2016 IL App (1st) 140809-U

SIXTH DIVISION
April 8, 2016

No. 1-14-0809

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 20331
	)	
SHERARD MARTIN,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's conviction and sentence for being an armed habitual criminal are affirmed over his contentions that: (1) the evidence was insufficient to prove him guilty of the offense beyond a reasonable doubt; and (2) his conviction violated the proportionate penalties clause of the Illinois Constitution.

¶ 2 Following a bench trial, defendant Sherard Martin was found guilty of being an armed habitual criminal and sentenced to 12 years in prison. On appeal, he contends that: (1) the State failed to prove him guilty beyond a reasonable doubt where the two testifying officers gave improbable and unsatisfactory testimony and (2) his conviction for being an armed habitual

criminal violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). We affirm.

¶ 3 The State charged defendant with one count of being an armed habitual criminal, two counts of unlawful use of a weapon by a felon, and seven counts of aggravated unlawful use of a weapon.

¶ 4 At trial, the evidence showed that at approximately 10 p.m. on October 20, 2012, Chicago Police Officers Bowen and McDermott were driving southbound on South Jeffery Avenue in an unmarked police vehicle. While driving, both officers observed a Dodge Intrepid in front of them make a right turn onto East 88th Street without using its turn signal. As a result, they activated their vehicle's emergency lights and pulled the car over.

¶ 5 Both officers exited their vehicle with Bowen approaching the car's passenger side and McDermott approaching the driver side. They observed only one individual in the car, the defendant, whom Bowen knew "[f]rom the neighborhood." Bowen saw defendant moving the driver's seat "back and forth." McDermott noticed that defendant's car had not been put into park and observed defendant "adjusting his seating position." Shortly after, defendant accelerated and sped away from the officers. At this time, Bowen did not see defendant's hands or notice any weapon.

¶ 6 The officers ran back to their vehicle and began chasing defendant, who had turned left onto South Euclid Avenue. As the officers pursued defendant, there was artificial lighting, nothing obstructing their view of his car and according to McDermott, they were "a few car lengths" behind defendant. During the chase, Bowen observed defendant "throw a black object over the top" of the car with his left hand, but he could not identify the object. Similarly, McDermott observed defendant "throw that dark object over the roof" of the car using his left

hand. When the object hit the ground, both officers heard a "metallic sound." Bowen immediately radioed fellow officers, alerting them that defendant had thrown an object out of his car.

¶ 7 Bowen said defendant's car had been on South Euclid Avenue for approximately 100 feet, or a "[c]ouple houses in," before defendant threw the object over the car. He acknowledged that, at a preliminary hearing, he had testified that defendant threw the object from the car "maybe 20 feet" in on South Euclid Avenue. Bowen explained the distance he testified to in his preliminary hearing "was probably a mis-calculation on [his] part." He acknowledged that when he radioed other officers, he did not state the color of the object thrown, that he heard a "clang" sound or onto what side of the street the handgun was thrown.

¶ 8 Eventually, defendant's car became boxed in by McDermott and Bowen's vehicle, and another police vehicle near the 9300 block of South Merrill Avenue. McDermott subsequently arrested defendant.

¶ 9 Bowen returned to the area of East 88th Street and South Euclid Avenue, and he saw four or five officers looking for the object that defendant threw out of his car. Bowen walked to the area from where he recalled defendant throwing the object, which was 8806 South Euclid Avenue. There, he observed and subsequently recovered a .45-caliber Glock handgun with one live round inside the firearm on the street approximately a foot off the curb. Additionally, he observed a "broke[n]" extended magazine clip two or three feet away from the handgun and 20 .45-caliber rounds of ammunition "scattered" in the immediate area. Bowen did not believe the items were sent for fingerprint testing.

¶ 10 At the close of the State's case, the State, without objection from defendant, entered into evidence certified copies of defendant's prior convictions for unlawful use of a weapon by a

felon (case No. 06 CR 18769) and murder (case No. 93 CR 25087), which were the predicate offenses supporting the State's armed habitual criminal charge. The State also entered into evidence a document from the Illinois State Police indicating defendant had never been issued a valid firearm owner's identification card. The State rested.

¶ 11 Defendant moved for a directed finding, but the court denied the motion.

¶ 12 The defense entered into evidence three exhibits: a photograph of South Euclid Avenue; a photograph of the house located at 8806 South Euclid Avenue; and a map of the area around East 88th and 89th Streets, and South Euclid and Jeffery Avenues, on which Officer Bowen placed an "X" where he recovered the firearm. Defendant did not testify or present any other evidence on his behalf.

¶ 13 The court found defendant guilty of all nine counts. It noted that while the officers could not identify the object thrown by defendant out of the car as a weapon immediately, the handgun was found "in the area" where defendant threw it. The court additionally observed the handgun's condition, "having been broken" with "bullets strewn about," was "strong circumstantial evidence" that the firearm had been thrown by defendant.

¶ 14 Following the court's guilty finding, defendant filed a motion for a new trial, arguing there was insufficient evidence to convict him. In denying the motion, the court stated: "[P]oints that you were arguing, counsel, I don't find they are mutually exclusive or particularly impeaching. If there were any minor inconsistencies, I considered them. And I believe I resolved them obviously in favor of the officers' testimony."

¶ 15 The trial court subsequently sentenced defendant to 12 years in prison on the armed habitual criminal count and merged the remaining eight counts. This appeal followed.

¶ 16 Defendant first contends the State failed to prove him guilty of being an armed habitual criminal because it failed to prove beyond a reasonable doubt that he possessed a firearm.

¶ 17 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. We will not overturn a conviction unless the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48. While we must carefully examine the evidence before us, we must give proper deference to the trier of fact who observed the witnesses testify (*id.*), 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.

¶ 18 To sustain a conviction for being an armed habitual criminal, a defendant must receive, sell, possess, or transfer a firearm after previously being convicted of two prior enumerated felonies. 720 ILCS 5/24-1.7(a) (West 2012); see *People v. Ross*, 407 Ill. App. 3d 931, 935 (2011). The parties do not dispute that defendant has the requisite triggering felonies for the offense. Rather, the issue on appeal is whether the State presented sufficient evidence that defendant possessed the firearm found on the street by Officer Bowen.

¶ 19 The evidence showed that while Officers Bowen and McDermott chased defendant in their vehicle, they both observed him throw a dark object with his left hand over his car. When the object hit the ground, both officers heard a metallic sound. The officers were merely a few

car lengths behind defendant. There was artificial lighting on the street, and nothing obstructed their view of his car. After McDermott arrested defendant, Bowen returned to where he observed defendant throw the object and recovered a handgun along with a broken extended clip magazine and scattered ammunition. As the trial court noted, the condition of the extended clip magazine and the strewn-about ammunition was circumstantial evidence that they had been tossed out of a car. Additionally, defendant was the only individual in his car, and his flight from Bowen and McDermott raised a reasonable inference of his consciousness of guilt, *i.e.*, illegally possessing the firearm. See *People v. Grant*, 2014 IL App (1st) 100174-B, ¶ 33. Therefore, taking the evidence in the light most favorable to the State, there was sufficient evidence that defendant possessed the handgun to support his armed habitual criminal conviction.

¶ 20 Nevertheless, defendant maintains that the State failed to prove he possessed the firearm where Bowen and McDermott's testimony "was so unreasonable, improbable and unsatisfactory." Specifically, defendant posits it is "highly incredible" that he would toss a firearm over the roof of his car rather than simply drop it out the driver's side window. Instead, defendant suggests that when Bowen recovered the firearm "on the north side of the street," he simply "invented the story of the over the roof toss" to connect it to defendant. By this accusation, defendant essentially asks us to doubt the story testified to by the officers and deem them incredible and unbelievable. This claim, however, involves a question of witness credibility, which is a matter entirely within the province of the trier of fact who heard and observed the witnesses testify. See *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 21 Next, defendant highlights "specific flaws" in Bowen's testimony, namely inconsistencies and omissions between his trial testimony and preliminary hearing testimony.

Defendant points to Bowen's testimony concerning how far onto South Euclid Avenue defendant was before he threw the object from his car. At trial, Bowen stated defendant was approximately 100 feet onto South Euclid Avenue while at defendant's preliminary hearing, Bowen stated it was approximately 20 feet. Additionally, defendant asserts that at his preliminary hearing, Bowen did not state the object thrown was black, that it made a metallic sound, or that defendant threw the object over the roof of his car. Defendant's claim, however, involves the resolution of inconsistent evidence and omissions, and their impact on the trial, matters also reserved entirely for the trier of fact. See *id.* (stating the "resolution of inconsistencies and conflicts in the evidence *** are the responsibility of the trier of fact"); *People v. Rodriguez*, 2012 IL App (1st) 072758-B, ¶ 47 (stating "omissions *** go to the weight of the testimony to be evaluated by the trier of fact"). Furthermore, defendant's assertion that Bowen did not testify at the preliminary hearing concerning defendant throwing the object over the roof of his car is contradicted by the record. In defense counsel's cross-examination of Bowen, counsel read portions of Bowen's preliminary hearing testimony, which included that Bowen "observed [defendant] throw an object over the top of the car."

¶ 22 Lastly, in reaching our conclusion, we reject defendant's reliance on *People v. Quintana*, 91 Ill. App. 2d 95 (1968). In *Quintana*, this court reversed a defendant's conviction for possession of cannabis where the State relied solely on the uncorroborated testimony of a single police officer, which, in parts, was contradicted by another State witness, a crime lab chemist, concerning the packaging of the drugs. *Id.* at 97-99. Additionally, the appellate court found the officer had a "personal vendetta" against the defendant, whom the officer had known for four months and, multiple times, tried to turn into a personal informant using unconstitutional means. *Id.* at 97-98. Here, in contrast, there was no contradiction between State witnesses, there were

two testifying officers who corroborated one another and there is no evidence in the record of such a personal vendetta from any of the officers against defendant that would warrant questioning the veracity of their testimony. Although defendant asserts that Bowen had a motive to lie at trial because he stated he knew defendant "[f]rom the neighborhood," this singular reference at trial, without more, was innocuous.

¶ 23 Accordingly, despite the alleged improbabilities and inconsistencies in the officers' testimony, which defendant highlights, the evidence is not "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 24 Defendant next contends that his armed habitual criminal conviction violates the proportionate penalties clause of the Illinois Constitution. Specifically, defendant argues that the elements used to establish his offense of being an armed habitual criminal are the exact same elements used to establish the Class 2 offense of unlawful use of a weapon by a felon. He therefore requests that his 12-year sentence for being an armed habitual criminal be vacated and remanded for resentencing as a Class 2 felony of unlawful use of a weapon by a felon.

¶ 25 Article I, section 11, of the Illinois Constitution is known as the proportionate penalties clause (*People v. Sharpe*, 216 Ill. 2d 481, 491 (2005)), and it provides that "[a]ll penalties shall be determined *** according to the seriousness of the offense." Ill. Const. 1970, art. I, § 11. "In analyzing a proportionate penalties challenge, our ultimate inquiry is whether the legislature has set the sentence in accord with the seriousness of the offense." *People v. Guevara*, 216 Ill. 2d 533, 543 (2005). A sentence will violate "the proportionate penalties clause if it is greater than the sentence for an offense with identical elements." *Id.* "An expectation of identical penalties for identical offenses comports with 'common sense and sound logic' and also gives effect to the

plain language of the Illinois Constitution." *People v. Ligon*, 2016 IL 118023, ¶ 11 (quoting *People v. Christy*, 139 Ill. 2d 172, 181 (1990)). We review whether a statute violates the proportionate penalties clause *de novo*. *Id.*

¶ 26 We must compare the two offenses at issue – being an armed habitual criminal and unlawful use of a weapon by a felon – to determine if they have identical elements. See *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 20.

¶ 27 The armed habitual criminal statute states in relevant part: "A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm *after having been convicted a total of 2 or more times of any combination of the following offenses*." (Emphasis added.) 720 ILCS 5/24-1.7(a) (West 2012). The offense is punishable as a Class X felony (720 ILCS 5/24-1.7(b) (West 2012)), with a sentence between 6 and 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 28 By comparison, the unlawful use of a weapon by a felon statute states in relevant part: "It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition *if the person has been convicted of a felony under the laws of this State or any other jurisdiction*." (Emphasis added.) 720 ILCS 5/24-1.1(a) (West 2012). The offense is punishable as multiple classes of felonies depending on the circumstances. 720 ILCS 5/24-1.1(e) (West 2012). At issue here is the Class 2 variety, with a sentence between 3 and 14 years in prison if the defendant has already been convicted of one prior unlawful use of a weapon by a felon offense or if he has previously been convicted of a forcible felony. *Id.*

¶ 29 A plain reading of both statutes demonstrates that the two offenses are not identical. To convict a defendant of being an armed habitual criminal, the State must prove that the defendant

has been previously convicted of two enumerated offenses (720 ILCS 5/24-1.7(a) (West 2012)), whereas to convict a defendant of unlawful use of a weapon by a felon, the State must prove that defendant has been previously convicted of one felony of any kind. 720 ILCS 5/24-1.1(a) (West 2012). Clearly, the required proof for both offenses is different, and being an armed habitual criminal is the more serious offense, as it requires two prior felony convictions, not one. See *Johnson*, 2015 IL App (1st) 133663, ¶¶ 22-23 (analyzing and rejecting identical argument). Therefore, defendant's conviction did not violate the proportionate penalties clause.

¶ 30 In reaching this conclusion, we reject defendant's reliance on *Christy*, 139 Ill. 2d at 177, 181, where our supreme court compared the armed violence and aggravated kidnapping statutes and ultimately found them unconstitutionally disproportionate. The defendant claimed armed violence predicated on kidnapping with a category I weapon and aggravated kidnapping were identical offenses with disproportionate penalties. *Id.* at 178. After reviewing the respective statutes, our supreme court agreed finding both armed violence and aggravated kidnapping contained the identical elements, specifically kidnapping and a weapon. *Id.* at 181. However, armed violence was punishable as a Class X felony, whereas aggravated kidnapping was punishable as a Class 1 felony, thus less severely than armed violence. *Id.* The court therefore found the penalties unconstitutionally disproportionate. *Id.* In contrast, here, as we have already demonstrated, the offenses of being an armed habitual criminal and unlawful use of a weapon by a felon do not have identical elements, namely, the former requires two triggering offenses while the latter requires only one. Therefore, unlike in *Christy*, the penalties are not unconstitutionally disproportionate.

¶ 31 Lastly, in defendant's reply brief, he appears to argue, without any citation to legal authority, that his armed habitual criminal conviction should be vacated because he was subject to improper double enhancement. He argues:

> "[T]he statute as applied to [defendant] is unconstitutional because one of the two predicate felony convictions, unlawful use of a weapon, is based on the other felony conviction, the murder conviction. Thus, since one of the two convictions does not have a basis independent of the remaining conviction, [defendant's] sentence for armed habitual criminal is disproportionate."

Defendant, however, has forfeited any argument concerning improper double enhancement because he raised the issue for the first time in his reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); see also *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49. Forfeiture aside, the argument is meritless. See *Johnson*, 2015 IL App (1st) 133663, ¶ 18 (analyzing and rejecting identical argument).

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.