

No. 1-13-3186

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 17868
)	
ROBERT MOTON,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant's conviction of armed robbery is affirmed where the State proved beyond a reasonable doubt that defendant was armed with a firearm, and where the automatic transfer statute does not violate the eighth amendment, proportionate penalties clause or procedural due process requirements. Mittimus is modified.

¶ 2 Defendant was charged with five counts of armed robbery while armed with a firearm and five counts of aggravated unlawful restraint while using a deadly weapon. Following a bench trial, defendant Robert Moton was found guilty on all five counts of armed robbery. The

convictions were merged into one count of armed robbery, and the trial court sentenced defendant to 21 years' imprisonment, which included a 15-year enhancement for use of a firearm. On appeal, defendant contends: (1) that his conviction of armed robbery must be reduced to simple robbery because the State failed to prove beyond a reasonable doubt that he was armed with a firearm; (2) that section 5-130(1) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-130(1) (West 2010)), *i.e.*, the "automatic transfer" statute, violates the eighth amendment of the United States Constitution, the proportionate penalties clause of the Illinois Constitution, and the due process clauses of both the United States and Illinois Constitutions; and (3) that his mittimus must be corrected to reflect his conviction of only armed robbery. For the following reasons, we affirm the judgment and order the mittimus corrected.

¶ 3

BACKGROUND

¶ 4 On the evening of October 8, 2011, five young men entered the Hair Gallery barbershop located at 1439 West Marquette Road, in Chicago and proceeded to rob the individuals in the shop. One of the five offenders was defendant, who was 16 years of age at the time of the robbery. Following the robbery, the offenders fled from the scene and, at one point, were chased on foot by the police. The five victims of the robbery later identified defendant as the person who held them at gunpoint and ordered his accomplices to take various items from the victims—including three cell phones, keys, cash, and a wallet.

¶ 5 During the trial, the State presented testimony from the five victims of the robbery. Sedric Ferguson, Raphael Abraham, Darcell Cannon, Rayvian Johnson, and Shawn Watts all gave similar accounts about the incident. They testified that five males, including defendant, entered the barbershop and that some of the males had concealed their faces with masks.

According to the witnesses, defendant did not wear a mask nor did he conceal his face in any other manner.

¶ 6 Each of these eyewitnesses recalled that defendant held a gun during the robbery. Ferguson testified that defendant pulled the gun out of his sweater, cocked it, pointed it at Abraham, and told everyone to get down. Abraham testified that defendant cocked his gun and pointed it at everyone; the witness also testified that defendant's gun resembled the kind of weapons that he had previously seen being handled and discharged. Cannon testified that defendant pointed his gun, cocked it, and told everyone to get down; he also noted that when defendant cocked his gun, it made a sound "[l]ike a much ccchhh, ccchhh." Johnson similarly testified that defendant cocked his gun and waved it around at the victims while instructing them to sit down and to remove all items from their pockets. Johnson also stated that the gun made a sound like "Clack, clack, clack" as it was being cocked. Watts testified that defendant cocked his gun and that it made a "[c]licking sound." He also testified that defendant said "give me everything."

¶ 7 Chicago police officer Michael Gentile testified that, about 9 p.m. on October 8, 2011, he and his partner were on routine patrol in an unmarked vehicle. As they were driving eastbound on 67th Street, Officer Gentile saw several black males exiting the Hair Gallery barbershop; some of them had their faces covered and several of them were carrying items. He suspected a crime and gave chase on foot. Officer Gentile testified that during the chase, he heard items "hitting the ground" and saw a pair of pants being thrown as the suspects fled down a street and ran through a gangway adjacent to the barbershop. At one point, defendant, who was wearing a gray sweatshirt, broke off from the group with another individual and ran westbound through an open lot. Officer Gentile relayed a description of defendant and the other individual over the

police radio and continued to chase the other three suspects. He eventually apprehended one of them, Deshawn Sumlin, at 6757 South Loomis Boulevard. As he was taking Sumlin to the squad car, Sumlin discarded a cell phone that had been taken during the robbery and tried to kick it. Officer Gentile later returned to the barbershop to interview the victims.

¶ 8 On October 19, 2011, Officer Gentile received an investigative alert for defendant. He proceeded to the residence located at 5626 South Justine Street, and spoke with defendant's mother. Defendant's mother called defendant to the door, at which time Officer Gentile placed him under arrest and took him into custody. On cross-examination, Officer Gentile stated that he did not recall if any of the witnesses told him that defendant had cocked a weapon, and he did not make any such notation in his police report. He explained that even if the victims had told him that they saw defendant cock a weapon, he would "[n]ot necessarily" have included it in his report. He also admitted that he never recovered a gun from defendant.

¶ 9 The State also introduced footage from video surveillance that showed defendant and the other four offenders entering the barbershop. The footage showed a male in a gray sweatshirt pointing a gun inside the barbershop while the other men took items from the victims.

¶ 10 The parties stipulated that, if called to testify, Detective Doweling (phonetic) would state that he had issued an investigative alert for defendant after interviewing Sumlin. The State stipulated that the police reports contained no reference to the gray hoodie purportedly worn by defendant at the time of the incident. Following the close of the State's case in chief, the defense rested without presenting any evidence.

¶ 11 The trial court found defendant guilty of armed robbery with a firearm. Based upon its review of the surveillance video footage and the witnesses' identifications, the court determined that defendant was clearly the perpetrator with the gun in the barbershop on the night of the

robbery. It also found that the video established that defendant was armed with a firearm during the robbery, stating:

"I was able to watch in the manner in which he moved and most importantly I was able to watch the way he manipulated the object that was in his hand.

And the way that he gesticulated with that object during the course of the period of time that he was in the barber shop.

And it led me to the inescapable conclusion that what I saw that young man manipulating was a firearm in every since [*sic*] of the word.

The way the word was defined in the statute here in the State of Illinois."

The court did not render any findings as to defendant's aggravated unlawful restraint charges.

¶ 12 Defendant filed a motion for a new trial, arguing that the State failed to prove that he was armed with a firearm. On August 13, 2013, the trial court denied his motion. In defending its finding, the court noted that it had relied on its:

"own observations of the video, and the manner in which [defendant] carried [the] gun, the way that he gesticulated the gun which to me led by way of his body position the notion that the object was of some heft and weight, and its actual appearance which to me clearly indicated beyond a reasonable doubt that it was a firearm when considered in light of all the testimony that

surrounded it, the noise, the way it was manipulated, [and] the testimony of the witnesses."

At the sentencing hearing, the trial court imposed a sentence of 21 years' imprisonment for armed robbery, which included a 15-year enhancement for defendant's use of a firearm. This appeal followed.

¶ 13

ANALYSIS

¶ 14 On appeal, defendant contends: (1) that his conviction must be reduced to simple robbery because the State failed to prove that he was armed with a firearm beyond a reasonable doubt; (2) that section 5-130(1) of the Act, *i.e.*, the "automatic transfer" statute, is unconstitutional; and (3) that his mittimus must be corrected to reflect his conviction of only armed robbery. We address each of these arguments in turn.

¶ 15

A. Sufficiency of the Evidence

¶ 16 Defendant argues that the State failed to prove beyond a reasonable doubt that he committed armed robbery. He does not dispute his identity as the offender holding a gun at the victims in the barbershop on the night of the crime. Instead, he argues that the State did not prove that the gun in his possession was a "firearm" under section 1.1 of the Firearm Owners Identification Card Act ("FOID Act"), 430 ILCS 65/1.1 (West 2011). Defendant contends that because the gun was never recovered or discharged, a reasonable doubt exists as to the possibility that the gun was a BB gun or a toy gun, neither of which qualifies as a "firearm." For this reason, defendant argues, his conviction must be reduced to simple robbery.

¶ 17 The State maintains that defendant's possession of a firearm was established beyond a reasonable doubt through the circumstantial evidence presented at trial. Citing the eyewitness observations regarding the gun that defendant held during the robbery and defendant's conduct,

as well as the video surveillance footage of the incident, the State argues that there was sufficient evidence from which the trier of fact could conclude that defendant was armed with a firearm.

¶ 18 When reviewing the sufficiency of the evidence, we must determine whether, after viewing 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. Campbell*, 146 Ill. 2d 363, 374 (1992). It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve conflicts in the evidence and to draw reasonable inferences therefrom. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). We will not reverse a conviction unless the evidence is so "unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Campbell*, 146 Ill. 2d at 375.

¶ 19 1. Definition of a "firearm"

¶ 20 A person commits armed robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force and, at the time, carries on or about his person or is otherwise armed with a firearm. 720 ILCS 5/18-1(a), 18-2(a)(2) (West 2010). For purposes of determining what constitutes a "firearm" under the armed robbery statute, we look to the meaning ascribed under the FOID Act. 720 ILCS 5/2-7.5 (West 2010). Section 1.1 of the FOID Act defines a "firearm" as "any device *** which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2010). Excluded from the definition of "firearm" are the following:

"(1) any pneumatic gun, spring gun, paint ball gun or B-B gun which either expels a single globular projectile not exceeding .18 inch in diameter and which has a maximum muzzle velocity of less

than 700 feet per second or breakable paint balls containing washable marking colors;

(2) any device used exclusively for signalling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission;

(3) any devices used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition; and

(4) an antique firearm (other than a machine-gun) which, although designed as a weapon, the Department of State Police finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon." 430 ILCS 65/1.1 (West 2010).

¶ 21 We have previously held that the State may prove the firearm element of armed robbery through circumstantial evidence, noting that the "unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant was armed during a robbery." *People v. Wright*, 2015 IL App (1st) 123496, ¶ 74; see also *People v. Pollock*, 202 Ill. 2d 189, 217 (2002) (holding that a conviction may be based solely on circumstantial evidence provided that the evidence establishes the elements of the crime beyond a reasonable doubt). The question before us is whether there was enough evidence to prove that defendant was carrying a firearm beyond a reasonable doubt.

¶ 22 2. Evidence of a firearm

¶ 23 Here, all five victims unequivocally testified that defendant was armed with a gun. Significantly, they also described defendant's behavior in such a manner that the trier of fact

could have reasonably concluded that defendant was armed with a firearm. They testified that defendant came into the barbershop and cocked his weapon, which caused it to make a clicking sound, suggesting that the sound occurred because a bullet was loaded into the chamber. Defendant then pointed his gun at the victims and told them to "get down," implying that he was confident that his weapon was capable of being used as a meaningful threat to the victims, and therefore, was a firearm, not simply a BB gun or a toy gun. Abraham, who had some familiarity with guns, testified that the gun held by defendant resembled guns that he had previously seen. Finally, we have reviewed the video surveillance footage of the robbery that was admitted at trial. The video footage shows that on October 8, 2011, at approximately 9:22 p.m. (21:21:57 on the recording), a group of five males entered the area of the barbershop and started physically confronting the individuals who were already in the shop. According to the video footage, the intruders were led by a black male in a grey hooded sweatshirt, whose face was not covered or concealed in any way and who was carrying a dark object that appears, in all respects, to be a handgun. Defendant does not dispute that he was the male in the grey hooded sweatshirt depicted in the surveillance video. The recording shows defendant holding, waving and pointing the object at the victims in a manner that strongly suggests that the object was a gun and that he was using it as a weapon to threaten the victims as his accomplices took items from the victims and the premises. Coupled with the trial testimony from witnesses who recalled defendant cocking the gun, we find that the trier of fact's conclusion that defendant was holding a firearm is not "so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Campbell*, 146 Ill. 2d at 375. Accordingly we are persuaded, after viewing the evidence in the light most favorable to the prosecution, that any rational trier of fact could have found the

essential elements necessary to prove beyond a reasonable doubt that defendant committed armed robbery while armed with a firearm.

¶ 24 Defendant also takes issue with the fact that no gun was recovered in this case, and his conviction rests on the circumstantial evidence of a firearm. He claims that the State did not prove he had a firearm during the robbery because the definition of a firearm under section 1.1 of the FOID Act "is technical and requires evidence of both the design (to expel a projectile) and the manner in which the device achieves its design objective (by an explosion, expansion of gas, or escape of gas)." To the contrary, this court has held that proof that a defendant possessed a firearm, as defined under the FOID Act, need not be established "by direct or physical evidence" because the "unequivocal 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. Fields*, 2014 IL App (1st) 110311, ¶ 36 (citing *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007) and *People v. Thomas*, 189 Ill. App. 3d 365, 371 (1989)). Based on our own precedent, we reject defendant's argument that the State is required to establish evidence of this "technical" characteristic of a firearm, *i.e.*, proof of the gun's technical firing capability, in order to satisfy its burden of proving that the weapon defendant carried into the barbershop was a firearm.

¶ 25 3. Exclusions in the firearm definition

¶ 26 Defendant next argues that BB guns, which are expressly excluded from the definition of a firearm under section 1.1, can be made to look like the gun he used during the robbery in question. He has included a number of photographs of BB guns in his brief and asks us to take judicial notice of their appearance. These photographs, which are taken from the websites "wikihow" and Amazon, were not presented in the court below. Our consideration of them now would therefore be improper. It is not our function to retry defendant on appeal. *People v. Hall*,

194 Ill. 2d 305, 329 (2000). If we were to consider these photographs for the first time on appeal, it "would amount to a trial *de novo* on an essential element of the charges" relating to armed robbery. *People v. Williams*, 200 Ill. App. 3d 503, 513 (1990). This goes beyond the proper role of a court of review. Accordingly, we decline to consider these newly introduced photographs. We nonetheless note that defendant's interpretation of the firearm definition would also result in a scenario in which the State would be required to prove that the object defendant was carrying was *not* one of the items specifically excluded from the firearm definition. We observe from the outset that there was no evidence presented at trial which suggested that the gun defendant was holding falls within any of the statutory exclusions to the general definition of a firearm under section 1.1 of the FOID Act. Nonetheless, defendant's argument that the statute requires the State to prove that the gun is specifically an item excluded under the firearm definition presents an issue of statutory interpretation, which we review *de novo*. *People v. Jones*, 214 Ill. 2d 187, 193 (2005).

¶ 27 The rule for determining whether an exception constitutes an element of an offense has been set forth by our supreme court as follows:

"[W]here an act is made criminal, with exceptions embraced in the enacting clause creating the offense, so as to be descriptive of it, the People must allege and prove that the defendant is not within the exceptions so as to show that the precise crime has been committed. In other words, where the exception is descriptive of the offense it must be negated in order to charge the defendant with the offense. On the other hand, if the exception, instead of being a part of the description of the offense, merely withdraws

certain acts or certain persons from the operation of the statute it need not be negated, and its position in the act, whether in the same section or another part of the act, is of no consequence. [Citations.] Exceptions are generally mere matters of defense. [Citations.] " *People v. Close*, 238 Ill. 2d 497, 508 (2010) (quoting *People ex rel. Courtney v. Prystalski*, 358 Ill. 198, 203-04 (1934)).

¶ 28 Here, it cannot be said that the exclusions to the firearm definition are descriptive of the offense of armed robbery. A "firearm" is broadly defined for purposes of the armed robbery statute as "any device *** which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2010). This broad definition seemingly encompasses almost any device that would ordinarily be described as a gun. The legislature, however, has removed certain devices that would otherwise qualify as firearms from the statute. For example, it has excluded paint ball guns, BB guns, toy guns, and antique guns, among others, from the definition of a firearm. Significantly, the legislature has "merely withdraw[n]" certain specific firearms from the broader definition of a firearm, as opposed to narrowly defining the term "firearm" around the exceptions. We interpret this to mean that the legislature intended the firearm exclusions to be defenses to the offense of armed robbery; that is, it did not intend to require the State to prove, as an element of armed robbery, that defendant was *not* armed with one of the excluded firearms. See *Close*, 238 Ill. 2d at 508. Indeed, if we were to require the State to disprove each and every excluded firearm, as defendant proposes, it would be nearly impossible to prove a person guilty of armed robbery without recovering the firearm used during the robbery or evidence that was left in the event that the firearm discharged. See *People v. Skelton*, 83 Ill. 2d 58, 65 (1980) (expressing similar concerns with the type of approach

proposed by defendant). It could not be the legislature's intent to enact a statute that would allow the defendant in an armed robbery case to avoid a conviction simply by not firing a shot and successfully hiding or disposing of his weapon. See *People v. Lowe*, 153 Ill. 2d 195, 201 (1992) (presumption is that the legislature did not intend an absurd result). Accordingly, we reject defendant's argument that the State has the burden of disproving the existence of each and every firearm excluded by the armed robbery statute.

¶ 29 Defendant maintains that the victims' testimony regarding his possession of a gun during the robbery is insufficient because it was based on the subjective beliefs of the victims. He also points out that there was no reference in Officer Gentile's police report to the gun being cocked, despite the testimony of the victims at trial. We disagree. First, "in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Where the sufficiency of the evidence is being challenged on appeal, the reviewing court will not substitute its judgment by retrying the defendant. *Id.* Second, the record shows that the trial court considered the "objective" evidence that was admitted during the proceeding prior to his ruling. After watching the surveillance video footage of the crime, the court specifically cited the appearance of the gun, the sound it made, and defendant's manipulation of the gun. Defendant, nonetheless, argues that the trial court could not simply conclude "that the firearm was 'real,' " citing *People v. Ross*, 229 Ill. 2d 255 (2008), *Skelton*, and *People v. Crowder*, 323 Ill. App. 3d 710 (2001). None of these cases, however, addressed the issue of what constitutes sufficient proof of a firearm for purposes of the armed robbery statute. In *Ross* and *Skelton*, the issues presented were whether a pellet gun and a toy gun, both of which were recovered, constituted dangerous weapons under the armed robbery

statute. *Ross*, 229 Ill. 2d at 272 (pellet gun); *Skelton*, 83 Ill. 2d at 61 (toy gun). Meanwhile, in *Crowder*, the issue was whether the trial court properly dismissed an indictment charging defendant with unlawful possession of weapons by a felon and unlawful use of weapons as a sanction for the State's destruction of the gun recovered from defendant. *Crowder*, 323 Ill. App. 3d at 711. These cases offer no guidance to us in the present case. Because the uncontested evidence regarding defendant's gun was sufficient to allow the trier of fact to conclude that defendant was armed with a firearm beyond a reasonable doubt, we must affirm his armed robbery conviction.

¶ 30

B. The "Automatic Transfer" Statute

¶ 31 Defendant next contends that section 5-130(1) of the Juvenile Court Act, *i.e.*, the "automatic transfer" statute, violates the eighth amendment of the United States Constitution, the proportionate penalties clause of the Illinois Constitution, and the due process clauses of both the United States and Illinois Constitutions. He relies on the United States Supreme Court's rulings in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012). Although defendant acknowledges that the supreme court has decided this issue against him in *People v. Patterson*, 2014 IL 115102, he maintains that *Patterson* was wrongly decided so as to preserve the issue. The constitutionality of a statute may be challenged at any time (*People v. McCarty*, 223 Ill. 2d 109, 123 (2006)), and we review such a challenge *de novo* (*People v. Carpenter*, 228 Ill. 2d 250, 267 (2008)).

¶ 32 In *Patterson*, our supreme court addressed the constitutionality of the automatic transfer statute in light of the United States Supreme Court's rulings in *Roper*, *Graham*, and *Miller*. It held that those rulings did not affect its holding in *People v. J.S.*, 103 Ill. 2d 395 (1984), that the automatic transfer statute did not violate procedural or substantive due process. *Patterson*, 2014

IL 115102, ¶ 94, 97. The supreme court also held that the automatic transfer statute did not violate the eighth amendment or the proportionate penalties clause since the statute is "purely procedural" and not punitive. *Id.* ¶¶ 105-06. Defendant merely repeats the same arguments rejected in *Patterson*. Since we are bound by that decision (*People v. Artis*, 232 Ill. 2d 156, 164 (2009)), we can only reject the present constitutional challenge to the automatic transfer statute.

¶ 33 C. Correction of the Mittimus

¶ 34 Defendant lastly contends that his mittimus must be corrected to reflect his conviction of only armed robbery. His mittimus reflects convictions on five counts of armed robbery and five counts of aggravated unlawful restraint. At trial, the court only announced a finding of guilt as to the armed robbery counts, and at sentencing, the court entered a sentence only on defendant's conviction of armed robbery—6 years for the offense and 15 years for the firearm enhancement, followed by three years of mandatory supervised release. The State concedes that where the court did not sentence defendant for aggravated unlawful restraint, the mittimus must be corrected to reflect only defendant's convictions for armed robbery.

¶ 35 We agree that a mittimus correction is warranted. An adjudication of guilty on one count, without a finding on another, is equivalent to an acquittal on the latter count. *People v. Hinkle*, 408 Ill. 533, 534-35 (1951). Accordingly, because the court did not make any findings on the five counts of aggravated unlawful restraint, defendant was acquitted of those offenses. The references in the current mittimus reflecting convictions for aggravated unlawful restraint under counts 6 through 10 and the sentence of two years' imprisonment were made in error. Pursuant to our authority under Illinois Supreme Court Rule 615, we order the clerk to modify defendant's mittimus to reflect defendant's convictions only on Counts 1 through 5 for armed robbery, with all counts merging into Count 1 and the sentence of 21 years' imprisonment.

¶ 36

CONCLUSION

¶ 37 We find that defendant's conviction for armed robbery while armed with a firearm should be sustained. The State proved beyond a reasonable doubt that defendant committed the offense of armed robbery while armed with a firearm as defined under the FOID Act. We further conclude that the automatic transfer provision of the Juvenile Court Act does not violate the eighth amendment of the United States Constitution, the proportionate penalties clause of the Illinois Constitution, or the due process clause of both constitutions. Finally, the mittimus should reflect defendant's convictions of armed robbery only, with all five counts merged into one, and a sentence of 21 years' imprisonment with a three-year MSR term. For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and order the clerk to correct defendant's mittimus.

¶ 38 Affirmed; mittimus modified.