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2012 IL App (3d) 100501-U

Order filed April 16, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-10-0501
	)	Circuit No. 09-CF-1417
	)	
KENDALL BROWN,	)	Honorable
	)	Glenn H. Collier,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice Schmidt and Justice Holdridge concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The evidence, when examined in the light most favorable to the State, was sufficient to convict the defendant of aggravated unlawful use of a weapon. The DNA analysis charge is compensatory and is not a fine that may be reduced by the \$5 per day statutory credit for each day of presentence incarceration.
- ¶ 2 After a jury trial, the defendant, Kendall Brown, was convicted of aggravated unlawful use of a weapon. 720 ILCS 5/24-1.6(a)(1) (West 2008). He was sentenced to 30 months of probation and 180 days in jail. He was also ordered to pay a \$200 deoxyribonucleic acid (DNA)

testing fee. On appeal, the defendant argues that: (1) the State failed to prove him guilty of the offense beyond a reasonable doubt; and (2) the \$200 DNA testing fee should be offset by a monetary credit for time served in pretrial custody. We affirm.

¶ 3

### FACTS

¶ 4 Evidence at the defendant's jury trial indicated that on December 29, 2009, Sabion Williams, Dominick Clark, and Cameron Smallwood walked to a gas station, where they saw the defendant. They asked the defendant if he had marijuana to sell to them. The defendant indicated he only sold the marijuana in "sacks." Williams, Clark, and Smallwood walked across the street to a parking lot. A car, with the defendant riding in the front passenger seat, pulled into the parking lot. The defendant rolled down his window, and Williams handed the defendant \$5 to purchase some marijuana. The defendant took the money. The window of the car rolled up and the car pulled away, with no marijuana being exchanged. Smallwood fired a .32 caliber handgun in the direction of the car. Smallwood testified that the defendant returned fire on him. Williams and Clark ran from the scene and were picked up by police. Smallwood also ran away and hid nearby.

¶ 5 Smallwood buried his handgun in the snow as police approached him. Police later recovered Smallwood's handgun. Five shell casings were found in the parking lot where the shooting took place. A forensic scientist specializing in firearms and tool mark identification testified that all five casings had been fired through Smallwood's handgun. When Smallwood was questioned by police, he indicated that he had been shot at by "some guys" near the gas station.

¶ 6 Williams identified the defendant in a photograph lineup as the person that shot at him,

Clark, and Smallwood. He told police that after the defendant took the \$5, Williams and Smallwood called the defendant "bitches." The defendant pointed a handgun at Williams and Smallwood and fired at them. Smallwood returned fire in the direction of the defendant. Williams later testified at the trial that he did not see a gun in the defendant's vehicle or in the defendant's hand.

¶ 7 Clark testified that after the defendant took the \$5, the defendant's window rolled up and the car drove off. When the defendant's vehicle reached the end of the parking lot, Clark heard gunshots that did not originate from himself, Williams, or Smallwood.

¶ 8 Smallwood testified that when the defendant was in the car he saw a gun in the defendant's lap. After the defendant took the \$5 the car pulled away a short distance and then stopped. The defendant opened his car door and had a black gun in his hand. Smallwood became scared and fired five or six shots. The defendant returned fire at Smallwood. As Smallwood ran away, he heard four or five louder gunshots. The loud gunshots were different than the shots that he had just heard and were not from the defendant's direction. Smallwood hid next to someone's house until police found him 10 minutes later. As police were approaching, Smallwood threw his gun in the snow. In his police interview, Smallwood indicated that the defendant had shot at him first, but at the subsequent trial Smallwood indicated he was the first to fire his gun.

¶ 9 The jury found the defendant guilty. The trial court sentenced the defendant to 30 months of probation and various costs and fees, including a \$200 DNA analysis fee. The defendant appealed.

¶ 10

## ANALYSIS

¶ 11

## I. Sufficiency of the Evidence

¶ 12 On appeal, the defendant argues that the evidence was insufficient to convict him of aggravated unlawful use of a weapon. Specifically, he contends that his conviction was based on the testimony of Smallwood, who, the defendant claims, had motive to falsely accuse him, and who gave testimony that was impeached and inconsistent.

¶ 13 When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine whether, when 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. Cunningham*, 212 Ill. 2d 274 (2004); *People v. Collins*, 106 Ill. 2d 237 (1985). Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *Cunningham*, 212 Ill. 2d 274

¶ 14 Where a finding of guilt depended on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony of the eyewitness as true beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d 274. "In conducting this inquiry, the reviewing court must not retry the defendant." *Id* at 279. It is the responsibility of the trier of fact to determine the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ortiz*, 196 Ill. 2d 236 (2001). We will set aside a defendant's conviction only if the evidence was insufficient or so unreasonable, improbable, or unsatisfactory that reasonable doubt exists as to the defendant's guilt. *Ortiz*, 196 Ill. 2d 236.

¶ 15 To sustain a conviction for aggravated use of a weapon, the State in this case was required to prove that: (1) the defendant knowingly carried a firearm on his person, or in any

vehicle, or concealed on or about his person; (2) the defendant was not on his own land, abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission; and (3) the firearm was uncased, loaded and immediately accessible at the time of the offense. 720 ILCS 5/24-1.6(a)(1) (West 2008).

¶ 16 Here, in viewing the evidence in the light most favorable to the prosecution, we conclude that all the elements of aggravated unlawful use of a weapon were proven beyond a reasonable doubt. The defendant knowingly carried a gun on his person and had the gun with him in the car. The defendant's gun was uncased and immediately accessible. There was proof that the gun was loaded through Smallwood's testimony that the defendant fired the gun. The defendant possessed the gun in a parking lot, which was not his land, abode, legal dwelling, or fixed place of business.

¶ 17 We disagree with the defendant that Smallwood's testimony was so incredible and inconsistent so as to support a reasonable doubt as to the defendant's guilt. We acknowledge that Smallwood initially indicated to police that the defendant shot at him first and then changed his story at trial to admit that he had fired his weapon first. However, it was the jury's responsibility to determine Smallwood's credibility and the weight to be given to his testimony. Smallwood had consistently indicated that the defendant had a firearm and shot that firearm on the night of the incident, from the time of the investigation until he testified at trial. Additionally, although Williams' testimony at trial indicated that the defendant did not shoot a gun, Williams had previously told police that the defendant fired shots at him, Smallwood, and Clark.

¶ 18 In reviewing the evidence in the light most favorable to the State, we find that a rational fact finder could have found the defendant guilty of aggravated unlawful use of a weapon beyond a reasonable doubt.

¶ 19

## II. Monetary Presentencing Credit Against DNA

¶ 20 The defendant additionally requested that this court direct the circuit clerk to modify his mittimus to reflect a \$5 *per diem* monetary credit against his \$200 DNA assessment fee for time that he spent in presentence custody. See 725 ILCS 5/110-14(a) (West 2008) (providing that a defendant charged with a bailable offense is entitled to a credit of \$5 per day against any fine). During the pendency of this case on appeal, our supreme court held that the \$200 assessment fee for DNA testing is a fee, and not a fine, so that presentence custody credit does not apply to the charge. *People v. Johnson*, 2011 IL 111817. Thus, we must deny the defendant's claim.

¶ 21

## CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 23 Affirmed.