

No. 1-11-3537

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).

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 2752
)	
EMMIT SMITH,)	The Honorable
)	Mary Colleen Roberts,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Pursuant to *People v. Aguilar*, 2013 IL 112116, defendant's conviction for aggravated unlawful use of a weapon pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (720 ILCS 5/24-1.6(a)(1),(a)(3)(A) (West 2010)), must be reversed. Defendant's conviction for aggravated unlawful use of a weapon pursuant to section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code of 1961 (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)), must be reversed when the State failed to prove an element of the offense.

¶ 2 Following a bench trial, defendant Emmit Smith was convicted of two counts of aggravated unlawful use of a weapon and sentenced to 24 months of probation. On appeal,

defendant contends that he was not proven guilty beyond a reasonable doubt when the State failed to establish at trial that he did not reside in, or was not a social invitee of, the apartment where he was arrested. Defendant further contends that section 24-1.6(a)(1) of the Criminal Code of 1961 (the Code) (720 ILCS 5/24-1.6(a)(1) (West 2010)), is unconstitutional because it violates the right to keep and bear arms as guaranteed by the second amendment of the United State Constitution. We reverse.

¶ 3 Defendant was charged via information with, *inter alia*, aggravated unlawful use of a weapon in that he knowingly carried on his person, a firearm, when he was not on his own land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another as an invitee with that person's permission when the firearm was uncased, loaded and immediately accessible (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West, 2010)); and when not on his own land or in his own abode, legal dwelling or fixed place of business, or on the land or in the legal dwelling of another as an invitee with that person's permission he knowingly carried on his person, a firearm, when he had not been issued a currently valid Firearm Owner's Identification card (FOID card) (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)).

¶ 4 Defendant's arrest and prosecution arose from a December 31, 2009 incident during which a Chicago police officer saw him standing on a porch holding a firearm. At trial, officer Andrew Camarillo testified that on the evening of December 31, 2009, he saw defendant standing on the porch of 4019 West Van Buren holding a handgun. When he and fellow officers parked in front of that address, defendant entered the building. Defendant had "trouble" getting in the door. Camarillo followed defendant inside and observed defendant going up the stairs to the second floor. When defendant reached the top of the stairs, he "knocked real hard" and the

door opened. Camarillo then chased defendant through an apartment. Ultimately, defendant threw the gun out of a window at the rear of the apartment. Camarillo then took defendant into custody. When Camarillo later reunited with other officers, he recognized the revolver officer Lesch was holding as the one defendant threw out of the window.

¶ 5 Camarillo overheard another officer give defendant the *Miranda* warnings and then heard defendant state that he had a gun because that location was a "weed spot" and defendant had to protect his "shit." Later, during the booking process, Camarillo heard defendant state that his address was 2735 South LeMoyne. Defendant did not produce a FOID card.

¶ 6 During cross-examination, Camarillo admitted that he had previously seen defendant on the porch at 4019 West Van Buren at least a dozen times. He also saw boxes of clothes in the room from which defendant threw the gun.

¶ 7 Officer Nicolas Lesch also testified that he saw defendant standing on the front porch of 4019 West Van Buren holding a revolver. After defendant went into the building, Lesch went to the backyard. He subsequently observed a black object that looked like a revolver thrown from the second floor of the building. When he retrieved the gun, his examination revealed that it was loaded with shotgun shells. When Lesch later prepared defendant's booking report, defendant indicated that 2735 West LeMoyne was his home address.

¶ 8 Although Lesch had previously been inside the second floor apartment at 4019 West Van Buren, he had not seen defendant there before.

¶ 9 Defendant testified that he lived at 4019 West Van Buren until January 1, 2010, when he had to move. He had lived there for several weeks and had been arrested there twice. Defendant denied that Camarillo chased him into the apartment and denied that Lesch filled out his arrest

report. He also denied making any statements to the police. His state identification listed 2735 West LeMoyné as his address because he had to obtain new identification before the holiday. He denied handling any firearms the night of his arrest.

¶ 10 During cross-examination, defendant clarified that the first time he saw either Camarillo or Lesch was at the police station. He testified that he was playing cards with three other men about an hour before midnight when about 20 officers "swarm[ed]" inside, took everyone into custody, and transported them to a police station.

¶ 11 The parties then stipulated that the gun and ammunition recovered in this case were tested for fingerprints and that the fingerprint recovered did not match defendant's fingerprint standard.

¶ 12 In finding defendant guilty of aggravated unlawful use of a weapon, the court stated that this case required a credibility finding, and that it found the officers credible. The court then stated that it found defendant's testimony "self-serving," and not credible. The court found defendant guilty of two counts of aggravated unlawful use of a weapon, and sentenced him to 24 months of probation.

¶ 13 Here, defendant was convicted of two counts of aggravated unlawful use of a weapon in that he knowingly carried on his person, a firearm, when he was not on his own land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another as an invitee with that person's permission when (1) the firearm was uncased, loaded and immediately accessible (see 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)), and (2) he had not been issued a currently valid FOID card (see 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010)).

¶ 14 Initially, this court notes that defendant's conviction for aggravated unlawful use of a weapon pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Code (720 ILCS 5/24-1.6(a)(1),

(a)(3)(A) (West 2010)), must be reversed pursuant to *People v. Aguilar*, 2013 IL 112116. In that case, our supreme court determined that because section 24-1.6(a)(1), (a)(3)(A) categorically prohibits the possession and use of an operable firearm for self-defense outside the home, it violates the right to keep and bear arms as guaranteed by the second amendment of the United States Constitution. *Aguilar*, 2013 IL 112116, ¶¶ 21-22. Therefore, defendant's conviction on that count must be reversed. *Aguilar*, 2013 IL 112116, ¶ 22.

¶ 15 Defendant also contends that his aggravated unlawful use of a weapon conviction based upon a failure to possess a valid FOID card must likewise be vacated as unconstitutional. However, this court need not reach the constitutionality of section 24-1.6(a)(1), (a)(3)(C) of the Code because, as discussed below, the State failed to prove an element of the offense and when a court can resolve a case on nonconstitutional grounds, it should do so. See *People v. Lee*, 214 Ill. 2d 476, 482 (2005)); see also *In re E.H.*, 224 Ill. 2d 172, 178 (2006) (constitutional issues should be reached only as a last resort).

¶ 16 On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt because the State failed to prove that he did not reside in, and was not a social invitee of, the second floor apartment at 4019 West Van Buren.

¶ 17 In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering 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. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272.

A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates reasonable doubt as to a defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 18 Here, defendant contends that he was not proven guilty beyond a reasonable doubt because the State failed to establish that he was not the social invitee of a legal resident of the second floor apartment. The State responds that this argument must fail because defendant's defense at trial was that he lived at 4019 West Van Buren and a defendant may not advance a theory of defense on appeal that was not presented before the trial court. We disagree.

¶ 19 Whether defendant was a social invitee at the time of his arrest is not an affirmative defense; rather, it is an element of the offense. See 720 ILCS 5/24-1.6(a)(1) (West 2010) (a person commits the offense of aggravated unlawful use of a weapon when he carries on or about his person, except when on his land or in his 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"). When an exception appears as part of the body of a substantive offense, the State has the burden to disprove the exception beyond a reasonable doubt in order to sustain a conviction for the offense. *People v. Laubscher*, 183 Ill. 2d 330, 335 (1998). Although the State may rely on circumstantial evidence in sustaining this burden (*Laubscher*, 183 Ill. 2d at 335), the State must establish beyond a reasonable doubt not only a defendant's guilt, but also the essential elements of the crime (*People v. Anderson*, 117 Ill. App. 3d 806, 808 (1983)). In other words, the State may not leave to conjecture or assumption essential elements of the crime. *Laubscher*, 183 Ill. 2d at 335-36.

¶ 20 Here, defendant was initially observed on the porch at 4019 West Van Buren. He then

went inside, ran up the stairs, was admitted to the second floor apartment after knocking, and ultimately threw a handgun out of the window at the rear of the apartment. Although defendant argues that the fact that he was admitted to the apartment after knocking establishes that he was a guest, the State replies that circumstantial evidence, *i.e.*, the facts that defendant ran from the police and then threw the gun out of a rear window are inconsistent with the actions of a social invitee who had permission from a legal resident of the second floor apartment to have a gun on the premises. However, there was a complete lack of evidence at trial regarding whether defendant had the permission of a legal resident to be in the apartment with a firearm.

¶ 21 *People v. Laubscher*, 183 Ill. 2d 330 (1998), is instructive. There, the defendant was found guilty of, *inter alia*, unlawful use of weapons following a dispute on the lawn of the apartment building where he lived. The appellate court reversed the unlawful use of weapons conviction finding that the State failed to prove that at the time defendant was observed in possession of a weapon, he was not either "on his land" or in his "fixed place of business" as provided in the exceptions to the unlawful use of weapons statute. On appeal to the supreme court, the State argued that it had presented sufficient evidence that the defendant was not on his land at the time he was observed with a weapon.

¶ 22 In that case, our supreme court noted that the only evidence offered by the State regarding defendant's connection with the property was that he lived in the apartment building, there was no proof of his interest in his unit or the surrounding land, or as to the ownership of the property in general. *Laubscher*, 183 Ill. 2d at 336. The court agreed with the appellate court that although it was not unreasonable for the trial court to assume that defendant had no ownership interest in the premises, permitting such an inference absent an evidentiary basis effectively shifted the

burden to the defendant to prove that he was actually on his land or fell within one of the other statutory exceptions. *Laubscher*, 183 Ill. 2d at 336.

¶ 23 Similarly, here, although the State presented testimony regarding defendant's legal residency, there was no testimony at trial regarding whether defendant was a social invitee of the legal residents of the second floor apartment. Because a person who carries a firearm "on the land or in the legal dwelling of another person as an invitee with that person's permission" falls under an exception to section 24-1.6(a)(2) of the Code (720 ILCS 5/24-1.6(a)(2) (West 2010)), the State had the burden to disprove beyond a reasonable doubt the existence of this exception in order to sustain defendant's conviction. *Laubscher*, 183 Ill. 2d at 335. Absent any evidence regarding whether defendant was a social invitee, this court cannot assume that defendant's actions of running to the second floor and then throwing the gun out of a window established that he was not a social invitee. See *Laubscher*, 183 Ill. 2d at 335-36 (permitting such an inference without any evidentiary basis would effectively shift the burden to a defendant to prove that he fell within an exception). We therefore reverse defendant's unlawful use of a weapon conviction pursuant to section 24-1.6(a)(2), (a)(3)(C) of the Code because the State failed to prove beyond a reasonable doubt that defendant was not the social invitee of a legal resident of the second floor apartment when he was arrested. See *Laubscher*, 183 Ill. 2d at 335-36.

¶ 24 Because we find that the State failed to prove beyond a reasonable doubt that defendant was not a social invitee of a legal resident of the second floor apartment where he was arrested, we need not address defendant's alternative argument that the State failed to establish beyond a reasonable doubt that he did not reside at 4019 West Van Buren.

¶ 25 Accordingly, defendant's unlawful use of a weapon convictions are reversed.

1-11-3537

¶ 26 Reversed.