason not to follow our earlier decisions and thus hold that the armed habitual criminal statute did not violate the prohibition on *ex post facto* laws in the instant case.

¶ 18 Lastly, the parties agree that defendant's \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)) was improper because he provided a DNA sample following a prior felony conviction. Our supreme court has determined that the DNA analysis fee may not be assessed under such circumstances. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 19 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the \$200 DNA analysis fee is vacated. The judgment of the circuit court is affirmed in all other respects.

¶ 20 Affirmed in part and vacated in part.