

SIXTH DIVISION  
February 21, 2014

No. 1-11-2357

**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. 10 CR 8678
	)	
DAMIAN BROOKS,	)	The Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE REYES delivered the judgment of the court.  
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant's armed robbery conviction and sentence affirmed over challenges to the sufficiency of the evidence, the entry of alleged hearsay evidence, and the constitutionality of the firearm sentencing enhancement.
- ¶ 2 Following a bench trial, defendant, Damian Brooks, was found guilty of armed robbery and sentenced to 21 years' imprisonment. On appeal, defendant challenges the sufficiency of the

evidence to sustain his conviction, and the trial court's admission of certain alleged hearsay testimony. He also contends that the trial court's application of the firearm sentencing enhancement was unconstitutional and that his sentence is void. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 I. Facts of Armed Robbery

¶ 5 At approximately 8:53 p.m. on April 4, 2010, Johnny Rodriguez (Rodriguez), his pregnant wife,<sup>1</sup> Brenda Lopez (Lopez), and their four year old son were returning home from an Easter celebration. The family parked their vehicle in the parking lot of their apartment building in Melrose Park and, as Rodriguez collected items from the automobile, Lopez began walking towards the building with their son. At this time, the defendant and another individual approached Lopez and placed against her head a shotgun, which Rodriguez described as "black and brown, big, long." The offenders instructed the couple to hand over their money.

¶ 6 Lopez grabbed her son, placed him in front of her, and turned her back to shield him "from looking at what's going on." Rodriguez became angry and tried to divert the offenders' attention from Lopez, yelling, "what are you doing, are you serious, she's pregnant[.]" Defendant "kept telling [him] not to do nothing." Defendant's co-offender then took Lopez's purse and went through Rodriguez's pockets, taking his cigarettes, cell phone, and cash. After seizing these items, the offenders ordered the family to go inside the apartment building. Once

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<sup>1</sup> Although Rodriguez testified that Lopez was his "wife," Lopez testified that they were not married, but she sometimes referred to him as her "husband."

inside, the couple called police as defendant and his co-offender fled the scene.

¶ 7 After the police arrived, Rodriguez gave a description of the offenders. According to Rodriguez, he "kept looking at [defendant's] face[.]" during the incident from a distance of two to four feet with nothing obstructing his view. Rodriguez also testified that the area was illuminated by lights in the parking lot, on the building, and in the street. On April 7, 2010, Rodriguez identified defendant and his co-offender in separate photo arrays, specifically identifying defendant as the one holding the weapon. On April 12, 2010, he again identified defendant in a physical line-up at the Melrose Park Police Department. Lopez was unable to identify any suspect due to having her back turned and her head facing the door.

¶ 8 II. Trial

¶ 9 At trial, Rodriguez testified to the above events and made an in-court identification of defendant as the offender with the shotgun. During cross-examination, Rodriguez described the offender with the shotgun as having had "very little facial hair" and standing at "about my height, maybe two inches taller. I'm five-eight, so what, five-nine, five-ten."

¶ 10 Melrose Park police officer Negron<sup>2</sup> testified that, on April 4, 2010, he responded to a call of an armed robbery and spoke to Rodriguez and Lopez. During Officer Negron's direct examination, the State sought to elicit testimony regarding the substance of Officer Negron's conversation with Rodriguez where Rodriguez described the offenders' heights as "five-five" and "five-seven." Defendant objected to the evidence as hearsay, which the trial court overruled.

The State then offered a stipulation:

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<sup>2</sup> The record on appeal does not provide a first name for Officer Negron.

"[The State]: Judge, we'll stipulate that this officer got a description, and that description led to his further investigation because that's all it really comes in for.

The Court: Correct.

[The State]: For his further investigation. For him to actually figure out the details of it is actually irrelevant to this trial. So we would stipulate he was given a description and that he then continued his investigation.

[The State, Co-counsel]: I think it's relevant as to the—

The Court: Absolutely it is relevant. You can continue."

¶ 11 Officer Carlos Patterson of the Maywood police department testified that he arrested defendant on April 10, 2010. He stated that defendant's height was listed in the arrest report as "five-five[.]" but that this was an "approximation" and he estimated defendant's height as "five-seven."

¶ 12 Defendant testified that he is "five-five[.]" and that, on the evening of April 4, 2010, he and his former girlfriend were at his home. He fell asleep at approximately 7:30 p.m. while watching television, and woke up around 10:30 p.m. He denied possessing a shotgun or robbing anyone on that date.

¶ 13 During closing arguments, the State argued, "Officer Negron testified today after speaking to the individual that he thinks they were looking for individuals of five-seven, five-five." Defense counsel objected, which the trial court overruled:

"[Defense counsel]: That is hearsay testimony. That's now—now the State, now they see that they have brought that in for the purpose of the matter asserted and now the

State is trying to get it in.

The Court: [T]he testimony of the officer was that one was five-seven and the other was five-five. [The State] can argue it. It was testified to.

[Defense counsel]: But that's hearsay.

The Court: I did not sustain your objection. I overruled your objection with respect to that. It came in. [The State] can argue it."

¶ 14 After the close of evidence and argument, the trial court found defendant guilty of armed robbery. The court observed that Rodriguez had "stayed focused on that person [defendant]" and that he was able to pick defendant out of a photo array and line-up. The court also noted that "there was some issue as to height. Most people are probably way off when it comes to guessing height. \*\*\* Mr. Brooks says he is five-five. I would take it that he's a little taller[.]" Defendant was subsequently sentenced to the minimum Class X sentence of six years' imprisonment, plus an additional 15 year enhancement based on defendant's possession of a firearm during the offense, for a total of 21 years' imprisonment.

¶ 15 ANALYSIS

¶ 16 I. Sufficiency of the Evidence

¶ 17 On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction contending the State failed to prove beyond a reasonable doubt he possessed a firearm during the offense. He maintains the witnesses' testimony that they observed him carrying a "shotgun" is insufficient to prove the item he possessed met the statutory definition of a firearm. The State responds that the witnesses' unequivocal and credible testimony established that defendant

possessed a firearm during the robbery.

¶ 18 When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under this standard, the trier of fact is responsible for assessing the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 19 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 2010). A person commits armed robbery when he or she violates section 18-1 and he carries on or about his person or is otherwise armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). Under the Criminal Code, a "firearm" is defined in Section 1.1 of the Firearm Owners Identification Card Act (720 ILCS 5/2-7.5 (West 2010)), as any device which is designed to expel a projectile by the action of an explosion, or expansion or escape of gas, with various exclusions, such as BB guns and antique firearms (430 ILCS 65/1.1 (West 2010)).

¶ 20 In support of his contention that the evidence was insufficient to establish his possession of a firearm, defendant cites *Ross*, in which the victim testified the defendant pointed a handgun

at him during the robbery, but the "gun" recovered by the police was a BB gun. *Ross*, 229 Ill. 2d at 258. The supreme court determined that the evidence was insufficient to prove that the BB gun was a "dangerous weapon" because there was no evidence regarding the weight and composition of the BB gun, or whether it was loaded. *Id.* at 276-77.

¶ 21 Unlike in *Ross*, however, nothing in the record suggests the weapon defendant had in his possession was anything other than an actual shotgun. Under similar circumstances, the supreme court held that, based on the victim's testimony that defendant held a gun to his head, combined with the circumstances under which he was able to see the weapon, the jury could have reasonably inferred that defendant had a real gun. *People v. Washington*, 2012 IL 107993, ¶¶ 35-36. Similarly, in *People v. Malone*, 2012 IL App (1st) 110517, ¶ 51, this court held that where there was no evidence presented that the firearm was a toy or fake weapon, the victim's testimony and the circumstances in which she viewed the weapon, along with a videotape and photograph of the offense, supported a finding that the defendant was armed with a firearm.

¶ 22 Viewed in the light most favorable to the prosecution, the evidence in this case established that Rodriguez observed the firearm that defendant possessed during the robbery, and described it as a "shotgun" that was "black and brown, big, long." He also observed defendant point the shotgun at Lopez, while he was standing just two to four feet away during the course of the incident. The area was illuminated, there was nothing obstructing his view, and Rodriguez's level of attention was high as he "stayed focused on" defendant during the incident. This testimony was corroborated by Lopez, who also observed one of the offenders carrying a shotgun. Given Rodriguez's unequivocal testimony and the circumstances under which he was

able to view the weapon, we likewise find that a rational trier of fact could have reasonably inferred that defendant possessed a real shotgun during the crime's commission to sustain his armed robbery conviction. *Washington*, 2012 IL 107993, ¶ 36.

¶ 23

## II. Hearsay Testimony

¶ 24 Defendant next asserts he was denied a fair trial when the trial court permitted hearsay testimony from Officer Negron. Evidentiary rulings are within the discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92, 133 (2007). An abuse of discretion occurs only where the trial court's decision is arbitrary, and no reasonable person would adopt that view. *Id.*

¶ 25 Defendant concedes Officer Negron's testimony would have been permissible to show the investigative steps taken by the officer, per the stipulation offered by the State and Illinois case law. See *People v. Jura*, 352 Ill. App. 3d 1080, 1086 (2004) ("A police officer may testify regarding the steps taken in investigating a crime and describe the events leading up to the defendant's arrest when the evidence satisfies some relevant nonhearsay purpose"). In this case, however, defendant asserts the trial court admitted and relied upon Officer Negron's hearsay testimony as substantive evidence regarding defendant's height. According to defendant, because the trial court relied upon this inadmissible hearsay evidence, we must reverse and remand for a new trial.

¶ 26 First, we note the record does not necessarily support defendant's contention that the trial court relied on the testimony as substantive evidence. To the extent there is any ambiguity, we generally presume the trial judge considered the evidence for its proper, limited purpose. See

*People v. Avery*, 227 Ill. App. 3d 382, 389 (1991). While the record plainly establishes the trial court admitted the evidence, it does not specifically indicate for what purpose the trial court considered it. For example, when the State stipulated it would be willing to limit the testimony only to show the investigative steps of the officer, the trial court interjected, "[a]bsolutely it is relevant. You can continue." Moreover, during closing arguments, defense counsel objected to the State using the evidence for the truth of the matter asserted, to which the trial court responded, "the testimony of the officer was that one was five-seven and the other was five-five. [The State] can argue it. It was testified to." The court further added, "I did not sustain your objection. I overruled your objection with respect to that. It came in. [The State] can argue it." At no point did the trial court declare it had admitted the evidence for some purpose other than the limited purpose for which the State offered it. Furthermore, while the trial court acknowledged "there was some issue as to height," this does not necessarily mean it relied on Officer Negron's testimony as substantive evidence of defendant's height. The trial court merely noted, "[m]ost people are probably way off when it comes to guessing height. \*\*\* Mr. Brooks says he is five-five. I would take it that he's a little taller[.]" Nevertheless, even assuming the trial court considered the evidence for the truth of the matter asserted, we do not find the trial court abused its discretion because the testimony falls under a statutory exception to the general prohibition against hearsay.

¶ 27 Section 115-12 of the Criminal Code, titled "Substantive Admissibility of Prior Identification," provides in relevant part:

"A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies

at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." 725 ILCS 5/115-12 (West 2010).

In this case, Rodriguez testified at trial and was subject to cross-examination,<sup>3</sup> fulfilling conditions (a) and (b). Thus, the remaining question is whether Rodriguez's statement was "one of identification of a person made after perceiving him."

¶ 28 Defendant argues the hearsay exception does not apply to this case because the testimony elicited from Officer Negron was a "description," not an "identification." While defendant cites to authority for this proposition, the lone case on which defendant relies makes no mention of any such distinction. See *People v. Shum*, 117 Ill. 2d 317, 341-42 (1987).<sup>4</sup> Moreover, the supreme court has specifically cautioned against the narrow reading of the exception defendant advances. See *People v. Tisdell*, 201 Ill. 2d 210, 219 (2002). In particular, the supreme court advised against "limiting 'statements of identification' to a witness' actual identification of a defendant," as such an "interpretation mistakenly focuses on the result rather than the process."

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<sup>3</sup> The record indicates Rodriguez's testimony preceded that of Officer Negron. Nevertheless we note this fact does not affect whether Rodriguez was subject to cross-examination concerning his statement for the purposes of the exception; defense counsel could have cross-examined Rodriguez about the statement following his direct examination or upon recalling him as a witness subsequent to the examination of Officer Negron. See *People v. Lewis*, 223 Ill. 2d 393, 403-05 (2006).

<sup>4</sup> In *Shum*, the supreme court found a witness's prior identification of her attacker by name fell within the hearsay exception of section 115-12 and could be elicited as substantive evidence during the testimony of the police officer. *Shum*, 117 Ill. 2d at 342. The court did not limit the exception to *only* such identifications, nor did it distinguish between "descriptions" and "identifications." See generally *id.*

*Id.* Instead, a court should "constru[e] 'statements of identification' to include the entire identification process." *Id.* In fact, in his reply brief, defendant acknowledges the line of contrary "authority where courts have held that hearsay evidence of offender descriptions were admitted substantively." See *People v. Williams*, 263 Ill. App. 3d 1098, 1111 (1994) (finding a description of "the offender and his clothing, as well as the type and color of his car" sufficed as an identification under section 115-12); *People v. Newbill*, 374 Ill. App. 3d 847, 851-52 (2007) (finding physical descriptions "such as height and hair color" to be part of the "entire identification process" and thus admissible as substantive evidence under section 115-12).

¶ 29 Presented with this authority, we find the testimony falls under the exception delineated under section 115-12. Accordingly, the trial court did not abuse its discretion by admitting Officer Negron's testimony.

¶ 30 III. Constitutionality of Firearm Enhancement

¶ 31 Defendant finally contends that the 15-year firearm enhancement imposed on his conviction is "void *ab initio*" because it was found unconstitutional in *People v. Hauschild*, 226 Ill. 2d 63, 88-89 (2007), and was not revived by Public Act 95-688. At the time defendant filed this appeal, various districts of the appellate court were split on whether, following the enactment of Public Act 95-688, the enhanced sentence for armed robbery could be applied to a defendant's sentence. Compare *Malone*, 2012 IL App (1st) 110517 at ¶ 90 and *People v. Brown*, 2012 IL App (5th) 100452, ¶ 16 with *People v. Gillespie*, 2012 IL App (4th) 110151, ¶ 54. However, after defendant submitted his brief and before the State filed a response, the supreme court settled the question in *People v. Blair*, 2013 IL 114122, ¶ 35, holding that Public Act 95-

688 did revive the 15-year sentencing enhancement in the armed robbery statute when it amended the armed violence statute.

¶ 32 In his reply brief, defendant concedes that the supreme court has settled this issue and acknowledges that we must follow the holding of *Blair*. We agree. *People v. Muhammad*, 398 Ill. App. 3d 1013, 1017 (2010). We thus find that Public Act 95-688 revived the 15-year firearm enhancement provision of the armed robbery statute, and, accordingly, that defendant's challenge to the propriety of his sentence fails.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.