

SECOND DIVISION
March 29, 2016

No. 1-14-0831

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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 2533
)	
JOHN FREEMAN,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment affirmed over defendant's challenge to the sufficiency of the evidence to sustain his conviction for armed violence.

¶ 2 Following a jury trial, defendant John Freeman was found guilty of armed violence based on felony possession of a controlled substance. 720 ILCS 5/33A-2(a) (West Supp. 2011). In a concurrent bench trial, defendant was found guilty of two counts of unlawful use of a weapon by a felon (UUWF). The trial court merged the UUWF counts with the armed violence count, and sentenced defendant solely on the armed violence conviction to 18 years' imprisonment. On

appeal, defendant contests the sufficiency of the evidence to sustain his conviction for armed violence. 720 ILCS 5/33A-2(a) (West Supp. 2011).

¶ 3 The evidence adduced by the State at defendant's jury trial showed that at about 11 p.m., on January 13, 2011, Chicago police officers Chris Skarupinski and Joseph Byrne were investigating an unrelated criminal matter on the far south side of Chicago. The officers described the area as a well-lit residential neighborhood. Both officers were wearing plain clothes, topped by their police stars and bulletproof vests, and full tactical duty belts. Officer Byrne was driving an unmarked police car south on State Street when they saw two lone men walking east at the intersection of State and 108th Streets. The officers later identified the men as Harold Newton and defendant, who was carrying a backpack over his shoulder.

¶ 4 Pursuant to the unrelated criminal matter, the officers decided to conduct a field interview of defendant, and stopped their vehicle about five to ten feet from him. As Officer Skarupinski got out of the car, defendant looked in the officers' direction, and ran, with the backpack in tow. He continued past four houses on State Street, then threw the backpack on the ground, and ran back the way he came. Officer Skarupinski followed him at first, but when Officer Byrne apprehended defendant, he retrieved the backpack that defendant had thrown on the ground.

¶ 5 Officer Skarupinski searched the backpack onsite, and found a .40 caliber handgun loaded with nine live rounds, one large bag of a tan-colored substance, ten smaller bags containing a similar looking substance, and some cannabis. The parties stipulated that the subsequent testing of the recovered substances by the forensic chemist confirmed the presence of heroin in the single bag and in five of the smaller bags, and that the total-weight of the content of the tested bags was eight grams.

¶ 6 The defense then moved for a directed finding on all counts, arguing in relevant part, that the evidence, which showed that defendant dropped the backpack, thereby divesting himself of the handgun and the possibility to use it against anyone, could not sustain the armed violence charge, in light of *People v. Smith*, 191 Ill. 2d 408 (2000). The court highlighted key factual differences between *Smith* and the case at bar, and denied the motion.

¶ 7 Harold Newton testified for the defense that he and defendant, his friend of 22 years, were in the basement of a barbershop shooting pool and drinking beer, when he suddenly "had to relieve" himself. Because the restrooms were upstairs, Newton decided to go to the alley. While outside, he saw two unidentified individuals put a backpack into a garbage can and leave. He liberated the backpack from the garbage, and his search revealed only a gun inside. He hid the bag in the barbershop, and then went back to playing pool without telling anyone about what he had found. Newton also testified that his intent when he found the gun was to use it in case he or a friend was arrested. Defendant and Newton left together on foot, and Newton carried the bag until they approached an alley about 30 to 40 steps away from the intersection of 108th and State Streets. At that point, Newton noticed his shoes were untied, and asked defendant to hold the backpack. Defendant agreed, and remained in possession of the bag as they continued east on 108th Street.

¶ 8 Newton further testified that, less than one minute after he stopped to tie his shoes, a car pulled up, and two men jumped out. Startled, Newton moved away as quickly as he could, but a previous football accident prevented him from running. He confirmed that defendant ran with the backpack in his possession, but claimed that he did not see the officers' badges or duty belts, and

he thought they were wearing hoodies or some kind of jacket. After he was some distance away, Newton took a closer look at the car, realized it was a police vehicle, and returned.

¶ 9 The case was submitted to the jury, which found defendant guilty of armed violence. On appeal, defendant seeks reversal of his conviction for armed violence, contending that the State failed to prove beyond a reasonable doubt that he was "otherwise armed" because he did not have immediate access to, or timely control over, the handgun when confronted by the police.

¶ 10 As an initial matter, defendant contends that the facts are undisputed and therefore *de novo* review is appropriate to determine whether the evidence proved that he was "otherwise armed" beyond a reasonable doubt. *Smith*, 191 Ill. 2d at 411. We disagree, viewing defendant's argument as a challenge to the sufficiency of the evidence to prove an element of the offense. *People v. Givens*, 364 Ill 3d 37, 43 (2005). In such a case, we determine whether all of the evidence, direct and circumstantial, when viewed in a light most favorable to the prosecution, would allow a rational trier of fact to conclude that the essential elements of the crime had been proved beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995).

¶ 11 It is the province of the trier of fact to determine the credibility of the witnesses, the weight to be given to their testimony, to resolve any conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Salinas*, 347 Ill. App. 3d 867, 880 (1st Dist. 2004). Reviewing courts will not reverse a criminal conviction unless the evidence is so unsatisfactory or improbable that it creates a reasonable doubt of defendant's guilt. *Wiley*, 165 Ill. 2d at 297.

¶ 12 In this case, defendant was charged with armed violence in that he committed a felony, to wit: possession of a controlled substance, while armed with a dangerous weapon, a handgun. 720

ILCS 5/33A-2(a) (West Supp. 2011). By definition, a person is considered “armed with a dangerous weapon” when “he or she carries on or about his or her person or is otherwise armed” with a weapon prescribed by the statute. 720 ILCS 5/33A-1(c)(1), (c)(2) (West Supp. 2011). On appeal, defendant does not contest the sufficiency of the evidence to prove his possession of a controlled substance, but contends that the State failed to prove that he was armed with a dangerous weapon when he abandoned the backpack containing the gun prior to his arrest.

¶ 13 As set forth above, the record in this case shows, in relevant part, that when the police officers first arrived on the scene, defendant was carrying a backpack over his shoulder which contained a loaded handgun and contraband. As Officer Skarupinski started to get out of the car, defendant looked in the officers' direction, and then fled with the bag. As he attempted to flee from the police officers, defendant maintained control over the bag, before abandoning it and backtracking his route.

¶ 14 A similar situation was present in *People v. Anderson*, 364 Ill. App. 3d 528 (2006), where defendant fled when police officers confronted him and did not abandon his gun when the police arrived, but retained it during part of his flight. *Id.* at 530-31. The court in *Anderson* determined that defendant's desperation could easily have sparked gun violence, and that the "encounter carried the potential for the very carnage that the armed violence law was meant to prevent." *Id.* at 542. We find no meaningful difference in this case, and likewise conclude that the evidence viewed in a light most favorable to the State, supports the conclusion that defendant was proved guilty of armed violence beyond a reasonable doubt, where he was shown to be armed with a dangerous weapon while in possession of a controlled substance when police officers arrived and he instantly fled. *Id.*

¶ 15 In an attempt to distinguish *Anderson*, defendant points out that the police in this case did not identify themselves, as they did in *Anderson*. We do not find this dispositive. As the court explained in *People v. Condon*, 148 Ill. 2d 96, 109 (1992), the purpose of the armed violence statute was to deter felons from using dangerous weapons and to avoid the "dangerous consequences which might result if the felony victim resists." Here, regardless of whether the police officers identified themselves to defendant, it is undisputed that he ran from them with the handgun in the backpack, thereby creating the potential for the very use the statute was meant to prevent.

¶ 16 Defendant further contends however, that he was not "otherwise armed" because the factual basis for his armed violence conviction is more congruent with the scenarios that mandated reversal in *Smith*, and *Condon*. In *Condon*, defendant was not found to be in possession of any of the guns which were recovered in separate rooms throughout the house, and the issue before the court was whether defendant was nevertheless "otherwise armed". *Condon*, 148 Ill. 2d at 110. The supreme court explained that a felon without a weapon at hand cannot make the type of spontaneous decision to kill that the statute was enacted to prevent, and therefore, a felon could not be "otherwise armed" without some kind of immediate access to, or timely control over, the weapon. *Id.* at 109-10. In this case, unlike *Condon*, the handgun was shown to be on defendant's person and within his immediate reach as he initially ran from police before he abandoned the bag and his efforts to elude arrest.

¶ 17 In *Smith*, defendant dropped an unloaded handgun out of an apartment window as the police approached the building. *Smith*, 191 Ill. 2d at 410. After the police entered, they found contraband in the living room and defendant in a bedroom of the otherwise vacant apartment. *Id.*

Based on these facts, the supreme court held that defendant was not shown to be "otherwise armed" during the underlying felony, reasoning that he did not have immediate access to, or timely control over, the weapon because he had already dropped the gun out of the window when the police arrived. *Id.* at 412. Here, unlike *Smith*, defendant was shown to be in physical possession of the gun and the contraband in the backpack, and ran with it as the police approached, thereby escalating the potential for violence in the encounter, rather than extinguishing it. Accordingly, we find that *Smith*, is factually distinguishable, and provides no basis for reversal.

¶ 18 Defendant, further asserts that he was not "otherwise armed" under *Smith* because he was no longer in possession of the gun at the time of his arrest. However, the determination of whether a defendant is armed is not made at the moment of arrest. *People v. Harre*, 155 Ill. 2d 392, 400 (1993). This principle was evident in *People v. Brown*, 362 Ill. App. 3d 374 (1st Dist. 2005), where defendant was convicted of armed violence predicated upon aggravated fleeing or attempting to elude police. In that case, defendant fired three or four shots from a car, and as the police pursued defendant in their unmarked squad car, he threw his gun out of the window. *Id.* at 375. Sustaining his conviction, this court reasoned that defendant's abandonment of the weapon before his arrest "did not mitigate the fact that it was within his immediate access and timely control during the course of the underlying felony." *Id.* at 382. In this case, the evidence similarly shows that defendant completed the offense and then abandoned the weapon seconds before his arrest.

¶ 19 Defendant, also cites *People v. Neylon*, 327 Ill. App. 3d 300, 310 (2002) to suggest that *Smith* overruled *Harre sub silentio*. This theory was raised and rejected by the court in *Anderson*

which observed that, "the determinative point for *Smith* is not the moment of arrest *per se*, but the moment when the defendant no longer poses the kind of threat that the armed violence law was designed to prevent." *Anderson*, 364 Ill. App. 3d at 541. The court then concluded that *Smith* narrowed the set of circumstances that may be considered as raising that kind of threat and whether it is raised will depend on the unique facts of each case. *Id.* at 541-42. Here, on the facts presented, defendant possessed the handgun and the controlled substance at a time when the immediate potential for violence existed, namely, as he fled from police, and was thus proved guilty of armed violence.

¶ 20 We also find defendant's reliance on *People v. Shelato*, 228 Ill. App. 3d 622, 627 (1992) misplaced. In *Shelato*, the only evidence of any relationship between defendant and the weapon defeated the presence of violent potential. When the police entered the residence, defendant was seated on the couch, and they found the weapon buried in a duffel bag on the other side of the room. *Id.* at 624. In holding that defendant did not have immediate access or timely control, the court elaborated that it would defy reason to infer that defendant could have traversed the distance, and dug through the bag while being watched by several armed police officers. *Id.* at 627-28. As such, *Shelato* is factually distinguishable from the case at bar.

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.