

No. 1-13-2674

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. 11 CR 1096
)	
MARK TURNER,)	Honorable
)	Arthur F. Hill, Jr. ,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

O R D E R

¶ 1 *Held:* The State presented sufficient evidence to prove defendant robbed a victim with a firearm to support a conviction for armed robbery with a firearm when the trial court found the victim's testimony of the presence of a gun to be unequivocal and credible despite defendant's contention that the victim could only see the alleged gun for three to four seconds and that no gun was ever recovered or entered into evidence.

¶ 2 After a bench trial, defendant Mark Turner was convicted of armed robbery with a firearm and sentenced to 21 years in prison. On appeal, defendant contends that: (1) the State did not prove beyond a reasonable doubt that he was armed with a firearm to support his conviction

for armed robbery with a firearm; and (2) his fines and fees order should be corrected to reflect a credit toward his \$15 State Police Operations Fund fine and \$50 Court System fine, and a reduction in his \$25 Violent Crime Victims Assistance Fund fine.

¶ 3 At trial, Chiquita Battle testified that at approximately 6 a.m. on November 24, 2010, she was in her apartment located on South Maryland Avenue in Chicago, getting ready to attend a meeting. She left her apartment on the second floor to pick up her glasses that she left at her mother's apartment, which was on the same floor in the same building.

¶ 4 As Battle stepped out of her apartment, she noticed defendant in the doorway of the building's main entrance on the first floor with his back facing her. Defendant was wearing jeans and a jacket with a hood, with the hood over his head. She was able to see defendant through the stairs that led from the second floor to the first floor. Battle grabbed her glasses from her mother's apartment and then returned to her apartment to finish getting ready. On her way back, she did not see defendant. Battle put her coat on, grabbed her purse and then left her apartment. She proceeded down the stairs toward the main entrance, which was well lit and as "bright as [the courtroom]."

¶ 5 As she reached the main entrance, defendant appeared from behind, touched her right shoulder and forcefully turned Battle around. With Battle facing defendant, he placed what Battle believed to be a gun on her right temple, pressed up against her skin. She could not identify what type of gun it was, but noted that "it was silver and had a little black handle on it." While defendant was only a couple inches from Battle, he gestured with his index finger to his lips and told her to "ssshhh." Defendant demanded that Battle give him the purse and then grabbed it from her shoulder.

¶ 6 Defendant quickly looked through a window near the main entrance to see if anyone was around, then ran out the building, crossed the street and began to walk east. Battle watched defendant's movements from that same window. Then, when she felt safe, she also exited the building. After leaving the building, she saw defendant enter a building on the corner of South Drexel Avenue and East 83rd Street. Battle called the police but the police were not able to apprehend defendant at that time. On cross-examination, Battle stated that from the time she saw defendant with the gun until the time he ran off, "a little *** more" than three to four seconds had elapsed. However, she admitted that in a hearing on January 10, 2011, she stated only "three to four second[s]" had elapsed.

¶ 7 A few weeks later, on December 12, 2010, Battle viewed a photo array of possible suspects and positively identified defendant as the man who robbed her. Later, on December 27, 2010, Battle viewed a line-up with possible suspects and again positively identified defendant as the man who robbed her.

¶ 8 After the State rested, defendant made a motion for a directed finding, which was denied. Defendant rested without presenting any witnesses. In finding defendant guilty of armed robbery with a firearm, the trial court stated "Ms. Battle testified clearly and convincingly." The court recounted Battle's description of the gun and that defendant placed the gun to Battle's temple. The court accepted the fact that the gun was not recovered and questioned whether or not it "[c]ould have been a BB gun" or a "replica" of a gun. Ultimately, the court held that there was sufficient evidence to prove that "defendant had *** a firearm" and was guilty of armed robbery with a firearm. Defendant was subsequently sentenced to 21 years in prison.

¶ 9 Defendant first contends that the State failed to prove beyond a reasonable doubt that he had a firearm when he robbed Battle because she only had an opportunity to view the gun for four seconds with "only a peripheral view" and there was no physical evidence indicating defendant used a firearm. Thus, defendant argues his conviction should be reduced from armed robbery to aggravated robbery. The State responds, arguing that it did present sufficient evidence to prove beyond a reasonable doubt that defendant used a firearm to support his conviction for armed robbery with a firearm because of Battle's unequivocal testimony.

¶ 10 Due process mandates that a defendant may not be convicted of a crime unless each element constituting that crime is proven beyond a reasonable doubt, (*People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) quoting *In re Winship*, 397 U.S. 358, 364 (1970)), and that burden is on the State (*People v. Diaz*, 377 Ill. App. 3d 339, 345 (2007)). When assessing the sufficiency of the evidence in a criminal case, the reviewing court must view the evidence in the light most favorable to the prosecution and then decide if any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056,

¶ 31. All reasonable inferences must be allowed in favor of the prosecution. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). We will not overturn a conviction unless the evidence is "so improbable or unsatisfactory that it creates" reasonable doubt of guilt. *Id.* Finally, while we must carefully examine the evidence before us, we must give the proper deference to the trial court who saw the witnesses testify (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)) because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 11 In order to convict an individual of armed robbery with a firearm, the State must prove: (1) the defendant committed a robbery under section 18-1 of the Criminal Code of 1961 ("Code") and (2) he did so while carrying "on or about his *** person or is otherwise armed with a firearm." 720 ILCS 5/18-2(a)(2) (West 2010). A firearm for purposes of section 18-2(a)(2) of the Code has the meaning ascribed to it by section 1.1 of the Firearm Owners Identification Card Act ("FOID Act"). 720 ILCS 5/2-7.5 (West 2010)). The FOID Act states a "firearm" is "any device, *** which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas" but excluding items such as a "paint ball gun," a "B-B gun" or a "pneumatic gun." 430 ILCS 65/1.1 (West 2010).

¶ 12 In determining whether an individual committed an armed robbery with a firearm, Illinois courts look at the victim's in-court testimony and the circumstances under which she was able to see the firearm. See *People v. Washington*, 2012 IL 107993, ¶ 36; *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 51, 52. The testimony of a single witness unequivocally stating that the defendant possessed a gun during the commission of a robbery can sustain a conviction for armed robbery. See *People v. Fields*, 2014 IL App (1st) 110311, ¶ 36 ("[U]nequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed during a robbery."); *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007) (stating that a victim testifying that the defendant held "a chrome-plated, 9-millimeter handgun" during a robbery "alone was sufficient to establish that defendant was armed during the robbery"). Illinois courts have repeatedly held that the recovery of the alleged firearm used during the commission of the crime or its introduction into evidence is not a prerequisite for an armed robbery conviction. See *Washington*, 2012 IL 107993, ¶¶ 24, 37 (affirming trial court's finding that

defendant was guilty under pre-amended armed robbery statute despite "no weapon [being] recovered or introduced into evidence"). In fact, this court has held that a conviction for armed robbery may be sustained even if the weapon is not accurately described by the victim. *Lee*, 376 Ill. App. 3d at 956.

¶ 13 Here, defendant contends that the State did not prove beyond a reasonable doubt that he committed the robbery with a firearm to support his conviction for armed robbery with a firearm.

¶ 14 Defendant first argues that the sole testimony of Battle who stated the crime occurred in three to four seconds was insufficient proof that defendant had a firearm. However, Illinois courts have stated that there is no rigid formula of evidence required to sustain a conviction for armed robbery. See *Washington*, 2012 IL 107993, ¶ 36; *Malone*, 2012 IL App (1st) 110517, ¶¶ 51, 52. The factual judgment of whether Battle could have seen the firearm and positively identified it as such during the commission of the robbery is a determination best left for the trier of fact who observed the victim testify about the events in question. See *Smith*, 185 Ill. 2d at 541. The trial court accepted Battle's recognition and identification of a firearm being used during the commission of the robbery, and we will defer to its factual finding.

¶ 15 Defendant also argues that based on the facts elicited at trial, Battle could only see the gun "with peripheral vision," which is an observation of poor reliability. This argument is without merit. Defendant again is asking us to make a factual determination when the issue of what Battle could or could not have seen with regard to her peripheral vision is best resolved by the trial court, which believed she could clearly see the firearm.

¶ 16 Defendant also argues that no gun was recovered nor was any photograph of the gun entered into evidence. This fact is not fatal to the State's case as there need not be any

corroborating physical evidence if the trial court accepts Battle's testimony to be credible and positive, which it did. See *id.* (stating that the testimony of a sole credible witness can be sufficient to convict a defendant). As well, as we have mentioned, an armed robbery conviction is not contingent on physical evidence being presented at trial. See *Washington*, 2012 IL 107993, ¶¶ 24, 37. Battle's unequivocal testimony, even as the sole evidence at trial that defendant possessed a gun during the commission of the robbery, is sufficient to sustain a conviction for armed robbery with a firearm. See *Fields*, 2014 IL App (1st) 110311, ¶ 36.

¶ 17 Finally, defendant argues that *Washington* and *Malone* should be disregarded by this court. It argues *Washington* involved an armed robbery charge under the pre-2000 amended version of the armed robbery statute, where a defendant had to be armed with a dangerous weapon. See 720 ILCS 5/18-2(a) (West 1998). In regard to *Malone*, defendant argues that the evidence was stronger in *Malone* than the case at bar and also that it was "incorrectly decided." While the armed robbery statute at issue was different in *Washington*, we continue to believe the reasoning and general principles elucidated in *Washington* hold true. Furthermore, we respectfully decline defendant's request to reconsider the holding in *Malone*, and we continue to adhere to its reasoning despite different factual nuances.

¶ 18 Turning to the factual distinctions defendant identifies, we note that while the evidence in *Malone* included a surveillance video depicting the alleged gun, (*Malone*, 2012 IL App (1st) 110517, ¶ 9), the lack of such is not fatal to the instant case. See *Washington*, 2012 IL 107993, ¶ 36 (stating a victim's testimony and the circumstances in which she viewed the gun can lead to a reasonable inference that defendant possessed a real gun). In fact, we find *Malone* to be instructive in analyzing the facts of the subject appeal. The key evidence in *Malone* was that the

cashier heard the gun make a heavy sound when it hit the counter, described the gun as "black or black and silver" and there was a surveillance video showing the gun. *Malone*, 2012 IL App (1st) 110517, ¶¶ 4, 9. Additionally, there was no indication in the evidence that the gun was anything but a real gun. *Id.* ¶ 52.

¶ 19 While in this case there was no video surveillance here, we do have a strong base of evidence. Defendant pressed the gun up against Battle's temple. She also stated the area where defendant pointed the gun at her was well lit and described the gun as "silver [with] a little black handle on it." Furthermore, there was no evidence presented that the gun was anything but a real gun. Finally, the trial court accepted the unimpeached and unequivocal testimony of Battle as credible and convincing, a determination best reserved for the trial court. See *Smith*, 185 Ill. 2d at 541; *Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 20 Thus, when viewing the evidence in the light most favorable to the prosecution and making all reasonable inferences therefrom in its favor, we cannot say that no rational trier of fact could have found beyond a reasonable doubt that defendant was armed with a gun that met the statutory definition of a firearm.

¶ 21 Defendant next contends that his fines and fees order should be corrected to reflect a credit toward his \$15 State Police Operations Fund fine and \$50 Court System fine based on his presentence incarceration, as well as a reduction in his Violent Crime Victims Assistance Fund fine. Defendant's fines and fees originally totaled \$499.

¶ 22 When a sentence does not conform to the statutory requirements, that sentence is void and may be challenged in any court or at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10. We

review the trial court's imposition of fines and fees *de novo* as it is an issue of statutory construction. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 23 Defendant first argues, the State concedes, and we agree, that his \$15 State Police Operations Fund charge (705 ILCS 105/27.3a (West 2010)) is a fine. See *People v. Graves*, 235 Ill. 2d 244, 250 (2009); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. As such, defendant should receive credit toward his \$15 State Police Operations Fund fine based on his presentence incarceration. See 725 ILCS 5/110-14 (West 2010).

¶ 24 Defendant next argues that his \$50 Court System charge (55 ILCS 5/5-1101(c) (West 2010)) is also a fine for which he should receive credit. The State responds that the Court System charge is actually a fee and the prior Illinois cases holding that the Court System charge is a fine were "wrongly decided and should not be followed." See, *e.g.*, *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 31; *People v. Smith*, 2013 IL App (2d) 120691, ¶ 17. Our supreme court held that the monetary charges in section 5–1101 of the Counties Code (55 ILCS 5/5-1101 (West 2010)), "set[] forth 'fines and penalties,' although they are labeled 'fees to finance court system.'" *Graves*, 235 Ill. 2d at 253. While *Graves* dealt with Mental Health Court and Youth Diversion/Peer Court charges under section 5–1101 of the Counties Code, (*id.* at 251), both the second district and third district appellate courts have held *Graves'* logic applies to the Court System charge and construed it as a fine. See *Ackerman*, 2014 IL App (3d) 120585, ¶ 31; *Smith*, 2013 IL App (2d) 120691, ¶ 17. We find no reason to depart from our reliance on *Graves* and adopt a different result than in *Ackerman* and *Smith*. Therefore, we hold the \$50 Court System charge imposed by section 5–1101(c) of the Counties Code is a fine and defendant should receive credit from his presentence incarceration. See 725 ILCS 5/110-14 (West 2010).

¶ 25 Finally, defendant argues, the State concedes, and we agree, that his \$25 Violent Crime Victims Assistance Fund fine (725 ILCS 240/10 (West 2010)) should be reduced to \$12 based on section 10(b) of the Violent Crime Victims Assistance Act, which authorizes "an additional penalty of \$4 for each \$40, or fraction thereof, of fine imposed." 725 ILCS 240/10(b) (West 2010). Defendant was fined \$25 pursuant to section 10(c) of the Violent Crime Victims Assistance Act, which authorizes a flat \$25 fine for violent crimes when no other fine is imposed. 725 ILCS 240/10(c) (West 2010). However, the trial court imposed other fines on defendant for a total of \$95: a \$30 Children's Advocacy fine, a \$15 State Police Operations Fund fine and a \$50 Court System fine. As such, his Violent Crime Victims Assistance Fund fine should be reduced to \$12.

¶ 26 Pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we order the clerk of the circuit court to modify defendant's fines and fees order to credit him \$15 toward his State Police Operations Fund fine; credit him \$50 toward his Court System fine; and reduce his Violent Crime Victims Assistance Fund fine to \$12 for a total due of \$421. For the reasons stated above, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 27 Affirmed; fines and fees order corrected.