FIFTH DIVISION
September 30, 2015

No. 1-13-2533

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. 12 CR 16045
	)	
DOMINGO MENDOZA,	)	Honorable
	)	Rosemary Grant Higgins,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's conviction for armed habitual criminal affirmed over his claim that the evidence was insufficient to prove him guilty of the offense beyond a reasonable doubt; fines and fees order modified.

¶ 2 Following a jury trial, defendant Domingo Mendoza was found guilty of armed habitual criminal, and sentenced to 10 years' imprisonment. On appeal, defendant contests the sufficiency of the evidence to prove him guilty of the offense beyond a reasonable doubt claiming that the testimony of the arresting officers was improbable and contradicted by the consistent testimony of the defense witnesses. He also contends that the fines and fees order should be corrected.

¶ 3 The record sets forth that defendant was charged with one count of armed habitual criminal, two counts of unlawful use of a weapon by a felon, two counts of unlawful use of a weapon, two counts of aggravated unlawful use of a weapon by a felon, and one count of unlawful possession of a firearm by a street gang member in connection with an incident which occurred near 24th and Troy Streets in Chicago on August 16, 2012. The State *nolle prossed* six of the counts, and the matter proceeded to a jury trial on the one count of armed habitual criminal, and one count of unlawful possession of a firearm by a street gang member.

¶ 4 At trial, Chicago police officer Renoldo Serrato testified that approximately 4:40 p.m. on August 16, 2012, he and his partner, Officer Gerardo Vega, were on patrol in an unmarked police vehicle wearing vests with the police insignia over plain clothes when they received a radio call of criminal damage to property in the 2400 block of south Troy Street. En route to the location, Officer Serrato observed defendant standing on the corner of 24th and Troy Streets, then saw him start running while pointing a handgun at a vehicle that was proceeding eastbound. The officers gave chase in their police vehicle without activating their emergency equipment. As they drove closer, Officer Serrato observed that defendant was holding a blue steel semi-automatic handgun. When defendant became aware of their presence, he ran southbound into an alley.

¶ 5 The officers followed defendant into the alley and observed him toss the weapon with his right hand. The handgun bounced off the wall and fell in between two garbage cans. Officer Serrato detained defendant while Officer Vega retrieved the firearm and cleared the weapon by removing the magazine and the bullet from the chamber. Officer Serrato did not see anyone else in the alley, and he never lost sight of defendant during the chase, or the weapon in defendant's hand. Officer Serrato then testified to the chain of custody for the handgun and the ammunition

from the time the firearm left defendant's hand until he identified it at trial. When Officer Serrato inspected the handgun at trial, he did not see any scuff marks or other signs of damage.

¶ 6 Officer Serrato further testified that he and Officer Vega spoke with defendant at the 10th District police station. After defendant waived his *Miranda* rights, he informed the officers that he was a member of the Latin Kings and that some gang members had broken his windows so he was going to shoot them. He also told them that he had been beaten into the gang when he was 12 years old, that he was now an "original gangster" and that he "calls it for the shorties." Officer Serrato also observed a tattoo of five dots on defendant's hand.

¶ 7 On cross-examination, Officer Serrato stated that he could not recall the specifics of the radio call and that he did not activate the emergency equipment on the vehicle when he saw defendant with a handgun because he was trying to remain inconspicuous. He also did not remember anything about the vehicle defendant was chasing because his attention was focused on defendant, but he did not see any other vehicles or anyone else in the area. He further stated that he did not call for fingerprinting of the weapon because he observed defendant with the handgun in his hand. Finally, he stated that he did not see defendant carrying a handbag, nor did he see defendant's son, Edwin, or defendant's wife, Olga Delgadillo, in the alley.

¶ 8 Officer Vega testified to the same series of events as Officer Serrato leading up to defendant's arrest in the alley, and defendant's statements about his gang affiliation during the ensuing conversation at the police station. On cross-examination, he also stated that the officers did not activate the lights on their vehicle because they were trying to remain inconspicuous and did not recall anything about the vehicle defendant was chasing because his attention was focused on defendant. Officer Vega further stated that he did not see defendant's son, two

women, a minivan, or any other individuals in the alley when defendant was detained. When Officer Vega inspected the handgun at trial, he observed scuff marks on the handle.

¶ 9 Officer Michael Kapior was accepted as an expert in gang intelligence and testified that the Latin Kings controlled the area of 24th and Troy Streets. He described the process by which someone is initiated into the gang, which involved being beaten, and also explained that "shorties" refers to newer members of the gang, while an "original gangster" denotes a higher rank within the gang. He then explained that the tattoo of five dots on defendant's hand was a symbol of his affiliation with the Latin Kings.

¶ 10 The State then introduced into evidence a letter of certification from the Illinois State Police indicating that defendant had not been issued a Firearm Owner's Identification Card (FOID), and certified copies of defendant's two prior felony convictions.

¶ 11 Nadine Cardenas testified on behalf of defendant that she lived at 2429 South Troy Street in Chicago, and that she called defendant, her brother, in the early morning hours of August 16, 2012, to inform him that their aunt had passed away. Defendant, who lives in New Era, Michigan, told her that he and his family were going to drive to Chicago for the funeral. At approximately 4 p.m. that day, she received a call from defendant informing her that he had arrived. When she went outside, she observed her niece, Barbara Delgadillo, and her nephew, Antonio, parked two houses down. They told her where defendant was parked, and Cardenas walked to defendant's minivan on 24th and Troy Streets where she saw defendant's wife, Olga Delgadillo, rolling a bag with wheels on it.

¶ 12 As she got closer to the minivan, she saw her 12-year-old nephew, Edwin, crying and "all shook up." After speaking with Edwin, Cardenas looked for defendant, but instead observed two

police officers in the alley, and defendant in a police vehicle. She spoke to the officers, and then started to walk back to her apartment with Edwin, who was carrying a Mickey Mouse bag and a black purse. After meeting Olga along the way, they returned to the alley to speak with the officers, then returned to Cardenas' apartment.

¶ 13 On cross-examination, Cardenas stated that she did not see defendant in the alley before he was arrested, so she did not know what circumstances led to his being placed inside the police vehicle. Furthermore, before she entered the alley, she did not hear any sound from defendant or Edwin, nor the police officers or their vehicle.

¶ 14 Olga Delgadillo testified that she lives with her husband, defendant, and children in New Era, Michigan, and that, after receiving a call from Cardenas, the family drove to Chicago and arrived at approximately 4 p.m. on August 16, 2012. Her son and daughter, Antonio and Barbara, drove in one car, and she, defendant, and Edwin drove a minivan. After they parked, Olga rolled her suitcase to the stairs of Cardenas' apartment, and returned to the minivan to grab more bags. On her way back, she saw Edwin, who was carrying a black purse and Mickey Mouse bag, crying and saying that "they had arrested his dad." Olga testified that her loaded handgun was in a black carrying case inside the Mickey Mouse bag. She told the officers in the alley that the weapon belonged to her, but they did "not really" respond to her, so she walked back to Cardenas' apartment. On cross-examination, Olga acknowledged that she did not see or hear any activity before she got to the alley, and she did not know what happened before defendant was placed inside the police vehicle.

¶ 15 Edwin testified to the same series of events leading to the family's arrival in Chicago the afternoon of August 16, 2012. When everyone exited the minivan, he grabbed a black purse,

defendant grabbed the Mickey Mouse bag, and Olga began rolling her suitcase toward Cardenas' residence. Defendant then went into the alley near 24th and Troy Streets to relieve himself, as Edwin stood at the mouth of the alley. While defendant was standing in between two garbage cans in the alley, two officers arrived and told him to place his hands on the garbage can. The officers searched defendant and then the black purse and Mickey Mouse bag. He did not see the officers open the black case inside the Mickey Mouse bag containing the weapon, but did hear them work the zipper on the case. The officers threw the bags at Edwin who then walked out of the alley where he saw his aunt, Cardenas.

¶ 16 Edwin went back into the alley with Cardenas and saw defendant in the police vehicle. Cardenas spoke with the officers, then left the alley and saw Olga. Edwin was crying and could not speak, but went back into the alley with Olga and Cardenas where Olga spoke with the officers, before walking back to the apartment. He testified that throughout the events of the day, he did not observe defendant with a handgun, and did not see him chasing a vehicle on the street. On cross-examination, Edwin stated that the alley was about 20 feet from Cardenas' apartment, that he did not run or scream when defendant was arrested, and that he never saw a weapon in the alley.

¶ 17 Defendant acknowledged his prior convictions for possession of cannabis with intent to deliver and burglary, then testified to the events of August 16, 2012. He repeated the same sequence related by Edwin and Olga leading up to the family's arrival in Chicago, but added that there were also five Chihuahuas in the minivan. Upon arrival, he got out of the minivan with the Mickey Mouse bag and went into the alley on 24th and Troy Streets to relieve himself while Edwin, who was holding a black purse, stood at the mouth of the alley. A police vehicle then

pulled into the alley, the passenger stepped out, and told him to place his hands on the garbage can.

¶ 18 The officers searched defendant and the bags, and placed him in handcuffs after they found the handgun in the black case inside the Mickey Mouse bag. Defendant testified that he knew his wife owned the weapon, but he did not know that she brought it to Chicago. The officers threw the bag at Edwin, and placed defendant in the police vehicle. Defendant watched as Olga spoke to the officers, but he did not see Cardenas speak to them. He further testified that he never had a weapon in his hand and never chased a vehicle, and in any event, he was left-handed, so he would not have been holding a firearm in his right hand.

¶ 19 Defendant further testified that he was taken to the police station where he waived his *Miranda* rights. He informed the officers that the handgun belonged to his wife, and denied telling them that he was in a gang or that he was chasing members of the Latin Kings. He testified that he had been a member of the Latin Kings, but that he left the gang in 1989 or 1990, and was not a member of any gang on the date of the incident.

¶ 20 On cross-examination, defendant reiterated that there were five Chihuahuas in the vehicle, and acknowledged that his tattoo of five dots was a symbol of the Latin Kings. He also acknowledged that he did not have a FOID card.

¶ 21 Following closing arguments, the jury found defendant guilty of armed habitual criminal, but not guilty of unlawful possession of a firearm by a street gang member. After considering the relevant factors in mitigation and aggravation, the court sentenced defendant to a term of 10 years' imprisonment.

¶ 22 In this appeal from that judgment, defendant contends that the State failed to prove him guilty beyond a reasonable doubt where the officers' testimony was improbable and contradicted by the consistent testimony of the defense witnesses. He maintains that no reasonable trier of fact could believe that the officers would not activate their emergency lights when they observed him with a handgun chasing after a vehicle, that there is no further evidence of the criminal damage call to which the officers were responding, and that he would not have been carrying the weapon in his right hand, as the officers testified, because he is left-handed.

¶ 23 Where defendant challenges the sufficiency of the evidence to sustain his conviction, the reviewing court must consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 269 (2006). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution, and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 24 To sustain defendant's conviction for armed habitual criminal in this case, the State was required to prove that defendant possessed a firearm after having been convicted of two qualifying felonies. 720 ILCS 5/24-1.7 (West 2012). Defendant does not contest the proof of his

prior felony convictions, but contends that the State failed to prove that he possessed a firearm beyond a reasonable doubt.

¶ 25 Viewed in a light most favorable to the prosecution, the evidence in this case establishes that the two officers were responding to a call of criminal damage when they observed defendant chasing a vehicle with a weapon in his hand. Without activating the emergency equipment on their vehicle, they followed defendant into an alley and observed him throw the handgun which was recovered by one of the officers and found to be loaded. At the police station, defendant informed the officers he was chasing some Latin Kings who had broken the windows in his vehicle and that he was going to shoot them. This evidence, and the reasonable inferences therefrom, was sufficient to allow a reasonable trier of fact to find that defendant was in possession of a firearm, and, with the evidence of his previous convictions, proved guilty of armed habitual criminal beyond a reasonable doubt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 26 Defendant contends, however, that the officers' testimony was incredible because, although each officer testified that he observed defendant while responding to a call of criminal damage, there was no further evidence regarding the circumstances of the call. Defendant further argues that it is unlikely that the officers would not have activated their emergency equipment upon observing him with a weapon, and that the trier of fact should have accepted the plausible version of the incident as described by the defense witnesses, which contradicted the officers' testimony.

¶ 27 We initially observe that defendant's claim regarding missing evidence represents a misunderstanding of the standard of review, which focuses on the sufficiency of the evidence actually presented by the State. *People v. Howard*, 376 Ill. App. 3d 322, 330 (2007). Once the

State has met its burden, the reviewing court need not consider whether more evidence was presented. *Id*. Here, as set forth above, the evidence presented, when viewed in a light most favorable to the State, was sufficient to prove defendant's guilt of the charged offense.

¶ 28 Insofar as his assertion regarding missing evidence relates to the credibility of the officers, we note that this matter is within the province of the trier of fact (*Sutherland*, 223 Ill. 2d at 242), and we will not substitute our judgment for that of the jury unless the proof is so unsatisfactory that a reasonable doubt of guilt appears (*People v. Berland*, 74 Ill. 2d 286, 305-06 (1978)). We do not find this to be such a case.

¶ 29 The record demonstrates that the two officers testified consistently to the series of events which began with a call of criminal damage to property and observation of defendant on the street chasing a vehicle with his handgun. They also testified consistently as to defendant's flight after he became aware of their presence, his disposal of the weapon in the alley where he was arrested and the firearm was recovered, and to defendant's incriminating statements at the police station.

¶ 30 Defendant contends, nevertheless, that the officers' testimony regarding the call of criminal damage is unbelievable because the police report reflects the call was for Cardenas' address, and neither defendant, nor Cardenas, made any reference to criminal damage, and, further, that no rational trier of fact could believe the officers' testimony that he was carrying the handgun in his right hand, because he is left-handed. There is nothing in the record to suggest that defendant could not, or otherwise would not, carry the firearm in his right hand, nor is there support for his contention that the radio call never occurred. More importantly, these peripheral matters do not refute the officers' testimony regarding defendant's possession of a handgun,

which was found credible by the jury. *Berland*, 74 Ill. 2d at 306; *People v. Reed*, 80 Ill. App. 3d 771, 780 (1980).

¶ 31 In essence, defendant contends that the jury should have accepted the version of the incident as presented by the defense witnesses instead of that presented by the officers. In reviewing the evidence, however, it is not our prerogative to substitute our judgment for that of the trier of fact (*Berland*, 74 Ill. 2d at 306), and we will not disturb the credibility determination made by the jury unless the testimony is so improbable or unbelievable that a rational trier of fact could not find the essential elements of the offense beyond a reasonable doubt (*Beauchamp*, 241 Ill. 2d at 8).

¶ 32 In making its credibility determination, the jury may properly consider defendant's relationship with the defense witnesses, and need not believe their testimony. *Reed*, 80 Ill. App. 3d at 781. The verdict entered in this case establishes that the jury accepted the consistent testimony of the officers regarding defendant's possession of the weapon, and rejected the defense witnesses' version of the events. We find no basis for disturbing that determination where the strength of the officer's testimony was not diminished by the alibi witnesses (*Berland*, 74 Ill. 2d at 307), and, accordingly, we affirm the conviction entered.

¶ 33 Defendant next contends that the order assessing fines, fees, and costs contains several miscalculations and errors and should be corrected. Defendant first contends, the State concedes, and we agree, that the total costs assessed were miscalculated as $844, and should be corrected to $704. Defendant also contends, the State concedes, and we agree that defendant is entitled to pre-sentence incarceration credit to offset charges for the Children's Advocacy Center, Mental Health Court, the Youth Diversion/peer court, the drug court, and the State Police Operations fee.

People v. Jones, 223 Ill. 2d 569, 581-82 (2006). Defendant further contends, the State concedes, and we agree that the Court System fee and the Trauma Fund fine for unlawful use of a weapon should be vacated because defendant was not convicted of the triggering offenses. 55 ILCS 5/5-1101(C) (West 2012); 730 ILCS 5/5-9-1.10 (West 2012).

¶ 34 Defendant next contends that the number of days served in custody should be corrected from 209 days as reflected on the fines and fees order to 299 days. The State agrees that the number of days served in custody was incorrectly entered on the fines and fees order, but argues that defendant is entitled to 298 days because he is not entitled to credit for the day on which he was sentenced and remanded to the IDOC, citing *People v. Walton*, 376 Ill. App. 3d 149, 161 (2007). We agree with the State, and order that defendant be credited with 298 days of pre-sentence custody credit.

¶ 35 Defendant also contends that the clerk improperly imposed a "per day of trial fee" of $50 per day for a total fee of $200. He maintains that, under the governing statute, the court must enter an order specifying the number of days for which a per diem shall be allowed. Since the fee here was assessed without such an order from the court, he claims that it should be vacated. In the alternative, defendant argues that since his trial lasted only two days, the total fee should be corrected to $100.

¶ 36 The State responds that there is an order in the record titled "Order Assessing Fines, Fees and Costs," which includes the imposition of the "per day of trial" fee. Because defendant's trial began on the first day of *voir dire* on February 13, 2013, and concluded on February 15, 2013, including defendant's sentencing hearing on June 10, 2013, the State maintains that the trial lasted a total of four days, accounting for the fee entered.

¶ 37 Defendant replies that the State's reliance on the order in the record is misplaced because the order was not signed by the court. He maintains that without specific instructions from the trial court, the clerk cannot, on its own, impose this assessment. In support of this contention, defendant cites *People v. Warren*, 2014 IL App (4th) 120721. In that case, defendant argued that the trial court improperly delegated the imposition of fines to the county clerk, and the record contained no docket entry, order, or otherwise indicated that the court approved of the assessments or that defendant or his counsel were even aware of them. *Warren*, 2014 IL App (4th) 120721, ¶ 81. The reviewing court noted that only the court may impose a fine, and that any fine assessed by the clerk must be vacated. *Id.* ¶¶ 82, 85. This case is readily distinguishable from the case at bar, which involves the imposition of a fee.

¶ 38 In *People v. Graves*, 235 Ill. 2d 244, 250 (2009), the supreme court defined a fee as "a charge that seeks to recoup expenses incurred by the state, or to compensate the state for some expenditure incurred in prosecuting the defendant," whereas a fine is "punitive in nature." The statute at issue in this case provides that the State's Attorney shall be entitled to $50 for each day actually employed in the trial, and "the court before whom the case is tried shall make an order specifying the number of days for which a per diem shall be allowed." 55 ILCS 5/4-2002.1(a) (West 2012). The statutory language shows that the assessment is intended to compensate the State for the cost of prosecuting defendant, and, as such, is a fee which may be properly assessed by the clerk. In addition, the procedural command in the statute that "the court *** shall make an order" is analogous to those found to be directory, rather than mandatory (see *e.g.*, *People v. Robinson*, 217 Ill. 2d 43, 57 (2005) (10-day service provision following summary dismissal of post-conviction petition); *People v. Davis*, 93 Ill. 2d 155, 159 (1982) (statutory requirement that

trial court state reasons for sentence imposed), and the lack of specific instructions by the court regarding the fee does not warrant the vacation of it.

¶ 39 As for the calculation of the number of days to which this fee applies, defendant argues that trial does not begin until the jury is sworn in, which occurred on February 14, 2013, and that the State has cited no authority finding that the sentencing date constitutes a day of trial for purposes of the statute. To the contrary, this court has held on numerous occasions that trial begins at *voir dire*. See, *e.g.*, *Jordan v. Savage*, 88 Ill. App. 2d 251, 257 (1967); *People v. Wilhite*, 2 Ill. App. 2d 29, 33 (1954). Defendant argues, nevertheless, that when trial begins depends on the issue before the court. However, his citations to cases considering double jeopardy are unavailing as this court has recognized that "double-jeopardy concerns dictate a different mark for the start of trial than in the general case." *People v. Vest*, 397 Ill. App. 3d 289, 294 (2009). Here, *voir dire* began on February 13, 2013, the trial ended on February 15, 2013, and defendant was sentenced on June 10, 2013, where the State's Attorney was present and "actually employed." Therefore, his trial lasted for three days, and included one day for sentencing, for a total per diem of four days, and we find that the "per day of trial" assessment totaling $200 was correctly calculated.

¶ 40 Finally, defendant contends that the court should remand his cause with instructions to correct the mittimus in accordance with this order. However, remand is unnecessary where this court has the authority to order the clerk of the circuit court to make necessary corrections to the mittimus. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 41 Accordingly, we order the clerk of the circuit court of Cook County to modify defendant's fines and fees order to reflect that defendant served 298 days in pre-sentence

custody, correct the mittimus to reflect the vacation of the above-referenced assessments, with a final total of $534; and we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 42 Affirmed, fines and fees order modified.