FOURTH DIVISION
December 31, 2015

No. 1-13-3750

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 17142
	)	
FELTON WILLIAMS,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Where police officer testified that the defendant dropped bag from balcony and that weapons came out of bag on impact with ground, evidence was sufficient to establish defendant's knowing possession of weapons. Mittimus corrected to reflect only one conviction for armed habitual criminal, and case remanded for sentencing on two counts of unlawful possession of a weapon by a felon.

¶ 2 Following a bench trial, defendant Felton Williams was convicted of three counts of being an armed habitual criminal, three counts of unlawful possession of a weapon by a felon, and two counts of possession of a defaced firearm. The trial court sentenced defendant to nine

years in prison. On appeal, defendant contends the State did not prove beyond a reasonable doubt that he knowingly possessed the three weapons recovered from a black bag that police saw him toss to the ground from the balcony of his co-defendant's apartment. We disagree and affirm the firearm convictions. Defendant also argues that, even if he was properly convicted of the firearms offenses, the mittimus should be corrected to reflect a conviction on only one count of being an armed habitual criminal, because the armed habitual criminal statute does not allow multiple convictions for the simultaneous possession of multiple firearms. The State agrees with this latter argument, and so do we. Accordingly, we affirm in part, vacate in part, and order the mittimus corrected.

¶ 3 Defendant was charged with three counts of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), with each count based on one of the three weapons recovered at the scene. Each of those counts alleged that defendant had previously been convicted of robbery in case No. 10 CR 2888 and aggravated robbery in case No. 10 CR 2889. Defendant also was charged with three counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), with each count based on one of the recovered weapons. Each of those counts alleged that defendant had previously been convicted of the felony offense of robbery in case No. 10 CR 2888.

¶ 4 In addition, defendant and his co-defendant, Bernard Sanders, each were charged with two counts of possession of a firearm with a defaced serial number (720 ILCS 5/24-5 (West 2012)), with each count based on one of the recovered weapons. They also each were charged with one count of unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1) (West 2012)).

¶ 5 The trial court conducted simultaneous but severed bench trials as to defendant and Sanders. At defendant's trial, Matthew Cleaver testified that, at about 3:30 p.m. on August 15, 2012, he was sitting on the patio of his first-floor condominium unit in Chicago. Cleaver saw two men run past him down an alley, one of whom was carrying a firearm by his hip. After calling 911, Cleaver saw the men climb an outside stairwell and enter a unit on the third floor of 6652 North Ashland Avenue, the building across the alley. A short time later, Cleaver identified defendant and Sanders as the men he saw run past his patio.

¶ 6 Chicago police officer Christopher Pillow testified that he responded to Cleaver's 911 call and heard a noise while walking toward 6652 North Ashland. Pillow looked up and saw a window being opened and then "saw a person who I know to be Felton Williams in a blue T-shirt stick his upper torso out the window and drop a black object from the window." The officer identified defendant in court. Pillow testified that the object defendant dropped was a black plastic bag, and that two guns came out of the bag when it hit the ground. He remained next to the bag while another officer recovered a total of three weapons from the bag and removed bullets from each gun.

¶ 7 On cross-examination, Pillow said he did not see defendant look inside the black bag before dropping it. When asked to "describe the size of this black bag," the officer replied, "It's like a standard black bag from a convenient [*sic*] store." He could not recall if there was writing on the bag. The bag was not inventoried and no photographs were taken of the bag. Officer Pillow's case report was entered into evidence.

¶ 8 Chicago police officer Ommundson testified that after he arrived at the scene to assist, he apprehended defendant and Sanders coming out of a third-floor apartment. Neither defendant nor Sanders had a gun or ammunition in their possession when they were arrested.

¶ 9 Chicago police evidence technician Anthony Beam testified that he examined the three guns and ammunition recovered in this case. The serial numbers of two of the weapons, a Ruger and a Bersa, were scratched off. Beam took photographs of defendant and Sanders that were entered into evidence. In those photos, defendant wore a blue shirt, black pants, and a baseball cap. Sanders wore a black sleeveless T-shirt and blue jeans with striped undershorts visible above the waist of his jeans.

¶ 10 Chicago police detective Marco Garcia testified that defendant made a statement that evening after being advised of his *Miranda* rights. Defendant said he was a "foot soldier" for the Gangster Disciples street gang and had been involved with that gang since he was 15 years old. Defendant said he was recently involved in a dispute with the Latin Kings. Detective Garcia testified that the colors of the Gangster Disciples were blue and black, which were the colors worn by defendant that day. On cross-examination, Detective Garcia said that before he spoke with defendant at the police station, he was told by other officers that the guns had been recovered from a black duffle bag, and that Officer Pillow had to open the bag to retrieve them.

¶ 11 The State entered into evidence certified copies of defendant's previous convictions for robbery in case No. 10 CR 2888 and aggravated robbery in case No. 10 CR 2889. The parties stipulated that defendant's date of birth was October 25, 1989, making defendant 22 years old at the time of these offenses. The defense presented no evidence.

¶ 12 The trial court convicted defendant of all but one of the charged counts, finding defendant not guilty of unlawful possession of a firearm by a street gang member. The court stated that it found Cleaver's testimony credible as to the events preceding the recovery of the weapons. The court noted Officer Pillow's testimony that the bag dropped from the balcony by defendant was "described as a black plastic bag similar to the kind of bag one would get at a convenient [*sic*] store or food store or something like that." The court noted that Officer Pillow "saw two guns come out of that bag" and three guns were recovered, which all held live ammunition and two of which had defaced serial numbers.

¶ 13 The court found Officer Pillow's testimony credible but noted the officer's account was "arguably impeached" by Detective Garcia's testimony that he was told Officer Pillow needed to open a black duffle bag to retrieve the weapons. The court further stated:

> "I found Officer Pillow, again, to be a credible witness. He was unimpeached by his own report with respect to those issues. I think the fact that he saw the guns come out of the black plastic bag makes more sense than that they were somehow concealed in a duffle bag. I don't think the guns would have come out of some sort of a duffle bag since presumably it would be zipped up, possibly it wouldn't be, but in any event he saw the guns fly out of the bag when it hit the ground.
>
> Detective [Garcia], I'm sure, interviewed numerous witnesses but the detective wasn't there when the guns hit the ground, so to speak, and I don't believe that the detective's report is accurate as to what Officer Pillow saw. I believe Officer Pillow's testimony under oath here in court as to what he saw."

¶ 14 Elaborating further on its acceptance of Officer Pillow's testimony that the guns were found in a thin plastic bag, as opposed to Detective Garcia's report indicating that they were in black duffle bag, the trial court noted that the detective's report "[came] from interviewing multiple officers, some of which may have not even been in the alley, but, in any event, it's not clear that it was Officer Pillow who told Detective Garcia that it was a duffle bag in the alley."

¶ 15 The trial court found defendant guilty of three counts of being an armed habitual criminal because he was in possession of the three weapons in the bag he tossed out the window. The court again noted it found Officer Pillow's account to be credible, further stating: "I think it would be impossible for an individual to be handling a plastic bag with three guns in it and not know what in fact they were handling."

¶ 16 The trial court also found that defendant had the prior requisite felony convictions for the offenses of being an armed habitual criminal and unlawful possession of a weapon by a felon. The court merged the unlawful possession of a weapon counts into the armed habitual criminal counts. In addition, the court found defendant guilty of the two defacement counts based on the Ruger and Bursa weapons. The court imposed concurrent sentences of seven years on each armed habitual criminal count and concurrent sentences of two years on each defacement count, for a total sentence of nine years in prison.

¶ 17 On appeal, defendant claims the evidence was insufficient to support his convictions, because the State did not prove he knowingly possessed the firearms that were recovered from the bag dropped from the balcony. He argues his knowledge of the bag's contents cannot be inferred from Officer Pillow's testimony.

¶ 18 Where, as here, a defendant has challenged the sufficiency of the evidence, a criminal conviction will not be overturned unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant; rather, the relevant inquiry 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. *Givens*, 237 Ill. 2d at 334; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 19 Defendant was convicted of being an armed habitual criminal, unlawful possession of a weapon by a felon, and the possession of defaced firearms. Each of those convictions required proof that defendant knowingly possessed a weapon. See 720 ILCS 5/24-1.7(a) (West 2012); 720 ILCS 5/24-1.1(a) (West 2012); 720 ILCS 5/24-5 (West 2012). Because the weapons in this case were seen in defendant's possession, the State proceeded under a theory of actual possession, by which the defendant exercises present personal dominion and immediate, exclusive control over the contraband. See *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 36.

¶ 20 A person acts "knowingly" when he is "consciously aware that his or her conduct is of that nature or that those circumstances exist." 720 ILCS 5/4-5 (West 2012). Generally, a defendant is deemed to have acted knowingly, or with knowledge, if it is shown he was aware of the existence of facts that make his conduct unlawful. *People v. Hinton*, 402 Ill. App. 3d 181, 184 (2010); *People v. Gean*, 143 Ill. 2d 281, 288 (1991). Because knowledge is not ordinarily susceptible to direct proof, it is generally established through circumstantial evidence. *Hinton*, 402 Ill. App. 3d at 185. Still, the State must present sufficient evidence "from which an inference

of knowledge can be made, and any inference must be based upon established facts and not pyramided on intervening inferences." *People v. Weiss*, 263 Ill. App. 3d 725, 731 (1994); *People v. Lissade*, 403 Ill. App. 3d 609, 613 (2010).

¶ 21 We find the evidence in this case was sufficient to establish defendant's knowing possession of the three weapons recovered from the black bag. Cleaver, the man watching from his patio, said that defendant and Sanders ran past him, and that Sanders was holding a weapon. Officer Pillow testified that defendant—whom he knew and recognized—dropped a black bag containing three guns from a balcony, and that two guns came out of the bag when the bag hit the ground. Pillow described the bag as an open plastic shopping bag. Viewing this evidence in the light most favorable to the State, the trial court could reasonably infer that defendant knew that the bag contained weapons. Indeed, as the trial court stated, it "would be impossible for an individual to be handling a plastic bag with three guns in it and not know what in fact they were handling."

¶ 22 Moreover, a defendant's act of flight and concurrent attempt to discard contraband can evince knowledge of wrongdoing. See, *e.g.*, *People v. Jones*, 215 Ill. App. 3d 652, 653-55 (1991) (rational trier of fact could infer defendant's knowledgeable possession of drugs after officer saw defendant throw bag of cocaine out of window while running away from police). Thus, the trial court could infer that defendant knew that the bag contained guns—and not some innocent items—by his flight and attempt to dispose of them.

¶ 23 Defendant nevertheless argues that Officer Pillow's account was contradicted by the testimony of Detective Garcia, who stated he was told the firearms were in a black duffle bag that needed to be opened for the weapons to be retrieved. In a bench trial, it is the responsibility

of the trial court, as the trier of fact, to determine the credibility of the witnesses, weigh the evidence, resolve conflicts in the evidence and draw reasonable inferences therefrom. *People v. Gonzalez*, 2015 IL App (1st) 132452, ¶ 14. In weighing the evidence, the trial court is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to the level of reasonable doubt. *People v. Bull*, 185 Ill. 2d 179, 205 (1998).

¶ 24 The divergent accounts of Detective Garcia and Officer Pillow do not inevitably create a reasonable doubt as to the defendant's guilt. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (reviewing court "will not reverse a conviction simply because the evidence is contradictory or because the defendant claims that a witness was not credible") (citations omitted). The trial court expressly acknowledged Detective Garcia's statement in its ruling but noted the detective was not at the scene of the weapons' recovery, as was Officer Pillow. The court further noted that Detective Garcia did not see the bag as it was dropped to the ground and retrieved. The court expressly stated that the possibility the guns were in a closed bag when defendant dropped them from the balcony was inconsistent with Officer Pillow's testimony that the guns came out of the bag and into view when the bag hit the ground near him. The trial court's factual findings in the face of contradictory testimony will not be disturbed unless a contrary finding is clearly apparent. *People v. Hayashi*, 386 Ill. App. 3d 113, 123 (2008). In this case, a contrary finding is not clearly apparent. The court was free to accept Officer Pillow's first-hand account over the statement of Detective Garcia, who was not an eyewitness to the discarding of the weapons. When viewing the evidence here in the light most favorable to the

State, a rational trier of fact could conclude that defendant knowingly possessed the weapons recovered from the bag.

¶ 25 Defendant also argues that the mittimus should be corrected to reflect a conviction on one count of being an armed habitual criminal. Defendant contends, and the State agrees, that pursuant to *People v. Davis*, 408 Ill. App. 3d 747 (2011), the armed habitual criminal statute does not allow multiple convictions for the simultaneous possession of multiple firearms. *Id*. at 752; see also *People v. Carter*, 213 Ill. 2d 295, 302 (2004). Accordingly, we vacate two of defendant's convictions for that offense and direct the circuit court to correct the mittimus to list only one conviction for being an armed habitual criminal. See *People v. Cotton*, 393 Ill. App. 3d 237, 268 (2009) (remand not required for correction of the mittimus).

¶ 26 We further conclude this case should be remanded to the trial court for sentencing on two of defendant's convictions for unlawful possession of a weapon by a felon. Defendant was convicted of possessing three weapons, and the trial judge merged the unlawful possession of a weapon counts into the armed habitual criminal counts. While, as we stated above, simultaneous possession of multiple firearms will not support multiple convictions under the armed habitual criminal statute, simultaneous possession of multiple firearms will support multiple convictions under the unlawful possession of a weapon by a felon statute. 720 ILCS 5/24-1.1(e) (West 2012); *People v. Almond*, 2015 IL 113817, ¶ 36. Because defendant possessed three weapons, the evidence supports the entry of judgment on two counts of unlawful possession of a weapon by a felon in addition to the one count of armed habitual criminal that we affirmed above. Although the State may not seek an increased sentence on appeal from a criminal conviction (*People v. Castleberry*, 2015 IL 116916, ¶ 24), this does not represent an increase in defendant's

punishment because this court is ordering the imposition of a sentence on a conviction for which no sentence had previously been imposed. *People v. Scott*, 69 Ill. 2d 85, 88 (1977); see also *Castleberry*, 2015 IL 116916, ¶ 25 (distinguishing act of increasing punishment on appeal from remanding for imposition of sentence on improperly unsentenced count). And although the State conceded that two of the armed habitual criminal counts should be vacated without requesting sentencing on the two unlawful use of a weapon by a felon counts, we are not bound by a party's concession on appeal. *People v. Schmidt*, 405 Ill. App. 3d 474, 487-88 (2010).

¶ 27 For the reasons we have given, we vacate defendant's convictions on two of the three counts of being an armed habitual criminal and order the mittimus corrected accordingly. We remand the case for sentencing on two of defendant's convictions for unlawful possession of a weapon by a felon. The judgment of the circuit court is affirmed in all other respects.

¶ 28 Affirmed in part, vacated in part, and remanded.