

No. 1-13-1481

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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. 11 CR 19193
)	
CEDRIC HARMON, JR.,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* Evidence sufficient to sustain defendant's conviction for unlawful use or possession of a weapon by a felon; unlawful use of a weapon by a felon statute does not, on its face, violate the second amendment; as-applied challenge not subject to review.

¶ 2 Following a bench trial, defendant Cedric Harmon, Jr., was found guilty of unlawful use or possession of a weapon by a felon (UUWF) and sentenced to 3 ½ years' imprisonment. On appeal, defendant contends that the evidence was insufficient to sustain that conviction where the State failed to prove beyond a reasonable doubt that he knowingly possessed a gun. In the

alternative, defendant argues that the UUWF statute is unconstitutional as applied to him because he possessed a gun in his home for the lawful purpose of protection, as well as on its face because it sweeps too broadly in its inclusion of all felons regardless of the nature of their past convictions.

¶ 3 Defendant was charged with two counts of unlawful use or possession of a weapon by a felon, and one count of defacing identification marks of a firearm in relation to events that occurred on October 18, 2011, at defendant's home located at 12557 South Stewart Avenue in Chicago, Illinois. The record shows that in the course of investigating a domestic disturbance, police officers found a loaded gun in a closet in defendant's bedroom. Defendant subsequently admitted his ownership of the gun to an officer.

¶ 4 At trial, Chicago police officer Shelly Herberger testified that at approximately 3:38 p.m. on October 18, 2011, she and her partners, Officers Alvarado and Castillo, responded to a call reporting a domestic incident at 12557 South Stewart Avenue. Upon arriving, she and her partners spoke with Cedric Harmon, Sr. (Cedric Sr.), defendant's father, outside of the home located at that address. Cedric Sr. told the officers that defendant had pointed a gun at him during an argument over a window and he wished to have defendant arrested. The officers then entered the home and proceeded up the stairs and into a bedroom in which a man, who Officer Herberger identified in court as defendant, was standing. At that point, the officers placed defendant into custody. When Officer Herberger looked around the room, she saw a handgun on a shelf in the closet. The door to the closet was open, although she initially thought that it did not have a door. Other items were on the shelf, however nothing obstructed her view of the gun. Officer Castillo recovered the handgun, which was loaded with nine rounds. Officer Herberger identified

People's Exhibit 1 as that gun and testified that the serial number on the gun had been defaced in that it had been filed down.

¶ 5 Officer Herberger further testified that defendant was then taken to the police station, and, after defendant was given *Miranda* warnings, which he indicated that he understood, he agreed to speak with her. Defendant then told Officer Herberger that he needed the gun to feel safe because he had a three-year-old son and there had been a lot of shootings in the neighborhood. On cross-examination, Officer Herberger acknowledged that she did not reduce defendant's statement about the gun to writing aside from including that information in her police report, and that at the preliminary hearing she testified that the closet did not have a door.

¶ 6 The court accepted into evidence a certified copy of defendant's prior felony conviction for unlawful purchase of a firearm using false information in Case No. 05 CR 22747. The State then rested its case in chief.

¶ 7 Ruby Mack, defendant's grandmother, testified for the defense that on the day of the incident, defendant and Cedric Sr. both lived with her at 12557 South Stewart Avenue. At approximately 11:30 a.m. that day, Cedric Sr. was fixing a broken window and became angry when she told him that the replacement he was using did not fit properly. When Cedric Sr. ran into the house and screamed at her, defendant told him not to speak to her that way. The two began to "scuffle" and Cedric Sr. reached for a knife from the kitchen, but defendant was able to restrain him. Mack eventually separated the two and defendant left the house. Mack left for work at approximately 1p.m. and did not return until 4 p.m. Mack identified Defense Exhibit 3 as photographs of the closet in defendant's bedroom, and testified that there was never a time when that closet did not have a door and that the closet door was usually closed. Mack further testified that she had never seen defendant with a handgun.

¶ 8 Defendant testified that on the day of the incident he lived at 12557 South Stewart Avenue and acknowledged his prior felony conviction. Defendant confirmed Mack's account of the details and the timing of the fight he had with Cedric Sr. on October 18, 2011. Defendant further testified that after the fight, he left the house at approximately 11:45 a.m. and returned at approximately 3 p.m. Shortly thereafter, as he was exiting an upstairs bathroom, he heard loud noises, then saw three officers standing in the upstairs hallway. One of those officers pointed a gun at him and arrested him in that hallway. The officers then entered his bedroom.

¶ 9 Defendant further testified that the door to his bedroom closet was closed at that time and denied that the gun the officers found in that closet was his or that he had placed it there. Defendant also denied telling Officer Herberger that he had the gun for protection, that he had a three-year-old son, or that there had been shootings in the neighborhood and he needed the gun to feel safe. On cross-examination, defendant acknowledged that he has a son who was three years old at the time of the incident.

¶ 10 During closing argument, defense counsel argued that the evidence presented showed that Cedric Sr. "must have" placed the gun in defendant's closet, and had been motivated to do so by the fight he had with defendant earlier in the day. Defense counsel pointed out that although both defendant and Mack testified that the fight had occurred at 11:30 a.m., Officer Herberger testified that the incident had been reported at 3:30 pm. Defense counsel argued that Cedric Sr. had waited to report the incident until after defendant had returned home so that he could frame defendant by planting the gun in his closet.

¶ 11 The trial court found defendant guilty of Count I, unlawful use or possession of a weapon by a felon, and of Count III, defacing the identification marks of a firearm, and merged the two counts. In announcing its decision, the court noted that defendant acknowledged that the

bedroom in which the gun was found belonged to him, and found that that bedroom was under defendant's exclusive control. The court recounted the evidence, including the conflicting testimony regarding what time the fight took place, whether the closet at issue had a door, and whether defendant made a statement regarding the gun. The court stated that what the case "really [came] down to" was whether it believed that defendant made an admission to Officer Herberger as to the "ownership" of the gun, and found that, based on Officer Herberger's testimony, the State had met its burden beyond a reasonable doubt. The court subsequently sentenced defendant to 3 ½ years' imprisonment for unlawful use or possession of a weapon by a felon. On appeal from that judgment, defendant first challenges the sufficiency of the evidence to sustain his conviction.

¶ 12 The standard of review on a challenge to the sufficiency of the evidence 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. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). This standard applies to all criminal cases, whether the evidence is direct or circumstantial, and acknowledges the responsibility of the trier of fact to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). 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).

¶ 13 To sustain defendant's conviction, the State had to prove that defendant knowingly possessed a firearm after having been previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2010). Defendant does not contest that he was previously convicted of a felony, but rather,

contends that the State failed to prove beyond a reasonable doubt his knowing possession of a gun.

¶ 14 When establishing the element of possession, constructive possession is sufficient and the State need not prove that defendant had actual possession of the gun. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. To establish constructive possession, the State must show that defendant had knowledge of the gun, and exercised immediate and exclusive control over the area where it was found. *Id.*, citing *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Here, defendant acknowledges that the closet in which the gun was found was located in his bedroom and does not contest that he exercised immediate and exclusive control over that area. Defendant maintains, however, that he had no knowledge that the gun was in the closet and posits that Cedric Sr. was the one who placed the gun in that location.

¶ 15 Knowledge may be established by evidence of a defendant's acts, declarations or conduct from which it can be reasonably inferred that he knew the contraband existed in the place where it was found (*Spencer*, 2012 IL App (1st) 102094, ¶ 17), and constructive possession is often proved entirely by circumstantial evidence (*McCarter*, 339 Ill. App. 3d at 879). Additionally, the testimony of a single witness, including that of a law enforcement officer, if positive and credible, is sufficient to convict, even if it is contradicted by the defendant. *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992).

¶ 16 Here, Officer Herberger testified that after she and her partners arrested defendant in his bedroom, she saw a handgun in plain view on a shelf in defendant's closet. She further testified that defendant told her that he had that gun for the purpose of protection, given that he had a three-year-old son and there had been shootings in his neighborhood. Viewing the evidence presented in the light most favorable to the prosecution (*Siguenza-Brito*, 235 Ill. 2d at 224), we

find that the State sustained its burden in establishing that defendant had knowledge of the gun at issue, and thus constructively possessed it, and, accordingly, that defendant was proven guilty beyond a reasonable doubt of the unlawful use or possession of a weapon by a felon.

¶ 17 Defendant, nevertheless, argues that he never made a statement to Officer Herberger about the gun, and that Officer Herberger's testimony stating otherwise is not credible. He also points to conflicts in the evidence regarding the time his fight with Cedric Sr. took place in relation to when the incident was reported to police, the location where he was arrested, and whether the door to his closet was open or closed at the time officers searched his bedroom. However, it was for the trial court, as trier of fact, to make credibility determinations and resolve any conflicts in the evidence, and we have no basis for substituting our judgment for that of the trial court in this matter. *Campbell*, 146 Ill. 2d at 374-75, 389. Additionally, not only is defendant's argument that Cedric Sr. was the one who placed a gun in the closet mere speculation which is insufficient to raise a reasonable doubt of his guilt (*People v. Phillips*, 215 Ill. 2d 554, 574 (2005)), but all of defendant's arguments were presented to and rejected by the trial court, and are thus unpersuasive (*People v. Baugh*, 358 Ill. App. 3d 718, 737 (2005)).

¶ 18 In the alternative, defendant argues that the UUWF statute, pursuant to which he was convicted, is unconstitutional on its face because it violates his second amendment right to bear arms. Specifically, defendant contends that the UUWF statute sweeps too broadly in its inclusion of all felons, regardless of the nature of their past convictions.

¶ 19 Statutes are presumed to be constitutional, and, if reasonably possible, this court has a duty to construe a statute in a manner that upholds its validity. *People v. Graves*, 207 Ill. 2d 478, 482 (2003). The party challenging the statute bears the burden of clearly establishing that it

violates the constitution. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). The constitutionality of a statute is a question of law which we review *de novo*. *Id.* at 486-87.

¶ 20 The second amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend II. Courts have adopted an intermediate scrutiny standard in determining whether a statute violates the second amendment. *People v. Robinson*, 2011 IL App (1st) 100078, ¶ 18. To satisfy this standard, the challenged statutory provision must serve a significant, substantial, or important governmental interest, and the fit between the challenged provision and the asserted objective must be reasonable. *Spencer*, 2012 IL App (1st) 102094, ¶ 26.

¶ 21 Here, defendant does not challenge the facial validity of the UUWF statute where the prior felony conviction at issue is for a violent offense. Rather, he contends that where, as here, the prior felony conviction is for a non-violent offense, there is no proportional fit between the statute and its asserted objective.

¶ 22 Defendant acknowledges that in cases involving defendants who had prior felony convictions for non-violent offenses, this court has held that the UUWF statute does not violate the second amendment, and is constitutional on its face, because it is reasonably related to the important governmental objective of protecting the welfare and safety of the public. *Spencer*, 2012 IL App (1st) 102094, ¶ 31; *Robinson*, 2011 IL App (1st) 100078, ¶ 26. We adhere to our reasoning as stated in those decisions, and reiterate our finding that the UUWF statute does not, on its face, violate the second amendment. In doing so, we decline defendant's invitation to reconsider our analysis in *Spencer* and *Robinson* in light numerous federal court cases discussing

the intent behind the enactment of 18 U.S.C. §922(g)(1), the federal analogue to the Illinois UUWF statute.

¶ 23 In reaching our decision, we have considered defendant's argument that in *Spencer* and *Robinson*, this court erroneously relied upon dicta from the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court found that a District of Columbia ordinance that imposed a total ban on the possession of a functional handgun in the home and required that any lawful firearm in the home be disassembled or at all times bound by a trigger lock, thereby rendering it inoperable, violated the second amendment. *Heller*, 554 U.S. at 628, 635. In doing so, the Court stated in dicta that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626.

¶ 24 Contrary to defendant's assertion that we may not rely on the dicta from *Heller*, our supreme court has held that judicial dicta should carry dispositive weight in inferior courts. *People v. Williams*, 204 Ill. 2d 191, 206 (2003), citing *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). Additionally, the Supreme Court reiterated its approval of its statements in *Heller* in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *McDonald*, the Supreme Court struck down two ordinances that were similar to the one in *Heller*, and held that the protections of the second amendment applied to the states through the due process clause of the fourteenth amendment. *McDonald*, 561 U.S. at 750, 791. In doing so, the Court stated that "[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons' *** We repeat those assurances here." *McDonald*, 561 U.S. at 786. Accordingly, we find that our prior analysis in *Spencer* and *Robinson* relying upon the Supreme Court's dicta in *Heller* was not erroneous.

¶ 25 Defendant finally contends that the UUWF statute is unconstitutional as applied to him because it restricts his ability to possess a firearm in his home for the purpose of protecting himself and his family. We find, however, that defendant's contention is not subject to review because he failed to raise an as-applied challenge to the UUWF statute in the trial court, and thus the trial court did not conduct an evidentiary hearing regarding whether defendant possessed the gun for the purpose of self-defense. *Spencer*, 2012 IL App (1st) 102094, ¶ 32; see also *In re Parentage of John M.*, 212 Ill. 2d 253, 268 (2004) ("A court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact").

¶ 26 In so finding, we reject defendant's contention that such an evidentiary hearing took place or that factual findings on this issue were made. Although, as defendant points out, Officer Herberger testified that he told her that he had the gun for the purpose of protection, the fact remains that no specific inquiry was made to the veracity of defendant's statement regarding the purpose of his possession of the gun. Notably, in announcing its decision at trial, the court specified that it believed Officer Herberger's testimony that defendant made a statement to her regarding "ownership" of the gun, and did not make any specific findings regarding the purpose for defendant's ownership of that gun.

¶ 27 Moreover, even if the trial court had conducted an evidentiary hearing on this issue and made sufficient findings of fact, we would reject defendant's claim because the UUWF statute does not include exceptions for non-violent felonies (720 ILCS 5/24-1.1(a) (West 2010)), and no such exception was recognized by the Supreme Court in *Heller* or *McDonald*. *Spencer*, 2012 IL App (1st) 102094, ¶ 32.

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

¶ 29 Affirmed.