2013 IL App (2d) 120335-U
No. 2-12-0335
Order filed September 24, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-3074
PHILLIP T. MERRITT,	)	Honorable Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in deeming other-crimes evidence admissible to show *modus operandi* and in deeming it more probative than prejudicial; (2) the State proved defendant guilty beyond a reasonable doubt of armed robbery: given the weight of the toy gun that defendant used, which was admitted into evidence, the jury was entitled to find that it was a dangerous weapon.

¶ 2 Defendant, Phillip T. Merritt, appeals his conviction of armed robbery (720 ILCS 5/18-2(a)(1) (West 2008)). He contends that the trial court improperly allowed other-crimes evidence and that his use of a toy gun was insufficient to support his conviction of armed robbery. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on October 1, 2009, in connection with the robbery of Margaret Castle at a payday loan or "cash store." Before trial, the State moved *in limine* to introduce evidence of five other armed robberies or incidents for purposes of showing identity through *modus operandi*. The motion was granted over objection, with the court finding that there were similarities in the type of victim, the method used, and the location. On March 15, 2011, a jury trial began, with defendant appearing *pro se.*

¶ *5* Margaret Castle testified that, on September 26, 2009, she was employed at the Title Cash Store in Loves Park, Illinois. Around 11:15 a.m., a tall black man with gold-rimmed glasses, who Castle identified in court as defendant, entered and said that he wanted to get a loan. Castle sat down at her desk, and the man pulled out a gun and demanded money. Castle gave him about $190 in a blue bank bag with the inscription "Title Cash Riverside." The man then told Castle to get into the rear of the store and close the door. Moments later she heard the front door close and she called the police. A short time after the police arrived, they brought a man in custody to the store for Castle to identify. She was unable to do so at that time because she was nervous and he was not wearing glasses.

¶ 6 Charles Lynde, a police officer for Loves Park, testified that he had been investigating robberies of cash stores. After an incident on September 25, 2009, he was looking for a six-foot-tall black male with a dark four-door car. On September 26, 2009, he was responding to an alarm at a different cash store when he was dispatched to investigate the robbery at the Title Cash Store. As he was driving there, he saw a dark green Acura being driven by a black man with gold-rimmed glasses, who Lynde identified in court as defendant. As they passed, defendant placed his hand on the side of his face. Lynde followed defendant, who disobeyed four stop signs, sped up to 60 miles

per hour in a residential neighborhood, and then crashed into a house. After a foot chase, during which defendant tossed what looked like a semi-automatic handgun over a fence, defendant was arrested.

¶ 7 Defendant told another officer that he was just trying to pay his bills and that the gun was a BB gun, not a real gun. Defendant then said "I fucked up, man." He later said to another officer, "I really fucked up today. I'm not going to see the outside again." A black pistol, which turned out to be a plastic toy gun, along with $10 and a blue bank bag with the inscription "Title Cash Riverside," was found at the scene of the crash, and $182 was recovered from defendant's wallet.

¶ 8 Evidence of other incidents and robberies at cash stores was introduced and took up a large portion of the State's case. Nancy Massie, an employee at the Cash Store in Loves Park, testified that, at around 10:44 a.m. on September 26, 2009, a six-foot-tall black man came into the store and inquired about a loan while Massie was on the phone. The man fit the description of a man who the police said had robbed several stores in the area, so she pushed a panic button that triggered a silent alarm. Massie did not hang up the phone, and the man left the store. The police later brought defendant to the store, and Massie identified defendant as the man who had come in earlier.

¶ 9 Brittany Almberg, an employee at the Cash Loan Store in Loves Park, testified that, on September 25, 2009, at 10:06 a.m., defendant came in and said that he needed a title loan. He then reached in his pocket, pulled out a gun, and demanded money. After Almberg placed the cash drawer on the counter, defendant ordered her to lie on the floor and count. After he left, she called the police.

¶ 10 Thomas Kurth, an employee at Checks for Cash in Rockford, testified that, on September 18, 2009, at 11:45 a.m., defendant entered the store and Kurth began explaining how to obtain a loan.

Defendant pointed a gun at Kurth and said that he wanted money. After Kurth gave him the money, defendant told him to get on the floor and then left the store.

¶ 11 Jessica Bunnell worked at the Cash Store in Rockford and testified that, on September 5, 2009, at 12:10 p.m., defendant came into the store, asked about getting a loan, and then pulled out a gun. Bunnell gave him the money from the cash drawer and the safe. Another employee of the store also testified and corroborated Bunnell's testimony.

¶ 12 Mickey Otts, an employee at Illinois Title Loans in Rockford, testified that, on August 28, 2009, at 10:53 a.m., defendant came into the store, talked about getting a loan, and then pulled a gun out of a potato chip bag. After Otts gave him money, he told her to get in the back room. He then left the store. Another employee of the store also testified and corroborated Otts' testimony.

¶ 13 After the testimony about other crimes, the court gave a limiting instruction, stating that the evidence could be considered only for the limited purposes of defendant's identity, presence, and design. The State also relied on the evidence during a significant portion of its closing argument.

¶ 14 The jurors were allowed to handle the toy gun that was used in the charged robbery. During closing, the State argued that the toy gun was a dangerous weapon, focusing on the fact that it looked like a real weapon. Defendant argued that it was not a dangerous weapon, because it was made of plastic. In rebuttal, the State argued, without explanation, that the way the toy gun was used made it a dangerous weapon, and it noted that the jury could feel its weight. No specific descriptions of its weight and size were given. The jurors were instructed that "[a]n object or instrument which is not inherently dangerous may be a dangerous weapon depending on the manner of its use and circumstances of the case." They were also instructed that closing arguments were not evidence.

The toy gun is in the record and does not have the appearance or feel of a lightweight plastic item. It weighs around one pound.

¶ 15 The jury found defendant guilty, and defendant moved for a new trial, arguing that the court erred when it granted the State's motion *in limine* to allow other-crimes evidence and that the State failed to prove beyond a reasonable doubt that the toy gun was a dangerous weapon. The motion was denied. Defendant was sentenced to 30 years' incarceration, his motion to reconsider sentence was denied, and he appeals.

¶ 16 II. ANALYSIS

¶ 17 A. Other-Crimes Evidence

¶ 18 Defendant contends that the trial court erred in granting the State's motion *in limine*. He argues that the other-crimes evidence did not tend to show *modus operandi* and identity and that, even if it did, it was overly prejudicial. He does not dispute that Massie's testimony was appropriate, but disputes the rest of the other-crimes evidence.

¶ 19 "Other-crimes evidence encompasses misconduct or criminal acts that occurred either before or after the alleged criminal conduct for which the defendant is standing trial." *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 61. Other-crimes evidence is admissible to prove any material fact relevant to the case, but is inadmissible if it is relevant only to demonstrate the defendant's propensity to engage in criminal activity. *Id.* "Such evidence may be admissible when it is relevant to show, among other things, motive, intent, identity, absence of mistake or accident, *modus operandi*, or the existence of a common plan or design." *Id.*; see Ill. R. Evid. 404(b) (eff. Jan.1, 2011). "However, relevant other-crimes evidence may yet be excluded if its prejudicial effect substantially outweighs its probative value." *Johnson,* 2013 IL App (2d) 110535, ¶ 61. "The

admissibility of other-crimes evidence is committed to the sound discretion of the trial court, and its decision will not be disturbed absent a clear abuse of discretion." *People v. Null*, 2013 IL App (2d) 110189, ¶ 43. "An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id*.

¶ 20 " '*Modus operandi*, or 'method of working,' refers to a pattern of criminal behavior so distinct that separate crimes are recognized as the work of the same person. [Citation.] If evidence of other crimes is offered to prove *modus operandi*, there must be some clear connection which creates a logical inference that if defendant committed the former crime, he may have committed the crime charged.' " *People v. Boand*, 362 Ill. App. 3d 106, 125 (2005) (quoting *People v. Colin*, 344 Ill. App. 3d 119, 127 (2003)). "Although there must be a 'strong and persuasive showing' of similarity between the crimes, 'it is not necessary that the crimes be identical' for the other crime to be admitted into evidence to prove *modus operandi*." *Colin*, 344 Ill. App. 3d at 127 (quoting *People v. Williams*, 185 Ill. App. 3d 840, 853 (1989)). "Where common features may be insufficient to raise the inference of *modus operandi* on an individual basis, the combination of such features may reveal a distinctive combination so as to suggest the work of the same person." *Id*. "The test is not one of exact, rigorous identity, as some dissimilarity will always exist between independent crimes [citation]; rather, it is the similarity of the conduct as a whole, not the uniqueness of any single factor, which is the key to establishing *modus operandi*." *Id*.

¶ 21 The *modus operandi* exception to the general ban of other-crimes evidence has also been described as follows:

> " 'Most gas station armed robberies involve the use of a pistol to relieve an attendant of all the money in the cash register. Evidence of a series of gas station robberies committed

> by a masked man who, while armed with a pistol, forces attendants to empty their cash registers would not qualify for admission in order to show *modus operandi*, even though every armed robbery was committed in identical fashion. There would be no distinctive features to the methodology uncommon to most gas station holdups. However, if this same armed robber repeatedly demanded all of the Fritos that the station had on hand, instead of its cash, the robberies would take on a distinctive feature to suggest that they were the work of the same individual. Authorities would know that they were dealing with the Frito Bandito, and upon his arrest, the prosecution would be armed with all the robberies to prove his identity in the crime charged.' " *People v. Lenely*, 345 Ill. App. 3d 399, 410-11 (2003) (quoting *People v. Wilson*, 343 Ill. App. 3d 742, 756 (2003) (Kuehn, J., dissenting)).

However, "[t]he mere presence of some dissimilarities does not catapult the testimony into 'a clear abuse of discretion' category necessary on review to warrant reversal of the trial court's decision." *People v. Phillips*, 127 Ill. 2d 499, 522 (1989).

¶ 22 Here, the uncharged incidents were sufficiently similar to make them admissible to show *modus operandi*. All of the robberies involved cash stores in the same general area during a fairly short period of time. Each robbery took place in the late morning hours, between 10:06 a.m. and 12:10 p.m. Each involved a single suspect with a gun. In each, the suspect inquired about a loan. In all but one, the suspect told the victim to lie on the floor or go into a back room while he escaped. In all but one, the victim was female (and we do not find the gender of the male victim to be a significant distinction). Defendant focuses on dissimilarities, such as the use of a potato chip bag in one robbery, but there were far more similarities than dissimilarities among the robberies. Defendant also argues that there were no distinctive features, but the choice of cash stores, the locale,

the time of day, the inquires about loans, and the impairment of the victims combine to make a distinctive pattern. When the entire context and combination of factors are considered, the similarities were sufficient.

¶ 23 Defendant next argues that the amount of the other-crimes evidence was more prejudicial than probative. While we have concerns about the amount of evidence presented, we are unable to find that the court abused its discretion.

¶ 24 "The circuit court must weigh the relevance of the evidence to establish the purpose for which it is offered against the potential undue prejudice." *Colin*, 344 Ill. App. 3d at 129. "Whether the probative value of the evidence is outweighed by its undue prejudicial effect is within the sound discretion of the circuit court which will not be reversed absent its clear abuse." *Id*. at 129-30.

¶ 25 "Ordinarily, the admission of other-crimes evidence, although relevant, does not justify a 'mini-trial' of a collateral offense." *Id*. at 130. "The evidentiary details should be limited to those necessary to illuminate the issue for which the other crime was introduced." *Id*.

¶ 26 How much evidence may be introduced before crossing the line into being unduly prejudicial varies. In *People v. Funches*, 59 Ill. App. 3d 71, 74 (1978), the defendant sold a stolen car to a person in Rockford and made inculpatory statements to the police about a theft ring. License plates and various cutting tools were found in his garage, and another witness testified that he drove the car from Chicago to Rockford at the defendant's request. The State also provided evidence from seven people about thefts of their automobiles, four people who identified the defendant as having sold them stolen vehicles, and a person who testified that he participated in a theft ring with the defendant. The defendant presented testimony to contradict the evidence against him. The defendant was convicted. On appeal, we held that no reasonable person could doubt that the

prejudicial effect of the other-crimes evidence influenced the jury's verdict and deprived the defendant of a fair trial. *Id*. at 74. We stated that some references to other, similar thefts would have been permissible, but the cumulative effect of the seven thefts was too prejudicial. *Id*.

¶ 27 In *People v. Cardamone*, 381 Ill. App. 3d 462 (2008), we relied in part on *Funches* to find that the probative value of testimony from 14 witnesses about hundreds of instances of uncharged conduct was outweighed by its prejudicial effect in a prosecution for criminal sexual abuse against seven girls. We observed that, unlike in a case where the trial court might admit evidence from one or two people, in the face of so many allegations there was a great risk that the jury could find that the defendant must have done *something*, or that it could find beyond a reasonable doubt that the defendant was guilty not of the charges but instead of one of the uncharged acts. *Id*. at 494. We ultimately stated that "a large volume may make probative other-crimes evidence overly prejudicial." *Id*. at 496. We distinguished a case involving two witnesses, both because of the lesser amount of evidence and because the defendant in that case attempted to put an innocent construction on his actions. *Id*. at 496-97.

¶ 28 *People v. King*, 384 Ill. App. 3d 601, 608-09 (2008), illustrates the proper admission of multiple instances of other crimes. There, the defendant was charged with robbery of a purse and cell phone from a woman outside of her home. When the phone was recovered, it was discovered that a call had been made to a woman named Ashley Smart. At trial, the State introduced evidence from two other witnesses who also had their phones taken from outside of their homes. In one case, a call to Smart was made from the phone, and in the other, a call was made to a woman named LaCreacia Simmons. Smart and Simmons testified that defendant called them. On appeal, we held that the evidence did not cause undue prejudice. Each victim's testimony was purely factual, was

relatively brief, and did not reference the emotional effect of the attack. Given the "appreciable discretion afforded to the trial court in this type of situation," we could not say that the record disclosed sufficient grounds for overturning the trial court's determination that the value of the evidence was not outweighed by its prejudicial effect. *Id*.

¶ 29 We observe that a trial court should avoid allowing other-crimes evidence to become the focal point of the trial. In other words, the trial court must prevent a mini-trial on the issue of the uncharged conduct. See *Boand*, 362 Ill. App. 3d at 125. Here, the other-crimes evidence took up a significant portion of the State's case, with some witnesses called merely to corroborate the testimony of other witnesses. However, we are unable to say that the trial court abused its discretion in determining that the evidence was more prejudicial than probative. As previously noted, the evidence was probative to show identity through *modus operandi*. Identity was the crucial issue because Castle, the only eyewitness to the charged crime, was unable to identify defendant shortly after it occurred. Further, as in *King*, the witnesses' testimony was purely factual and did not emphasize the emotional effects of the robberies. Thus, any prejudicial effect was mitigated.

¶ 30 We find *Cardamone* and *Funches* distinguishable. *Cardamone* involved testimony about hundreds of other acts, and *Funches* involved seven other crimes. But even in *Cardamone*, we noted that clearly some of the evidence was admissible and that it can be difficult to determine precisely where to draw the line. *Cardamone*, 381 Ill. App. 3d at 489. We have also recognized that *Cardamone* was an extreme case. *People v. Perez*, 2012 IL App (2d) 100865, ¶ 49. Ultimately, in light of the probative value of the evidence, we are unable to say that the trial court abused its discretion.

¶ 31 B. Use of the Toy Gun as a Dangerous Weapon

¶ 32 Defendant next argues that the evidence was insufficient to convict him of armed robbery when he was armed with a toy gun.

¶ 33 "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Id*. Rather, " 'the relevant question is whether, after viewing 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.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard, a court of review must view in the State's favor all reasonable inferences drawn from the record. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). 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. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004). "Discrepancies, omissions and bias go to the weight of the testimony to be evaluated by the trier of fact." *People v. Rodriguez*, 408 Ill. App. 3d 782, 794 (2011).

¶ 34 Under section 18-1 of the Criminal Code of 1961, "[a] person commits robbery when he or she knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2008). Under section 18-2(a)(1), "[a] person commits armed robbery when he or she violates Section 18-1; and (1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm."

720 ILCS 5/18-2(a)(1) (West 2008). Whether an object is a dangerous weapon for purposes of the armed robbery statute is generally a question of fact. See *People v. Skelton*, 83 Ill. 2d 58, 66 (1980).[1]

¶ 35 The law concerning the use of a toy gun as a dangerous weapon arose primarily from *Skelton*. There, the defendant robbed a discount store, and a toy gun was found in his waistband. The gun was made of hard plastic, except for the barrel, which was constructed of thin metal. The gun was 4½ inches long and was quite light. The defendant was convicted of armed robbery, and the appellate court reversed, holding that the toy gun was not a dangerous weapon. Our supreme court granted leave to appeal and noted a split of authority on whether a toy gun could be considered a dangerous weapon. *Id*. at 62. After rejecting a subjective approach, the court stated:

> "[A] weapon can be dangerous, even though used in a manner for which it was not designed or intended. Thus, a rifle or shotgun, whether loaded or not, may be used as a club with devastating effect. Similarly, a handgun, when gripped by the barrel and used as a bludgeon, is equally dangerous whether loaded or unloaded." *Id*. at 64.

¶ 36 The court further observed:

> "Most, if not all, unloaded real guns and many toy guns, because of their size and weight, could be used in deadly fashion as bludgeons. Since the robbery victim could be badly hurt or even killed by such weapons if used in that fashion, it seems to us they can properly be classified as dangerous weapons although they were not in fact used in that manner during

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[1]The analysis for determining whether an object is a dangerous weapon under the armed robbery statute is different from the analysis of whether something is a dangerous weapon under the armed violence statute. The armed violence statute specifically defines the term. See *People v. Thorne*, 352 Ill. App. 3d 1062, 1071 (2004) (citing *People v. Davis*, 199 Ill. 2d 130 (2002)).

> the commission of the particular offense. It suffices that the potential for such use is present; the victim need not provoke its actual use in such manner." *Id.* at 66.

Ultimately, the court concluded that the gun at issue was not a dangerous weapon, because it did not fire pellets or blank shells or give off a flash and it was too small and light to be used as bludgeon. *Id.*

¶ 37 "Since *Skelton*, appellate court cases have refined the common law definition of dangerous weapon by dividing dangerous objects into three categories: (1) objects that are dangerous *per se*, such as loaded guns; (2) objects that are not necessarily dangerous, but were actually used in a dangerous manner during the robbery; and (3) objects that are not necessarily dangerous, but may become dangerous when used in a dangerous manner." *People v. Ross*, 229 Ill. 2d 255, 275 (2008) (citing *People v. Lindsay*, 263 Ill. App. 3d 523, 528 (1994) and *People v. Burge*, 254 Ill. App. 3d 85, 90 (1993)). "This effort at categorization is nothing more than a recognition of the proper role for the trier of fact." *Id*. "[Th]e trier of fact may make an inference of dangerousness based upon the evidence. The State may prove that a gun is a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or bludgeon." *Id*. at 276. Where the State failed to present such evidence, the evidence has been found insufficient to convict.

¶ 38 For example, in *Thorne*, 352 Ill. App. 3d at 1064, the defendant placed a black pistol in the victim's back and to his head. A police officer described the gun as a hard object and identified it as a Marksman .177-caliber black BB gun. *Id*. at 1066. The State did not introduce the gun into evidence and provided no pictures of it. *Id*. at 1073. The defendant was convicted, and he appealed. Finding the evidence insufficient, the court stated:

> "In all the cases that have found guns that are incapable of firing bullets to be dangerous weapons under the armed robbery statute, there was either evidence (1) that the gun was actually used in a dangerous manner, or (2) that the character of the weapon was such that it could conceivably be used as a bludgeon. [Citations.] In every case finding that an unloaded gun could have been used as a bludgeon and, therefore, could be considered a dangerous weapon, there was evidence presented as to the physical characteristics (weight or metallic nature) of the weapon. Here, the State failed to present such evidence." *Id*. at 1072-73.

¶ 39 Likewise, in *Ross*, the only evidence was that the gun was a .177-caliber pellet gun with a three-inch barrel. The State never presented the gun or photographs of it at trial, there was no evidence of its weight or composition, and it was never brandished as a bludgeon. Under those circumstances, the evidence was insufficient for the gun to be a dangerous weapon under the armed robbery statute. *Ross*, 229 Ill. 2d at 277. Cases where a toy gun was sufficiently proven to be a dangerous weapon generally included evidence about the size and weight of the object or how it could be used to inflict serious harm. See *Thorne*, 352 Ill. App. 3d at 1072-73 (collecting cases).

¶ 40 Unlike in *Ross* and *Thorne*, where the gun was not introduced into evidence, the gun here was presented to the jurors, who were each allowed to handle it. Thus, the jurors were able to personally experience the weight and size of the gun. The gun is also in the record, allowing us to hold that a rational trier of fact could have found that it had enough weight to be used as a bludgeon.

¶ 41 Defendant argues that the State's closing confused the matter since the State argued that the gun looked real. But defendant himself argued that the gun was not dangerous because it was made of plastic, and the State later noted that the jurors were able to handle the gun and feel its weight.

Ultimately, a rational trier of fact could have found that the gun was heavy enough that it could be used in a dangerous manner, which is sufficient to support the armed robbery conviction.

¶ 42 III. CONCLUSION

¶ 43 The trial court did not abuse its discretion in allowing other-crimes evidence. Further, the evidence was sufficient to prove defendant guilty of armed robbery beyond a reasonable doubt. Accordingly, the judgment of the circuit court of Winnebago County is affirmed.

¶ 44 Affirmed.