

FOURTH DIVISION
December 24, 2015

1-14-1142

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 19225
)	
ANTHONY DAVIS,)	Honorable
)	Noreen Valeria-Love,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's convictions for armed robbery and sentence of natural life imprisonment are affirmed; the State proved defendant was armed with a firearm as defined by statute and defendant's sentence of natural life imprisonment is not unconstitutional.
- ¶ 2 Following a bench trial the circuit court of Cook County convicted defendant, Anthony J. Davis, of two counts of armed robbery. Because defendant had two previous

convictions for Class X felonies, the court sentenced defendant to a mandatory term of life imprisonment. Defendant appeals, arguing (1) the State failed to adduce sufficient evidence to prove the object he displayed during the robbery was a firearm as defined by the armed robbery statute, and (2) because one of the convictions for a Class X felony on which defendant's current sentence of life imprisonment is based occurred while defendant was 17 years old, his current sentence is unconstitutional.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 In November 2010 two men robbed Aniela and Toma Filkovic as the Filkovics were closing their store in Cicero, Illinois. When the two men entered the store, Aniela was behind the counter and her husband Toma was in the basement. One of the men who entered the store was smoking a cigarette. Aniela told him he could not smoke in the store, and he dropped the cigarette. Then the man who had been smoking came behind the counter and displayed a black object that appeared to Aniela to be a handgun. Aniela testified that she could not say for certain whether the object she saw was a real firearm, a toy gun, a replica gun, or a pellet gun. She could only say that it looked like a black gun based on having seen guns on television. Before the men entered the store, Aniela had been counting money from the cash register. She left cash bundled with a rubber band on the counter next to the register when the men entered. After they left, the money that had been next to the cash register was gone.

¶ 6 Aniela called for Toma to come up from the basement. Toma testified that when he came up from the basement he saw a man with a gun. Toma identified defendant as that man.

Defendant pointed the gun in Toma's face. Toma testified he was less than a foot from the barrel of the gun. Toma knew it was a gun because he knows guns personally and has experience with guns. Toma testified his uncle has a collection of guns so he is familiar with how guns appear and how they work. Toma has personally fired a gun in the past. He looked right down the barrel of the gun that was pointed in his face. Defendant took Toma's wallet, which contained cash. Defendant, the other robber, Toma, and Aniela went to the front of the store. Defendant and the other robber grabbed cigarettes and alcohol and left the store. On cross-examination, the following exchange occurred between Toma and defense counsel:

“Q. [W]ell, it looked like a firearm to you; is that correct?

A. No. I know this is gun.

Q. Well, have—is it possible it could have been a replica gun?

A. No.

Q. Is it possible—

A. Not to me, no.

Q. No to you?

A. No.

Q. Are you an expert on firearms?

A. What you mean expert? I know firearm. I hold it. I go hunting sometimes.

Q. Did you hold the gun that was pointed at you?

A. No.

Q. Did you feel the gun in your hands?

A. No. I see in my eyes maybe 2, 3 inches.

Q. You saw in your eyes black metal with a barrel; is that correct?

A. I see gun in my eyes.”

¶ 7 Police recovered a DNA standard from the cigarette dropped at the scene. That standard was matched to defendant through the DNA database. Police obtained a DNA standard from defendant to confirm. Police tested the DNA standard from defendant and the DNA on the cigarette and they matched. Toma identified defendant as one of the robbers from a lineup, but Aniela was unable to identify anyone.

¶ 8 Following closing arguments the trial court found, in part, as follows:

“THE COURT: [Toma] gave a description of the gun. He used different terminology. I don’t know how those terms that we use in English translate in his native language.

But he indicated pipe. Referring to the barrel when he was asked about it. He called it a barrel when he referred to the cylinder that houses the bullets. He referred to it as a barrel. It is barrel shape.

They both indicated that the gun was black. He indicates he’s handled guns before. He has seen guns, has an uncle who has a gun collection. He’s fired weapons before. He goes hunting occasionally. And that it was a gun.

* * *

So the State has met its burden in this matter. There’s going to be a finding of guilty as to both counts.”

¶ 9 At defendant's sentencing hearing, the State introduced evidence of defendant's prior convictions which included convictions on October 3, 1990, when defendant was 17 years old¹, for aggravated criminal sexual assault and armed robbery, both Class X felonies, and a conviction in December 2007 for armed robbery, a Class X felony. The State asked the trial court to sentence defendant to natural life in prison. The court found the statute mandated a life sentence and entered judgment accordingly.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 The trial court sentenced defendant as an habitual criminal pursuant to the habitual criminal section of the general sentencing provisions in the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-95(a) (West 2010)) (hereinafter the "habitual criminal statute"). The habitual criminal statute defines an habitual criminal as, in pertinent part, a person who has been twice convicted of a Class X felony. 730 ILCS 5/5-4.5-95(a) (West 2010). "[A]nyone adjudged an habitual criminal shall be sentenced to a term of natural life imprisonment." 730 ILCS 5/5-4.5-95(a)(5) (West 2010). Defendant argues that because he was convicted of one of his prior Class X offenses when he was under 18 years old, his sentence as an habitual criminal is unconstitutional. As for the conviction itself, defendant does not challenge the sufficiency of the evidence to prove him guilty of robbery²; defendant only challenges the sufficiency of

¹ Defendant was born November 28, 1972.

² Defendant asks this court to vacate his conviction for armed robbery and reduce his conviction to simple robbery. Even if defendant is correct and the State failed to prove he was armed with a firearm as defined by statute, defendant does not dispute he displayed an object that a rational trier of fact could have found appeared to be a firearm or other

the evidence to prove that during the robbery he “carrie[d] on or about his or her person or [was] otherwise armed with a firearm” as required to prove the offense of armed robbery. 720 ILCS 5/18-2(a)(2) (West 2010) (a person commits armed robbery when he or she commits robbery or aggravated robbery (720 ILCS 5/18-1 (West 2010)) and carries on or about his or her person or is otherwise armed with a firearm). The Criminal Code defines “firearm” by reference to section 1.1 of the Firearm Owners Identification Act (FOID Act), which defines a “firearm” as “any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas,” excluding certain enumerated devices including but not limited to a spring gun, a BB gun, any device used exclusively for signaling, or an antique firearm. 430 ILCS 65/1.1 (West 2010).

¶ 13 1. Defendant’s Conviction for Armed Robbery

¶ 14 When a defendant raises a challenge to the sufficiency of the evidence to prove an element of the offense for which he stands convicted, the role of this court is to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]” (Emphasis and internal quotation marks omitted.) *People v. Johnson*, 2014 IL App (1st) 122459-B, ¶ 129. We will not retry defendant, substitute

dangerous weapon. Defendant also does not dispute that he pointed this object at the victims during the course of a robbery. A rational trier of fact could conclude beyond a reasonable doubt that by his gestures, defendant “indicated that he was armed with a firearm or other dangerous weapon.” *People v. Woods*, 373 Ill. App. 3d 171, 177 (2007). “A person commits aggravated robbery when he or she violates subsection (a) while indicating verbally or by his or her actions to the victim that he or she is presently armed with a firearm or other dangerous weapon.” 720 ILCS 5/18-1(b)(1) (West 2010). Thus, if we were to reduce defendant’s conviction, it would be reduced to aggravated robbery, not simple robbery as defendant requests.

our judgment for that of the trier of fact, or reverse the conviction if any rational trier of fact could have reached the same conclusion based on the evidence viewed in the light most favorable to the prosecution. *Id.* This standard reflects the proposition that it is the trier of fact's function to determine the credibility of witnesses and assign the weight to their testimony. *Id.* "While great deference is given to the findings of the [trier of fact,] a criminal conviction cannot be upheld if the evidence is so improbable or unsatisfactory as to give rise to a reasonable doubt regarding an essential element of the offense that the defendant has been found guilty of committing. [Citation.]" *Id.* ¶ 130.

¶ 15 In this case defendant argues the State failed to present any evidence at trial that the object defendant brandished during the robbery met the statutory definition of a firearm or that the object did not fit within any of the statutory exceptions to the definition of a firearm. Although defendant bases his challenge on both Toma and Aniela's testimony about the "object," the trial court's ruling demonstrates that the trial court relied on Toma's testimony to find the State satisfied its burden to prove defendant carried a firearm during the robbery.

¶ 16 Defendant argues Toma's "subjective belief" was insufficient to prove beyond a reasonable doubt defendant possessed a firearm as defined by statute, and Toma provided no testimony to establish that what he saw did not fall within one of the exceptions to the statutory definition of "firearm" in the FOID Act. Defendant argues those cases whose holdings suggest "that a witness's bare statement that the defendant possessed a gun can suffice to prove armed robbery" are inapposite because none of those decided whether such evidence was sufficient to prove the defendant possessed a firearm under the modern statutory definition. Defendant asserts the testimony of a non-expert witness that an object is a gun

cannot be held to prove the statutory definition of firearm because that holding would create a mandatory rebuttable presumption. Further, those decisions finding such testimony sufficient based on the absence of contrary evidence (that the object was not a firearm) improperly shifted the burden of proof to the defendant to prove the object at issue was not a firearm.

¶ 17 In *People v. Washington*, 2012 IL 107993, ¶ 1, the issue was whether the State presented sufficient evidence the defendant possessed a “dangerous weapon.” The *Washington* court noted amendments to the Criminal Code that took effect January 1, 2000 and which created “substantively distinct offenses based on whether the offenses were committed with a dangerous weapon *** or committed with a ‘firearm.’ ” *Id.* ¶ 6. The State charged the defendant in *Washington* under the preamendment statutes and had to prove the defendant committed the offenses charged “while armed with a dangerous weapon.” (Internal quotation marks omitted.) *Id.* ¶ 9. The trial court in *Washington* refused to instruct the jury on the definition of firearm finding the State did not have to “prove that up. The fact that he was armed with a weapon is sufficient.” *Id.* ¶ 16. The defense in *Washington* argued the State failed to prove that a dangerous weapon was used to commit the offenses. *Id.* ¶ 18. Defense counsel argued: “There was just simply not enough evidence. As I said, it could be a toy for all we know.” (Internal quotation marks omitted.) *Id.*

¶ 18 The jury found the defendant guilty. *Id.* ¶ 21. The appellate court reversed, holding the State did not present sufficient evidence the defendant committed the offenses while armed with a dangerous weapon. *Id.* ¶ 25. Our supreme court allowed the State’s petition for leave to appeal. *Id.* ¶ 26. Our supreme court reversed the appellate court. *Id.* ¶ 37. The

Washington court found the appellate court's reliance on *People v. Ross*, 229 Ill. 2d 255, 276 (2008) was misplaced. In *Ross*, the evidence presented at trial showed that the "gun" used during the offense "was, in fact, a small BB gun, with only a three-inch barrel. Further, because the BB gun was not entered into evidence and there was no evidence as to its composition or weight, there could be no inference that the BB gun could have been used as bludgeon." *Washington*, 2012 IL 107993, ¶ 34. Our supreme court found the evidence presented at trial in *Ross* actually precluded finding that the BB gun used during the armed robbery was a dangerous weapon. *Id.* ¶ 34.

¶ 19 The *Washington* court found *Ross* distinguishable. *Id.* ¶ 35. The evidence in *Washington* as to whether the defendant possessed a dangerous weapon consisted of the victim's testimony. The evidence in *Washington* established that for several minutes the victim had an unobstructed view of the weapon the defendant had in his possession during the commission of the crimes. *Id.* ¶ 35. The *Washington* court also noted that defense counsel in *Washington* only argued that "it could not be known for sure whether the gun was real or a toy because no gun was ever recovered." *Id.* ¶ 36. The *Washington* court's holding was that viewing the evidence in a light most favorable to the State the jurors as the triers of fact could have found beyond a reasonable doubt that the defendant was armed with a dangerous weapon. *Id.* ¶ 37.

¶ 20 Simply viewing the *Washington* court's holding in isolation, it would appear defendant is correct in this case and *Washington* is inapplicable because it did not assess the sufficiency of the evidence to prove anyone possessed a firearm as defined in the FOID Act, as was required in this case. However, defendant's argument dissociates the court's holding from its

reasoning. The *Washington* court's reasoning in reaching its decision is highly instructive in this case. In finding that the evidence proved the defendant possessed a "dangerous weapon," the *Washington* court relied on the testimony of a single eyewitness. It found that a rational trier of fact could infer from that testimony that the object in question was a "real gun." *Id.* ¶ 36. There can be no genuine dispute that what our supreme court meant by "real gun" is what the FOID Act describes. Our supreme court found the victim's "unequivocal testimony and the circumstances under which he was able to view the gun" (*id.*) sufficient to allow the trier of fact to reasonably infer that the defendant possessed a "real gun" (*id.*). Notably, our supreme court did not say in *Washington* that the evidence was sufficient to allow a reasonable trier of fact to reasonably infer that the object was a "dangerous weapon."

¶ 21 Defendant in this case argues that since our supreme court was not called upon to interpret the post-2000 statutory definition of firearm, its analysis in *Washington* is of little value here. The statute to which the jury in *Washington* had to apply the facts is of less significance than the reasonable inference the *Washington* court found the jury could find from the testimony of a single credible witness. The *Washington* court did not find the testimony of a single credible witness sufficient because the testimony went to prove a less-specific definition of a dangerous weapon; rather, the *Washington* court found the testimony sufficient evidence the object was a dangerous weapon because a single credible witness testified the object was a "gun" and the trier of fact could reasonably infer it was a "real gun." See *People v. Fields*, 2014 IL App (1st) 110311, ¶ 36 ("While this statutory definition [of firearm] excludes some specific types of firearms, the term 'firearm' is defined broadly, including 'any device, by whatever name known, which is designed to expel a projectile or

projectiles by the action of an explosion, expansion of gas or escape of gas.’ [Citations.] Thus, contrary to Fields’ assertion that the State must prove the gun is a firearm by direct or physical evidence, 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.”). “An inference is a factual conclusion that can rationally be drawn by considering other facts. [Citations.]” (Internal quotation marks omitted.) *People v. Moore*, 365 Ill. App. 3d 53, 58 (2006). “Where the evidence presented is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution. [Citation.]” *Id.* In *Washington*, our supreme court found that one such reasonable inference was that an object was a “real gun.” *Id.* ¶ 36. ¶ 22 *Washington* clearly stands for the proposition that the unequivocal testimony of a lay witness given after a sufficient opportunity to observe is enough evidence from which a reasonable trier of fact may infer an object is “a real gun.” *Id.* Other courts have recognized that “[t]he State does not have to prove the gun is a firearm [within the meaning of the statutory definition] by direct or physical evidence; 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. [Citation.]” (Internal quotation marks omitted.) *People v. Clark*, 2015 IL App (3d) 140036, ¶ 20 (quoting *People v. Wright*, 2015 IL App (1st) 123496, ¶ 74). The *Wright* court rejected the defendant’s argument that “because the witnesses only viewed the handle of the gun, their testimonies [were] insufficient to find [the defendant] had an actual firearm.” *Wright*, 2015 IL App (1st) 123496, ¶ 75.

¶ 23 In this case, there was sufficient evidence for the trier of fact to reasonably infer the object defendant possessed during the robbery was a firearm as defined in the FOID Act.

Toma testified he is familiar with firearms and testified that he had an unobstructed view of defendant's firearm at close range. We find Toma's testimony sufficient to support a finding that defendant possessed a "firearm" beyond a reasonable doubt under *Washington*.

¶ 24 2. Defendant's Sentence

¶ 25 Defendant argues that as applied to him, the habitual criminal statute violates both the federal and Illinois constitutions. Defendant argues that because he was 17 years old when he was sentenced for the 1990 convictions, and because the habitual criminal statute mandates a life sentence based on those crimes without consideration of his youthfulness or his culpability for those crimes at that age, the statute violates both the Eighth Amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution. In support of his argument defendant relies on "recent United States Supreme Court law and scientific findings *** suggesting that penal consequences for young people should be approached differently than for full adults."

¶ 26 Initially, we must address the State's argument that defendant's as-applied challenge to the constitutionality of the habitual criminal statute "is not justiciable" because defendant failed to raise the challenge in the trial court, thus depriving this court of an evidentiary record of any findings of fact as to defendant's "youth, immaturity and reduced culpability at the time he was convicted *** when he was 17 years old." Our supreme court has held that "[a] court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. [Citation.] Without an evidentiary record, any finding that a statute is unconstitutional 'as applied' is premature. [Citations.]" *In re Parentage of John M.*, 212 Ill. 2d 253, 268 (2004). Defendant counters "there

are no factual questions to be resolved” because his as-applied challenge is based on the undisputed fact he committed one of the offenses that lead to his mandatory life sentence when he was 17 years old and the United States Supreme Court has “recognized a general principle that juveniles under the age of 18 are less mature, less responsible, vulnerable to negative influences and less culpable.”

¶ 27 Defendant is not arguing the habitual criminal statute is unconstitutional as applied to him based on his individual characteristics when he was 17 years old. Defendant is arguing the habitual criminal statute is unconstitutional as applied to a defendant sentenced thereunder where one of the qualifying offenses was committed when the defendant was under 18 years old. See *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (recognizing diminished culpability of all juvenile offenders under 18). Because defendant’s age when he committed one of the qualifying offenses that led to his current life sentence is an undisputed fact, we find defendant’s specific constitutional challenge in this case can be resolved on this record.

¶ 28 Defendant argues he “is being severely punished for conduct he committed when he was inherently less culpable than he is now, as an adult.” In *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 2, the defendant argued that “the statutory provision regarding the sentencing of habitual criminals is unconstitutional as applied to [him] because one of his prior qualifying convictions *** occurred when he was 17 years old and, thus, his current natural life sentence constitutes punishment too severe for conduct that he had committed as a juvenile.” Like defendant in this case, the defendant in *Lawson* also argued that his sentence under the habitual criminal statute violated the Eighth Amendment and the proportionate penalties clause. *Id.* ¶ 48. This court rejected the defendant’s argument in *Lawson*. *Id.* ¶ 50. The

Lawson court held that the defendant's sentence in that case was "not merely the result of criminal conduct he committed *** when he was 17 years old, but rather, results from his third Class X felony conviction, which occurred within 20 years of his first Class X felony conviction and long after he had reached adulthood." *Id.* The *Lawson* court held that the natural life sentence in that case was not unconstitutional because the defendant's "adjudication as an armed habitual offender *** punished him for the new and separate crime he committed *** as an adult." *Id.* ¶ 53.

¶ 29 We find that, like the defendant in *Lawson*, defendant is being punished for "the new and separate crime he committed" in 2010 "as an adult." Defendant's adjudication as an habitual criminal does not merely result from the crimes he committed in 1990 as a juvenile, but also from his second qualifying conviction for a Class X felony in 2007³, long after defendant reached majority, and the conviction in this case.

¶ 30 Defendant asks this court to depart from the holding in *Lawson* because, he argues, the stance taken in that case "treats too lightly that one of [defendant's] predicate offenses is derived from juvenile misconduct committed when he was only 17 years old." Defendant also implies the *Lawson* court mistakenly relied on *People v. Dunigan*, 165 Ill. 2d 235 (1995), "for the notion that the punishment imposed under the [habitual criminal] statute is for the most recent offense only and is not a punishment for three prior felony convictions." We disagree

³ The circuit court convicted defendant of two Class X felonies on October 3, 1990 and sentenced him to 15 years' imprisonment. "Any convictions that result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purposes of this Section as one conviction." 730 ILCS 5/5-4.5-95(3) (West 2010).

with defendant's argument concerning the *Lawson* court's reliance on *Dunigan* and that the habitual criminal statute treats too lightly that one of the qualifying offenses occurred when defendant was 17 years old.

¶ 31 The purpose of the habitual criminal statute as applied to defendant (and everyone else) is to protect the public from a recidivist, not to punish defendant's conduct as a 17 year old. *People v. Franzen*, 183 Ill. App. 3d 1051, 1059-60 (1989) ("It is recognized that the statute does not constitute punishment for the prior offenses; rather, the prior adjudications are used to establish matters in aggravation to support the disposition authorized for a third serious offense."). Therefore, in the application of the habitual criminal statute, the weight that must be given to defendant's culpability when he committed his first qualifying offense is less than defendant would have us believe. Juveniles are still culpable for the crimes they commit, and their reduced culpability must be considered in the sentences for those crimes committed as juveniles. *People v. Gray*, 2015 IL App (1st) 112572-B, ¶ 10 (*Miller* "did not foreclose a sentencer's ability to impose life without parole on juvenile offenders ***. [Citation.] Rather, the court stated a sentencing judge must take into account how children are different from adults before imposing a lifetime of incarceration."). "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." *Graham v. Florida*, 560 U.S. 48, 75 (2010).

¶ 32 The habitual criminal statute represents a legislative determination of when the seriousness of the current offense and the rehabilitative potential of the offender require a

sentence of life in prison. See *Lawson*, 2015 IL App (1st) 120751, ¶ 52 (quoting *Dunigan*, 165 Ill. 2d at 246-47) (“Thus, the [Habitual Criminal] Act unquestionably represents a careful legislative consideration of both the seriousness of the offense and the rehabilitative potential of offenders subject to its terms.”). The habitual criminal statute “may be invoked only after a defendant has twice demonstrated that conviction and imprisonment do not deter him from a life of crime. [Citation.]” (Internal quotation marks omitted.) *Id.* ¶ 52 (quoting *Dunigan*, 165 Ill. 2d at 246). Nothing precluded the legislature from determining that when the first qualifying offense is committed as a juvenile, an offender who continues to commit serious crimes has demonstrated that conviction and imprisonment are not a deterrent to future criminal behavior. Defendant had an opportunity “to demonstrate that the bad acts he committed as a teenager are not representative of his true character” (*Graham*, 560 U.S. at 79) and failed. Even if defendant was less culpable when he committed a Class X felony when he was 17, the same is certainly not true when defendant committed another Class X felony less than 20 years later in 2007 and committed another qualifying offense in 2010.⁴ The application of the habitual criminal statute is not unconstitutional as applied to a defendant who committed his or her first qualifying offense while under 18 years old where the operation of the statute is based on the multiplicity and proximity of serious offenses rather than just the culpability of the offender for any one offense as a juvenile.

⁴ A person shall be adjudged an habitual criminal if “[t]he third offense was committed within 20 years of the date that judgment was entered on the first conviction;” in this case October 3, 1990, “provided, however, that time spent in custody shall not be counted.” 730 ILCS 5/5-4.5-95(4)(B) (West 2010).

¶ 33 Accordingly, we hold that the properly imposed life sentence in this case is not unconstitutional.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 36 Affirmed.