THIRD DIVISION
March 16, 2016

No. 1-14-3804

**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. 13 CR 11851 |
| | ) | |
| CARLOS CURRY, | ) | Honorable |
| | ) | Nicholas R. Ford, |
| Defendant-Appellant. | ) | Judge Presiding. |

---

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Defendant's conviction for armed habitual criminal affirmed over his challenge to the sufficiency of the evidence; there was no plain error in the State and the court mentioning the name of defendant's offense; judgment affirmed.

¶ 2 Following a jury trial, defendant Carlos Curry was convicted of armed habitual criminal and sentenced to 12 years' imprisonment. On appeal, he challenges the sufficiency of the evidence to sustain his conviction. He also contends that the use of the name of the charge, armed habitual criminal, had an extremely prejudicial effect on the jury that interfered with his

presumption of innocence. Defendant also maintains that the cumulative errors alleged justify vacating the judgment and remanding for a new trial.

¶ 3 Defendant was charged, in relevant part, with one count of armed habitual criminal for an incident that occurred on May 28, 2013, based on possessing a firearm after having been convicted of possession of a controlled substance with intent to deliver and aggravated unlawful use of a weapon.

¶ 4 At trial, Chicago police officer Joseph Gentile testified that at 6:13 p.m. on that date, he was on routine patrol with his two partners in an unmarked car with a municipal plate. They were in plain clothes wearing their vests, along with their stars and duty belts, which carried their weapon, handcuffs, and radio. While travelling eastbound on 59th Street just passing Union Avenue, they received information of an in-progress 911 call. The call was regarding a black male, wearing a white T-shirt and white cargo pants, with a gun at 5710 South Lowe Avenue which was a block away from where the police were driving. When they arrived at that location, Officer Gentile observed a black male wearing a white T-shirt and white cargo pants standing in the middle of the street looking in their direction. He then immediately walked towards the sidewalk. Officer Gentile did not see anyone else in the area fitting the description of the man from the 911 call. He noticed that there were close to 10 people on the east side of the block, and four to six people on the west side up and down the block.

¶ 5 Officer Gentile testified that he made eye contact with defendant, who immediately walked towards the rear of a white Chevy Malibu. The officer did not notice a bulge on defendant, a glint of metal or a gun in his hands, but noted that there was a vehicle between

himself and defendant. As defendant reached the rear of the parked Chevy Malibu vehicle, the officer "lost sight of defendant for a second, he squatted down and then seconds later reappeared and began walking towards the sidewalk." The officer explained that defendant squatted down by the back rear tire bumper area. There was no one else near that vehicle. Afterwards, defendant walked towards the police, who approached defendant, patted him down and handcuffed him. Officer Gentile then went to the area where he had seen defendant squat down, and observed on top of the rear back wheel well of the car a two-toned .45-caliber Taurus handgun, which was loaded with eight live rounds, including one in the chamber.

¶ 6 On cross-examination, Officer Gentile explained that he did not go and get plastic gloves to make sure fingerprints were preserved because he was mainly concerned for the safety of everyone around. He could not leave the gun, so he retrieved it to make it safe.

¶ 7 Officer Gentile further testified on cross-examination that he prepared an arrest report and case incident report in this case, but did not state in them that he initially saw defendant standing in the middle of the street, but, on direct examination, noted that he included the location in the occurrence address box of the arrest report. Even though Officer Gentile had testified that the 911 call indicated that the person in question was in pants, in response to counsel's question of whether it was unusual to see defendant in "shorts" and a T-shirt in the summer, Officer Gentile indicated that it was not unusual. He also testified on cross-examination that 57th Street and Lowe Avenue is an area known for drugs, gangs and guns.

¶ 8 Officer Melissa Tovar testified that she was driving the car with the other two police officers as passengers. While she was driving, they received a 911 dispatch call of a black male

with a gun wearing a white T-shirt and white cargo shorts in the area of 5710 South Lowe Avenue. As they approached that area, Officer Tovar noticed a group of males and females on the corner at 5710 South Lowe Avenue. There were about five people present, mostly females. She also observed defendant, who fit the description of the 911 call, standing right in the street in front of 5710 South Lowe Avenue. A male and a female were standing next to him. Officer Tovar testified that as soon as she approached, she observed defendant "approach behind two cars, he started walking swiftly, he was the only one walking away." Officer Tovar did not notice any bulge on defendant, or reflection of any metal on his person or anything in his hand. As he went behind the car, she lost sight of him for about a minute, and did not know what he did during that minute. Officer Tovar stopped her car, and the officers detained defendant. The parties then stipulated that defendant had two prior qualifying convictions.

¶ 9 At the close of evidence, the jury found defendant guilty of armed habitual criminal. Defendant filed a motion for a new trial, alleging, in relevant part, that the armed habitual criminal charge was stated to the jury nine times by the court and the State. Defendant contended that the phrase, "armed habitual criminal," is so prejudicial that once the jury heard it, the jury was predisposed to finding defendant guilty in the instant cause in a way that violated the presumption of innocence to which defendant was entitled. The court denied the motion, noting, in relevant part, that the legislature describes the crime in question as armed habitual criminal, and that it explained to the jury numerous times that the indictment in and of itself is not evidence against defendant. The court further noted that it explained to the jury that the name of the charge alone is not evidence.

¶ 10 On appeal, defendant first challenges the sufficiency of the evidence to sustain his conviction. He contends that based on conflicting testimony and entirely circumstantial evidence, the essential elements of armed habitual criminal were not proven beyond a reasonable doubt.

¶ 11 As an initial matter, defendant contends that the rule for review of a conviction based on circumstantial evidence is that to support such a conviction, "the facts produced must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence." However, the supreme court abolished the reasonable hypothesis of innocence standard of review of circumstantial evidence cases in *People v. Pintos*, 133 Ill. 2d 286, 291 (1989).

¶ 12 Rather, when defendant challenges the sufficiency of the evidence to sustain his conviction, our duty is to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proven beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995) (discussing standard of review in a circumstantial evidence case). A criminal conviction will be reversed only if the evidence is so unsatisfactory or improbable that it leaves a reasonable doubt of defendant's guilt. *Wiley*, 165 Ill. 2d at 297. For the reasons that follow, we do not find this to be such a case.

¶ 13 To sustain a conviction of armed habitual criminal, the State must prove, beyond a reasonable doubt, that defendant possessed a firearm after having being convicted of two or more qualifying felonies. 720 ILCS 5/24-1.7 (West 2012). Defendant does not dispute the proof of his two prior qualifying felony convictions, but maintains that there was insufficient proof that he

possessed a gun where there was conflicting testimony from the two police officers regarding the number of people present when defendant was confronted and whether defendant was wearing cargo shorts or pants, and from Officer Gentile as to whether defendant was wearing white cargo shorts or pants, and where the evidence was entirely circumstantial and implausible. We observe, initially, that to prove a case, the evidence may be entirely circumstantial. *People v. Toolate,* 45 Ill. App. 3d 567, 569 (1976). This case is one of constructive possession, which may be inferred from the facts; evidence establishing constructive possession is often entirely circumstantial. *People v. Neylon,* 327 Ill. App. 3d 300, 306 (2002).

¶ 14 The evidence in this case, when viewed in the light most favorable to the prosecution (*Pintos,* 133 Ill. 2d at 292), shows that Officers Tovar and Gentile responded to a 911 call regarding a black male wearing a white T-shirt with a gun in the area of 5710 South Lowe Avenue, an area known for guns. The officers testified that when they arrived at the location in question, they observed defendant fitting the 911 call description standing in the middle of the street. While there was a discrepancy between the officers as to whether the description further provided that the black male was wearing white cargo shorts or white cargo pants, no one else in the area fit the description. Officer Gentile testified that when defendant made eye contact with him, he immediately walked away from police and went behind a vehicle parked on the side of the road. He squatted down at the rear of the vehicle for a few seconds, then got up. When Officer Gentile went to where defendant squatted, he found a gun in the rear wheel well of the car. The inference that this gun was discarded by defendant flowed normally from the evidence presented to the trier of fact (*People v. Martin*, 401 Ill. App. 3d 315, 323-24 (2010)), which was

not required to search out all possible explanations consistent with innocence and raise them to the level of a reasonable doubt (*People v. Moore*, 394 Ill. App. 3d 361, 364-65 (2009)).

¶ 15 Furthermore, the minor discrepancies in the evidence, whether between two witnesses or within the testimony of one witness, are not unusual. See *In re M.W.*, 232 Ill. 2d 408, 437-38 (2009). We find that the minor discrepancies noted by defendant did not destroy the credibility of the officers. *People v. Mays*, 81 Ill. App. 3d 1090, 1099 (1980). It is well-settled that the testimony of a single witness, if positive and credible, is sufficient to convict, and here we had two officers testify. *People v. Dunskus*, 282 Ill. App. 3d 912, 918-19 (1996). Defendant also contends that proper procedure was not followed in recovering the weapon so that it could later be submitted for forensic examination. However, the lack of corroborating physical evidence does not raise a reasonable doubt as to defendant's guilt. *People v. Herron*, 2012 IL App (1st) 090663, ¶23. Viewing the evidence in the light most favorable to the State, we conclude that the trier of fact could find that defendant was in possession of a firearm (*Pintos*, 133 Ill. 2d at 292), and, with the evidence of his prior convictions, that he was found guilty of the charged offense of armed habitual criminal beyond a reasonable doubt (720 ILCS 5/24-1.7 (West 2012)).

¶ 16 In reaching this conclusion, we find *People v. Smith*, 185 Ill. 2d 532 (1999), cited by defendant, distinguishable from the case at bar. In *Smith*, 185 Ill. 2d at 543-45 the supreme court found the evidence insufficient to sustain defendant's conviction for murder where the witness testimony regarding whether defendant followed the victim out of the bar was contradicted by testimony from the bartender and the victim's companions, the witness' testimony was impeached with her signed statement that she gave five months before trial, and she had a motive to falsely

implicate defendant. Here, by contrast, there were no witnesses who contradicted the officers' testimony that defendant matched the description of the person given in the 911 call regarding a black male with a gun, that they saw defendant go behind the vehicle and disappear for a short while, and that Officer Gentile discovered a gun in the rear wheel well of that vehicle. There was also no motive to falsely identify defendant as the offender.

¶ 17 We also observe that defendant contends that police did not have ample opportunity to observe any wrongdoing. However, there was sufficient time where defendant made eye contact with Officer Gentile who then observed him squat behind the car for a few seconds, and then approach police. Accordingly, there was sufficient evidence to allow the trier of fact to find that defendant possessed a firearm and was in turn guilty of armed habitual criminal beyond a reasonable doubt. 720 ILCS 5/24-1.7 (West 2012).

¶ 18 Defendant next contends that he suffered undue prejudice in violation of Illinois Rules of Evidence 403 (eff. Jan. 1, 2016) by the repetition of the phrase, armed habitual criminal, to the jury by the State and the trial court. The State responds that defendant forfeited this issue for review where he did not object at trial when the State mentioned the armed habitual criminal offense and the court instructed the jury on it. The State further maintains that the mere recitation of the charge against defendant was not evidence admitted against defendant and did not constitute error. Although defendant raised this issue in his post-trial motion, he was also required to make an objection at trial. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). His failure to do so results in forfeiture. *Id.*

¶ 19 Defendant, in his reply brief, cites to *People v. Manzella*, 56 Ill. 2d 187, 195-96 (1973), overruled, on other grounds, by *People v. Huckstead*, 91 Ill. 2d 536, 548 (1982), in support of his contention that plain errors or defects affecting substantial rights may be noticed although not objected to at trial. Defendant contends that because issues of undue prejudice strike at fundamental fairness of a trial, the "failure to object should be considered as properly preserved for appeal," as he was unduly prejudiced by the repetition of the phrase, armed habitual criminal, in the presence of the jury.

¶ 20 The plain error doctrine is a narrow and limited exception to the general forfeiture rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that defendant was deprived a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The first step in plain error review, is to determine whether there was any error. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find no error, and thus, no plain error.

¶ 21 We conclude it is not error for the State to mention the name of the offense to the jury during argument and for the court to state it during jury instructions. Defendant cites Illinois Rules of Evidence 403 in support of his contention that the name of the offense was unduly prejudicial and should have been omitted. That rule provides, in pertinent part, that although relevant, *evidence* may be excluded if its probative value substantially outweighed the danger of unfair prejudice. (Emphasis added.) Ill. R. Evid. 403 (eff. Jan. 1, 2016). Rule 403 does not apply here, as the name of the offense is *not* evidence. Although defendant cites cases which caution

against naming *prior* offenses, defendant cites no case which has held that naming the *pending* offense prejudices a defendant. Accordingly, we find no error and thus no plain error.

¶ 22 In light of the foregoing, we affirm the judgment of the circuit court of Cook County, and based on our conclusion in this case, we need not address defendant's remaining contention.

¶ 23 Affirmed.