

NOTICE  
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2013 IL App (4th) 120018-U  
NO. 4-12-0018  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
July 29, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CLARANCE THOMPCKINS,	)	No. 10CF1138
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

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JUSTICE POPE delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court held (1) the State presented sufficient evidence defendant committed home invasion and armed robbery, (2) the trial court improperly considered statement made by defendant's mother under the coconspirator exception to the hearsay rule, and (3) defendant withdrew his argument the 15-year firearm enhancement was void.

¶ 2 In December 2010, a McLean County grand jury indicted defendant, Clarence Thompkins, for home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2010)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). After a September 2011 bench trial, the trial court found defendant guilty of both charges. In November 2011, the court sentenced defendant to concurrent terms of 45 years' imprisonment for both charges; this included a 15-year enhancement for the use of a firearm on both charges.

¶ 3 On appeal, defendant argues (1) the State did not present sufficient evidence of his

guilt, (2) the trial court erred in admitting testimony about statements his mother made, and (3) the 15-year firearm enhancement for armed robbery (720 ILCS 5/18-2(b) (West 2010)) is void. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 In December 2010, a McLean County grand jury indicted defendant for home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2010)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). In August 2011, the trial court granted the State's motion for a consolidated trial with James Manuel.

¶ 6

### A. Defendant's Bench Trial

¶ 7 In September 2011, the consolidated bench trial commenced.

¶ 8

#### 1. *The Hoppers' Testimony*

¶ 9 Barbara Hopper testified she and her husband Richard had lived in their Bloomington home for approximately five months prior to July, 29, 2008. Richard is disabled and uses a wheelchair. As a hobby, Richard collects guns. When the Hoppers moved, they hired a moving company for assistance. As the moving company would not move firearms, Barbara moved them herself. On July 29, 2008, at approximately 8:50 p.m., the doorbell rang and Barbara answered the front door. At first she did not see anyone and then "two men came from the side." Barbara tried to close the door when she "saw that they had masks on and guns" but "one of them pulled [her] through the door." The men then pulled her inside the house and said "this is a robbery." Barbara described the individuals as "black," "mid-twenties," and "it seemed like one of them was a little taller than the other." She described the attackers as wearing "black clothing," a hooded sweatshirt, and "surgical masks." One of the men wore gold wire rim glasses

and had drawn a mustache on his surgical mask. He grabbed hold of her wrist and held her. He had a gun but Barbara could not identify the type of weapon other than it was a gun. She testified it "seemed awful big" because "when it's held at you, it was awful big." Barbara testified "I would say it was a shotgun."

¶ 10 One of the men said "that they needed money" and she told them "we didn't have any." The second man asked "where's the guns" but before Barbara could answer he was "already going to where the guns were." The gun collection was located in the room immediately to the left of the front door. This man went into the gun room with a duffle bag and began filling it with guns. Barbara testified he had the same stature as one of the movers. She said no one else had been in the house with the same stature. Once the robbers filled the duffle bag with guns, they left out the front door.

¶ 11 On cross-examination, Barbara testified the robbers were in the house for approximately 10 to 15 minutes. One of the robbers was "a little thinner than the other." On redirect examination, Barbara testified other than the movers, only family and the cable installer had been in the house. The trial court asked whether the man in the front room was armed. Barbara testified he was armed with what "must have been a handgun" because "it was not a long gun like a rifle."

¶ 12 Richard Hopper (we note Richard's first name is "Lester" but he and his family use "Richard") testified he had fallen off a roof 19 years ago and then suffered a traumatic head injury that affected his memory. Some memories would come to him at a later time rather than right away. He collected coins and a variety of long guns and handguns.

¶ 13 On July 29, 2008, he was in the kitchen when the doorbell rang and his wife went

to answer. A man accosted her and "came into the kitchen area holding a gun to my wife's head" and holding her by the wrist. He testified the gun was a "cheap-looking gun" and a smaller .22-caliber handgun. The man holding his wife had a tattoo on his right forearm that "looked like two worms crisscrossing." Defendant and Manuel's arms were published to Richard but he did not recognize anything on either one of them. During the robbery, Richard was in the gun room with the robbers and the "tall man" removed a Colt .45 handgun with "pearlized grips."

¶ 14 On cross-examination, Hopper testified in addition to the cable installer, a carpet installer and chair lift installer had been in the house. The cabinet containing the Colt .45 had been moved by the moving company.

¶ 15 *2. The Missing Guns*

¶ 16 The State introduced an inventory created by Richard and his son listing 21 guns stolen on July 29, 2008, including, as relevant to this appeal: (1) an "Intratec Tec-9 9mm Semi-Auto Pistol," (2) an "Intratec DC-9 9mm Semi-Auto Pistol," (3) a "Taurus Hunter 66 .357 Revolver," (4) a "Taurus Hunter .44 Revolver," (5) a "Yugoslavian M48 8mm Rifle," and (6) a "Colt Government .45 Semi-Auto Pistol."

¶ 17 *3. Testimony About the Colt .45 and TEC-9*

¶ 18 Officer Amy Keil of the Bloomington police department testified she responded to a report of armed robbery on September 9, 2008, in the area of Todd Drive in Bloomington. When she arrived another officer had located a suspect, who was identified as defendant. Officer Keil recovered a handgun from the front right pocket of defendant's pants. Richard identified this as the Colt .45 handgun stolen from his collection.

¶ 19 Daniel Diciaula agreed to testify in the instant case as a proffer with federal



to the Bloomington police department. Patton did not inform the police he retrieved the weapons from the Thompkins residence.

¶ 24 Officer Scott Sikora, of the Bloomington police department, testified he met with Patton on September 9, 2008, and secured the weapons. The weapons included a "Tec 9," a "large revolver," and an "AK-47." Patton told Sikora "he had been contacted by a concerned citizen about some kids [playing] around a [D]umpster" where he found the weapons,

¶ 25 *5. Megan Bachman*

¶ 26 Megan Bachman testified Manuel is her boyfriend and the father of her daughter. Bachman saw defendant bring a hunter green duffel bag to her residence. Defendant brought the bag into the house with Manuel and went downstairs into the basement. Bachman did not recall telling investigators this was approximately a month or two before defendant and Manuel's arrest in September 2008. Bachman testified, over objection, she had a conversation with defendant's mother shortly after defendant was arrested for the September 9, 2008, robbery. Defendant's mother stated "[t]hat she had found [weapons] and she turned them in to the police" and "I should look to see if I have any guns; and if I did, to let her know and she would have the police come get them."

¶ 27 *6. Detective John Atteberry*

¶ 28 John Atteberry, a detective with the Bloomington police department, testified he participated in a proffer session with federal investigators and Diciaula. Diciaula told investigators Mario Dunning approached him about guns someone wanted to sell. Diciaula identified Manuel as the person who sold the guns.

¶ 29 Atteberry interviewed Dunning regarding the firearms. In early-summer 2008,

Dunning received a phone call from Manuel and he went to Manuel's house. The trial court did not permit Atteberry's testimony about statements Dunning made to him during the interview, including Dunning's statement he had a conversation with defendant's mother at the courthouse about "if there was any firearms in the house, they needed to get rid of them" because it was impermissible hearsay evidence, not covered by the coconspirator exception to the hearsay rule.

¶ 30 Atteberry testified he interviewed Bachman as a part of the investigation. Bachman stated in the summer of 2008 she saw defendant with a duffel bag at her residence. Bachman stated she was at defendant's mother's residence when defendant removed "something wrapped up" from a closet and a firearm fell out. Atteberry testified Bachman told him about a conversation that occurred at the courthouse between Bachman and defendant's mother:

"Q. And what was the purpose for this conversation, if you recall?

A. Yes. The conversation was that she located—Angelina Comas-Thompkins located some firearms at her house, and if Megan had any firearms there, at her house, she needed to get rid of them.

Q. And did she indicate how they could be gotten rid of?

A. To give her a call, to give Angelina a phone call. They would be taken care of.

Q. And did she indicate how they were going to get taken care of?

A. I believe it was with someone that she knew."

The trial court permitted Bachman's statements about what defendant's mother said to her about the effort to retrieve other guns as an admissible statement under the coconspirator exception of the hearsay rule.

¶ 31

#### *7. The Moving Company*

¶ 32 A representative of the moving company testified defendant worked on the Hoppers' move. According to the company's records, the move occurred on March 1, 2008.

¶ 33

#### *8. The Finding of Guilt*

¶ 34 In announcing its finding of guilt, the trial court described this as a "circumstantial case" and commented on the lack of positive identification. The court noted coincidences in the case, including the sale and possession of the guns and the Hoppers' descriptions of the defendants as "so amazing as to boggle the mind." The court observed Manuel has two tattoos on his arm and one is "calligraphy-like with a lot of curlicues and so forth" fitting the description provided by Richard.

¶ 35

#### B. Posttrial Motions and Sentencing

¶ 36 In October 2011, defendant filed a motion for new trial. In November 2011, the trial court denied the motion for new trial. That same day, the court sentenced defendant to 30 years' imprisonment on each count, plus 15 years because firearms were used in the commission of the offenses.

¶ 37

In December 2011, defendant filed a motion to reconsider sentence. The trial court denied the motion.

¶ 38

This appeal followed.

¶ 39

## II. ANALYSIS

¶ 40 On appeal, defendant argues (1) the State did not present sufficient evidence of his guilt, (2) the trial court erred in admitting testimony about statements his mother made, and (3) the 15-year firearm enhancement for armed robbery is void. We address defendant's contentions in turn.

¶ 41 A. Defendant's Sufficiency-of-the-Evidence Claim

¶ 42 Defendant contends he was not proved guilty beyond a reasonable doubt because the Hoppers did not identify him at trial. Defendant describes the Hoppers' description of the robbers as "they were black, in their mid twenties, dressed in black, hooded sweatshirts, with their faces covered by surgical masks," one was shorter than the other, the shorter man wore glasses, and one of the men had "a tattoo that looked like two worms criss-crossing." Defendant concedes he and Manuel match this description but "so does every other black man in his mid-twenties." Defendant asserts where "a witness's attention is focused on a weapon, the reliability of an identification is drawn into question" and the Hoppers' description is accordingly "unreliable." In his reply brief, defendant argues the trial court was wrong to conclude Manuel's tattoos showed him to be one of the perpetrators because it "seems to stem from the trial court's apparent belief that tattoos on one's arm are uncommon" and presents a "randomly chosen group" of nine inmates named Manuel in the Illinois Department of Corrections.

¶ 43 The State responds defendant's argument "is simply an invitation to this court to reweigh the evidence and to substitute its judgment for that of the trial court who heard the testimony and saw the tattoo." We agree with the State.

¶ 44 1. *Standard of Review*

¶ 45 "When considering an argument regarding the sufficiency of the evidence to

convict, we will affirm if, '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.' " *People v. Scott*, 2012 IL App (4th) 100304, ¶ 18, 966 N.E.2d 340 (quoting *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999)). This court "will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Campbell*, 146 Ill. 2d 363, 375, 586 N.E.2d 1261, 1266 (1992). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, and to draw reasonable inferences from that evidence. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 25, 963 N.E.2d 430 (citing *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009)). It is not the function of this court to retry the defendant. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E.2d 227.

¶ 46

## 2. Evidence In This Case

¶ 47

The Hoppers' failure to identify defendant in open court is not as detrimental as defendant asserts. First, the robbers attempted to conceal their identify by wearing hooded sweatshirts and masking their faces with surgical masks. Second, while the Hoppers' description of the robbers may be "general," defendant fits the description as he is an African-American male who would have been 18 years old in July 2008. Third, it is the trier of fact's role to determine the weight of the Hoppers' testimony and description in light of their conflicting descriptions of the guns used in the robbery, the fact the robbers were pointing guns at them, and Richard's traumatic brain injury.

¶ 48

Defendant's arguments in his reply brief about Manuel's tattoos are unpersuasive.

Evidence a "randomly chosen group" of nine male inmates with the name "Manuel"—evidence defendant did not present to the trial court—has no relevance—and since it is not contained in the trial court record, is improper for defendant to rely on in his reply brief. What is relevant is Barbara's testimony the robber had the same stature as one of the movers—a move defendant assisted in, Richard's testimony the robber who held a gun to his wife's head had a tattoo on the inside of his right forearm, and the trial court's observation Manuel had a tattoo in that location on his arm that "could well fit the description" given by Richard. We will not upset the court's finding.

¶ 49 Based on the totality of circumstances in this case, a reasonable trier of fact could conclude defendant committed home invasion and armed robbery at the Hopper residence on July 29, 2008. Evidence presented at trial showed (1) Richard had an extensive gun collection; (2) the guns were in the home when movers brought the furniture into the home; (3) defendant participated in the move; (4) approximately five months after the move, two African-American men entered the Hopper home at gunpoint, went straight to the gun room, and began putting the guns into a green duffle bag; (5) the stature of one of the robbers matched the stature of one of the movers; (6) after the robbery, Manuel sold several guns from the robbery to Diciaula but would not sell a Colt .45 handgun; (7) approximately one month after the robbery, (a) defendant was seen with a green duffle bag similar to the one used in the robbery; (b) defendant was arrested and found in possession of the Colt .45 stolen from the Hopper gun collection; and (c) defendant's mother found several of the stolen guns at the house she shared with defendant. Based on the evidence, the finder of fact could reasonably conclude defendant knew of the gun collection and its location in the house from his involvement in the move, returned to steal the

firearms, and then retained some of the guns.

¶ 50 B. Defendant's Hearsay-Evidence Claim

¶ 51 Defendant argues Bachman's statement defendant's mother told Bachman she "should look to see if [she] [had] any guns; and if [she] did, to let [defendant's mother] know and she would have the police come get them" was improperly admitted because (1) defendant's mother was not a coconspirator, and (2) the statements were not proximate in time to the original offenses. Defendant argues there was insufficient independent evidence of a conspiracy between defendant and his mother.

¶ 52 1. *Standard of Review*

¶ 53 Evidentiary rulings are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001).

¶ 54 2. *Coconspirator Exception to the Hearsay Rule*

¶ 55 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *Caffey*, 205 Ill. 2d at 88, 792 N.E.2d at 1187. The coconspirator exception to the hearsay rule provides, subject to foundation by independent proof of the conspiracy, any statement or declaration (1) by a coconspirator of a party, (2) committed in furtherance of the conspiracy, and (3) during its pendency is admissible against each and every coconspirator. *People v. Coleman*, 399 Ill. App. 3d 1198, 1202-03, 931 N.E.2d 268, 271 (2010) (quoting *People v. Childrous*, 196 Ill. App. 3d 38, 51, 552 N.E.2d 1252, 1261 (1990)); see also Ill. R. of Evid. 801(d)(2)(E) (eff. Jan. 1, 2011). " [T]he State must make an independent, *prima facie* evidentiary showing of the existence of a conspiracy between the declarant and the defendant.' "

*Coleman*, 399 Ill. App. 3d at 1203, 931 N.E.2d at 271 (quoting *People v. Ervin*, 226 Ill. App. 3d 833, 842, 589 N.E.2d 957, 964 (1992)). "Evidence of the conspiracy may be totally circumstantial; however, it must be sufficient, substantial, and independent of the declarations made by the coconspirator in order for the hearsay statements to be admitted under this exception." *Coleman*, 399 Ill. App. 3d at 1203, 931 N.E.2d at 271.

¶ 56

### 3. *The Trial Court's Ruling*

¶ 57

The State asserted the criminal conspiracy was to obstruct justice by hiding evidence, a crime alleged to have occurred around September 9, 2008. The direct evidence showed (1) defendant lived with his mother in the months after the July 2008 robbery; (2) defendant was arrested on September 9, 2008, in a separate case; (3) on September 9, 2008, defendant's mother approached Patton to get rid of the guns at her house; (4) Patton testified he and defendant's mother wanted to " 'protect' " defendant; and (5) Patton did not disclose the source of these firearms to police. As the trial court noted, "there very well could have been a conspiracy going on between Miss Comas-Thompkins and Mr. Patton, possibly extending to the Defendants but there's not really any proof of that. They appear to have been in jail at that point, but at least the assumption was there that it was being done on their behalf \*\*\*." The court then proceeded to admit Bachman's testimony regarding statements Comas-Thompkins made to her at the courthouse.

¶ 58

The trial court found a conspiracy between Patton and Comas-Thompkins, neither of whom was a defendant in the case. The court specifically found there was no proof this conspiracy extended to the defendants. Since the coconspirator exception requires a conspiracy with a defendant, it was error for the court to admit Bachman's hearsay testimony of what

Comas-Thompkins told her about turning over any weapons.

¶ 59 While it is true, as the State argues, Bachman's statement may have been permissible impeachment evidence, since Comas-Thompkins denied having told Bachman she found guns at her residence, impeachment evidence may be considered only as it relates to a witness's credibility. Since the trial court admitted the statements under the coconspirator exception to the hearsay rule, it considered it as substantive evidence. Thus it is irrelevant whether the statements may have been admissible for impeachment.

¶ 60 The State also argues defendant's failure to object to Patton's testimony somehow justifies admitting the hearsay statements Bachman testified about. Since Patton's testimony was clearly admissible, the State's argument is without merit.

¶ 61 Next, the State argues any error in admitting testimony about a conversation between Bachman and Comas-Thompkins was harmless. First, we note the State failed to raise a forfeiture argument. Here, defendant filed a posttrial motion, but did not include the error regarding Bachman's testimony in his motion. Nor did defendant argue this error at the hearing on the posttrial motion. While counsel objected at the trial to the admission of this evidence, both an objection and a posttrial motion raising the issue are required to preserve the issue for appellate review. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988).

However, since the State failed to raise forfeiture, we find the State forfeited this argument.

*People v. Artis*, 232 Ill. 2d 156, 178, 902 N.E.2d 677, 690 (2009) (rules of forfeiture apply to the State as well as the defendant).

¶ 62 Turning then to the harmless error argument, we find this isolated incorrect evidentiary ruling to have been harmless. Comas-Thompkins herself testified she found the guns

under the garage behind her house when her dog displayed interest in that area. She also testified she called Patton and asked him to come and get the guns. Patton testified he retrieved the guns from Comas-Thompkins at her residence and turned them in to the police. He admitted he was trying to protect defendant when he neglected to tell the police the truth about where and how he came into possession of the weapons. Bachman's contested testimony was inconsequential in the scheme of things. The trial court, in announcing its decision, never referred to the conversation between Bachman and Comas-Thompkins in any way.

¶ 63           While this was a circumstantial case, the circumstantial evidence of defendant's guilt was overwhelming. Defendant worked for the moving company that moved the Hoppers in March 2008. One of the armed robbers was tall and thin, with the same stature as one of the movers. This man asked "where are the guns" and went immediately to the room with the guns before Barbara could answer. Less than six weeks after the home invasion, defendant was arrested for armed robbery and had in his possession one of the Hoppers' guns. More of the Hoppers' guns were found by defendant's mother at her residence, where defendant had been residing. Bachman saw defendant with a long, green duffle bag, described similarly to the one the robbers had at the Hoppers' residence when the guns were stolen. While Bachman's testimony about her conversation with Comas-Thompkins should not have been admitted, it was inconsequential and had no impact on the verdict. While defendant's trial may not have been 100% perfect, he received what he was entitled to, a fair trial. *People v. Griffin*, 178 Ill. 2d 65, 90-91, 687 N.E.2d 820, 835 (1997).

¶ 64           C. Defendant's Armed-Robbery-Firearm-Enhancement Claim

¶ 65           Initially, defendant requested the 15-year firearm enhancement be vacated from

his sentence for armed robbery because the supreme court declared the enhancement in the armed robbery statute unconstitutional in *People v. Hauschild*, 226 Ill. 2d 63, 871 N.E.2d 1 (2007).

¶ 66 In March 2013, the supreme court held the legislature revived the sentencing enhancement in the armed robbery statute. *People v. Blair*, 2013 IL 114122, ¶ 35, 986 N.E.2d 75. In his reply brief, defendant, in light of *Blair*, withdrew his argument.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 69 Affirmed.