

No. 1-11-3612

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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. 10 CR 1596
)	
DEANDRE PROCTOR,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for Aggravated Unlawful Use of a Weapon is reversed where the State did not prove beyond a reasonable doubt that he was not on the land of another person as an invitee with permission to carry a firearm.

¶ 2 Following a bench trial, defendant Deandre Proctor was convicted of Aggravated Unlawful Use of a Weapon (AUUW) and sentenced to two years of probation. On appeal, defendant contends that he was not proved guilty beyond a reasonable doubt where the State failed to present any evidence that he was not on the land of another person as an invitee with that person's permission to carry a firearm. Defendant further challenges the sufficiency of the

evidence by arguing that the circumstances surrounding the observations of the testifying police officer could have easily led him to be mistaken about what he saw. Finally, in his reply brief, defendant raises a challenge to the constitutionality of the statute creating the offense of AUUW.

¶ 3 For the reasons that follow, we reverse.

¶ 4 At trial, Chicago police officer Michael Gentile testified that shortly after midnight on January 1, 2010, he was on routine patrol with a partner when he heard multiple shots fired nearby. He got out of the squad car and ran down the street until he came to a house. Officer Gentile "observed people in the yard and shots still coming from the backyard and alley area of that residence." Officer Gentile entered the gangway on the east side of the residence. He testified, "I go all the way to the yard area where I'm met by a wrought iron gate. However I'm watching at all these people running towards me towards the back door area of the residence. I see approximately four people run up the stairs. The fourth person that enters into that home has a chrome handgun in his hand and shuts the door and slams it. Approximately three other individuals are in the yard."

¶ 5 Officer Gentile testified that he drew his gun, announced his office, and ordered the people in the yard to stop where they were. One person sat down on the stairs. A second, identified in court as defendant, was running toward the house while holding a blue steel handgun by his right thigh. Defendant saw Officer Gentile, dropped the gun to the ground, and then followed the officer's directions to get on the ground. Officer Gentile clarified that when he first saw defendant, defendant was "coming from the alley area which is the south area of the residence from the garage."

¶ 6 Officer Gentile saw another man, identified in court as codefendant Mario Mallard, running right behind defendant. Mallard threw a blue steel handgun towards the middle of the yard and continued running toward the back of the house. Mallard then looked in Officer

Gentile's direction, saw that Officer Gentile was having trouble getting into the yard through the gate, picked up the gun he had thrown, and started running toward the alley. Mallard jumped over the fence, but was apprehended by officers in the alley.

¶ 7 Officer Gentile climbed the fence into the yard. His partner opened the gate, which turned out not to be locked, and followed. Once in the yard, Officer Gentile took defendant into custody and recovered the gun defendant had dropped. The weapon was a loaded .380 caliber semiautomatic handgun. When defendant was processed, he reported his address as one other than the house where he had been arrested.

¶ 8 On cross-examination, Officer Gentile stated that his observations took place over a 15- to-20-second time frame. When asked whether he saw "a lot" of people in the yard when he first got to the gate, Officer Gentile stated there were approximately 10 at the time he was approaching. He could not see the alley, but knew that officers were approaching that location. He did not know the other officers' exact position because he had gone to the front of the house. When asked about where he first saw defendant, Officer Gentile testified, "I didn't see him in the alley, but he was coming from that -- from the garage and that direction from the alley area." To his knowledge, the gun was never fingerprinted and defendant was not administered a gunshot residue test.

¶ 9 On defendant's behalf, Queen Thomas testified that she lived in the house in question on December 31, 2009, and January 1, 2010. Also living with her were her daughter and one or more of her grandchildren. On the night in question, several people were gathered at the house. Thomas testified that it was not a "party," but that "people just dropped by" because it was a tradition for friends and family to come over on New Year's Eve. When asked whether the people who were at her house that night had permission to be there, she answered, "Sure." When

specifically asked whether defendant had permission to be in her house that night, she said that he did.

¶ 10 Thomas testified that she was not feeling well, so she went to her room to lie down. A little after midnight she heard some shooting down the street, and the "next thing" she knew, her daughter told her the police were at the front door. Thomas went to the door and the police came in. Around the same time, four or five men, including one of Thomas' grandsons, ran in through the back door. A man named Myron Parnell threw a gun under a chair. The police brought defendant inside in handcuffs and sat him on a couch.

¶ 11 On cross-examination, Thomas acknowledged that she heard gunshots coming from her back yard, but explained those occurred "later on." She stated that the two gates to her back yard were locked that night, and that if the people in her back yard had not come through her front door, "they would have had to jump the fence" to get in. Thomas stated that when Parnell threw the gun, "My pressure went up. We don't deal with guns and he had a gun and he threw it in my house."

¶ 12 Defendant testified in his own defense. According to defendant, on the night in question, he was at a New Year's Eve party at the house of his then-girlfriend, Ashley Thomas, at Ashley's invitation. Ashley lived at the house with her grandmother, Queen Thomas, as well as her mother and two brothers. Defendant stated that he brought two bottles of champagne to the party. A photograph was entered into evidence of defendant with Ashley Thomas. In the photograph, which defendant testified was taken at the party, defendant was holding a bottle of champagne. Defendant stated that someone let him in the front door of the house, but he was not sure who it was who let him in. He did not see Queen Thomas when he was in the house.

¶ 13 At about midnight, defendant went into the back yard with Ashley's brother, taking a champagne bottle with him. There were about 10 or 15 people in the back yard, some of whom

were shooting. Defendant testified that he did not shoot, pick up, hold, or possess a gun. After the shots were fired, people started running past defendant toward the house. Defendant saw a police car on the street and an officer approaching the gangway. He ran toward the house, dropping the champagne bottle on his way. Defendant testified that he could not get into the house because the back door was locked. An officer, now at the gate, told him to freeze, which he did. Defendant stated that he never saw the officer recover a gun.

¶ 14 Following closing arguments, the trial court found defendant guilty of AUUW. The trial court denied defendant's posttrial motion and subsequently sentenced him to two years of intensive probation.

¶ 15 Defendant's first contention on appeal is that where the State failed to present any evidence that he was not an invitee with permission at the residence where he was arrested, he was not proved guilty of AUUW beyond a reasonable doubt. Defendant asserts that because the exception for invitees with permission appears within the statutory definition of the offense, it is an element of the offense, as opposed to an affirmative defense, and the State bore the burden of disproving it. He argues that the burden of proving invitee status may not be shifted onto him, that the only inference that can be made from the State's failure to meet its burden is that he was an invitee with permission, and that therefore, his conviction should be reversed.

¶ 16 Section 24-1.6 of the Criminal Code of 1961 addresses the offense of AUUW. 720 ILCS 5/24-1.6 (West 2010). The statute provides, in relevant part, as follows:

“(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her 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, any pistol, revolver, stun gun or taser or other firearm; or

(2) *** and

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense[.]" 720 ILCS 5/24-1.6 (a)(1), (2), (3)(A) (West 2010).

¶ 17 The plain language of the statute outlaws the carrying of a firearm with two exceptions: when on or about one's own land or in one's own abode, dwelling, or business; or when on the land or in the dwelling of another person as an invitee with that person's permission. 720 ILCS 5/24-1.6 (a)(1) (West 2010). "When an exception appears as part of the body of a substantive offense, the State bears the burden of disproving the existence of the exception beyond a reasonable doubt in order to sustain a conviction for the offense." *People v. Laubscher*, 183 Ill. 2d 330, 335 (1998). This court has held that a defendant's status, or lack thereof, as an invitee is a necessary element of the offense of AUUW. *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 16. As such, the State is required to prove that a defendant is not an invitee as an element of the offense. *Id.* at ¶¶ 20, 22. While the State may rely upon circumstantial evidence to do so, it may not leave essential elements of a crime to conjecture or assumption. *Laubscher*, 183 Ill. 2d at 335-36.

¶ 18 The State asserts that it has met its burden of proving defendant was not an invitee with permission. In support of this position, the State notes that Queen Thomas acknowledged people could have jumped the fence to get into her back yard, that Officer Gentile indicated at least one

of the gates to the yard was unlocked, and that Officer Gentile initially observed defendant running from the alley area. The State argues that a reasonable trier of fact could have determined from such evidence that defendant had only just entered the back yard when he was spotted by Officer Gentile, and had not received permission from anyone at the Thomas residence to enter. However, this position is speculative and ignores Thomas' direct testimony that defendant had her permission to be at the house that night. The State may not rely upon such conjecture to meet its burden of proof.

¶ 19 The State further relies upon Thomas' statement regarding how she reacted when Myron Parnell entered the house and threw a gun under a chair. Thomas testified, "My pressure went up. We don't deal with guns and he had a gun and he threw it in my house." The State argues that Thomas' testimony demonstrates she would never have given anyone permission to bring a firearm onto her property. We disagree. While Thomas' statement certainly suggests defendant did not have her permission to possess a firearm on her property, it does not rise to the level of proof beyond a reasonable doubt. Nor does it foreclose the possibility that another adult resident of the home gave him permission.

¶ 20 Finally, the State notes defendant's testimony that he was not sure who let him into the house, that he did not see Queen Thomas while he was inside, and that he never possessed a firearm on the night in question. The State argues that this evidence suggests defendant was not an invitee with permission to carry a weapon into Thomas' property. We find, as with Queen Thomas' statement that she does not "deal with guns," that this evidence is merely suggestive of a lack of permission, nothing more.

¶ 21 We agree with the state that it is possible, perhaps even probable, that defendant did not have permission to possess a firearm on the Thomas property. However, we find that the evidence is not sufficient to negate beyond a reasonable doubt the exception for invitees with

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permission, a necessary element of the offense of AUUW. See *People v. Laubscher*, 288 Ill. App. 3d 438, 441 (1997) (reversing conviction for AUUW where State failed to negate the "abode" exception). Accordingly, we reverse defendant's conviction.

¶ 22 Given our disposition, we need not address defendant's additional contentions on appeal.

¶ 23 For the reasons explained above, we reverse the judgment of the circuit court of Cook County.

¶ 24 Reversed.