2017 IL App (1st) 143887-U

THIRD DIVISION
February 1, 2017

No. 1-14-3887

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. 14 CR 6025
	)	
JONATHAN WALKER,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for armed habitual criminal is affirmed as none of the State's evidence was so improbable, unsatisfactory, or inconclusive that it created a reasonable doubt of defendant's guilt and a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Jonathan Walker was convicted of armed habitual criminal (720 ILCS 5/24-1.7 (a) (West 2012)) and sentenced to six years imprisonment. Defendant appeals his conviction, arguing that the State failed to prove beyond a reasonable doubt that he had been in possession of a firearm. For the reasons set forth herein, we affirm the judgment of the trial court.

¶ 3 On March 22, 2014, Chicago police officers Zapata, Kelly, Staunton, and Sampin arrested defendant in the 3900 block of West Grenshaw Street after recovering a weapon that Zapata observed defendant toss into a fenced-in yard. Defendant was charged with one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), and two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6 (a) (1)-(2) (West 2014). Defendant waived his right to a jury trial, and the case proceeded to bench trial.

¶ 4 At trial, Officer Zapata testified that he was a Chicago police officer and had been assigned to a gang enforcement unit. On the night of March 22, 2014, Zapata was on patrol with Officers Kelly, Staunton, and Sampin. Zapata was riding in the front passenger seat of an unmarked patrol vehicle driven by Officer Kelly, while Officers Staunton and Sampin trailed behind in another patrol vehicle. Officer Kelly drove southbound on Pulaski Road, turned left, and proceeded eastbound on West Grenshaw Street. As the vehicle turned left, Zapata observed defendant, who was walking westbound on the south side of Grenshaw Street, toss a small, shiny object into the front yard of the building located at 3937 West Grenshaw. The area was well lit with artificial street lighting and his view of defendant was unobstructed.

¶ 5 Zapata estimated that he was 40 or 50 feet away from defendant when defendant tossed the object. Believing the object to be a firearm, Zapata exited the vehicle and detained defendant at 3945 West Grenshaw. Officers Staunton and Sampin also exited their vehicle and approached defendant. Zapata told Staunton to check the yard at 3937 West Grenshaw, and followed him there after defendant was secured. At 3937 West Grenshaw, Officers Zapata and Staunton observed a small, two-shot handgun lying on top of a pile of snow. No other objects were in the area. Staunton recovered the firearm from the yard, and Zapata and Kelly placed defendant into custody.

¶ 6 On cross-examination, Zapata estimated that his vehicle was traveling between 10 and 20 miles an hour as it turned on to West Grenshaw Street and that he was 50 to 70 feet away from defendant when he first observed him walking westbound, toward the approaching patrol vehicles. Zapata stated that he observed defendant toss the shiny object through a wrought iron fence with his left hand. Zapata estimated that the bars on the wrought iron fence were five to six inches apart. After defendant tossed the object, he continued walking toward the officers. Zapata stated that the gun recovered from the yard had a two inch barrel and was three to four inches in length from grip to barrel, but admitted that he was "just guessing" as to the exact size.

¶ 7 Officer Staunton testified that he was on patrol in the vicinity of 3937 West Grenshaw on the night of March 22, 2014. Staunton was riding in a patrol vehicle driven by Officer Sampin, and they were traveling behind a vehicle containing Officers Kelly and Zapata. At 7:30 p.m., the officers were patrolling the 3900 block of West Grenshaw when Staunton observed Kelly and Zapata stop their vehicle and detain defendant. Staunton exited his vehicle and approached Zapata, Kelly, and defendant. After having a conversation with Officer Zapata, Staunton walked

to the building located at 3937 West Grenshaw and observed a handgun lying on the snow in the front yard. There were no other objects in the area. Staunton climbed over the fence and recovered the handgun, which he described as a Derringer 38-caliber handgun loaded with one live round. He described the fence as a black, wrought iron fence with gaps of three to five inches separating the bars. Staunton stated that he kept the gun in his custody until Officer Sampin inventoried it pursuant to Chicago police inventory procedures.

¶ 8 On cross-examination, Staunton conceded that he did not observe the actions that led Officers Zapata and Kelly to detain defendant. He estimated that the handgun he recovered had a barrel length of two to three inches.

¶ 9 The State introduced an Illinois State Police certification which stated that defendant had never been issued a Firearm Owner's Identification Card as of April 11, 2014. The State then introduced a certified copy of defendant's conviction from July 17, 2012, for a class 4 possession of a controlled substance. It next introduced a certified copy of defendant's conviction from September 10, 2010, for a class 1 manufacture or delivery of a controlled substance. Finally, the State introduced a certified copy of defendant's conviction from January 24, 2004, for a class 1 possession of a controlled substance.

¶ 10 The defense made a motion for a directed verdict, arguing that Officer Zapata's testimony was unbelievable. The trial court denied the motion.

¶ 11 Defendant testified that on March 22, 2014, he was at a party in a house located on West Grenshaw Street. He left the party shortly after 7 p.m. to buy a pack of cigarettes at a gas station located at the intersection of Roosevelt and Pulaski Roads. As he was walking westbound on the south side of West Grenshaw, talking on his cell phone, defendant noticed a "black crown", or

unmarked police vehicle, make a left-hand turn on to West Grenshaw Street. Defendant stated that the officer in the passenger seat of the vehicle called him over to the vehicle and searched him. Even though the search did not produce contraband, the officers placed defendant into the back of the patrol vehicle. Defendant testified that he did not have a gun that night, did not toss a gun through a fence, and was not allowed to possess a gun because he was on parole at that time. On cross-examination, the State impeached defendant's testimony with prior convictions.

¶ 12 After closing arguments, the trial court found defendant guilty of all charges. The court noted that Officer Zapata's testimony was credible and unimpeached, that it was not implausible to believe that such a small handgun could be tossed through such a fence, and that defendant's history with the police gave him a reason to toss the gun away.

¶ 13 On November 25, 2014, defendant moved for reconsideration and for a new trial. The trial court denied the motions and, after a hearing, sentenced defendant to six years in prison on the armed habitual criminal count, merging the remaining four counts into the armed habitual criminal count.

¶ 14 On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he possessed a firearm, an essential element of the armed habitual criminal offense. Specifically, he argues that Officer Zapata's testimony that defendant tossed a gun through a fence in front of police officers was implausible when compared to his own testimony.

¶ 15 The due process clause of the fourteenth amendment safeguards a criminal defendant from conviction in state court except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16. When considering a challenge to the sufficiency of the evidence

in a criminal case, a reviewing court's function is not to retry the defendant. *People v. Lloyd*, 2013 IL 113510, ¶ 42. Rather, a reviewing court must decide 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 offense beyond a reasonable doubt. *Id.*

¶ 16 This means that we must draw all reasonable inferences from the record in favor of the prosecution, and that " '[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)). In reviewing a trial court's decision, we must give proper deference to the trier of fact who observed the witnesses testify, 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. Circumstantial evidence is sufficient to sustain a conviction as long as it satisfies proof beyond a reasonable doubt of the charged offense. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 17 As relevant here, a person commits the offense of being an armed habitual criminal if he possesses any firearm after having been convicted of two qualifying felonies. 720 ILCS 5/24-1.7 (a) (West 2012). Defendant challenges the possession element of the offense. He argues that Officer Zapata's testimony is incredible and insufficient to prove beyond a reasonable doubt that defendant possessed a firearm. He argues that the idea that he would drop the gun in front of the officers is inherently suspicious. Further, he argues that Officer Zapata did not see defendant hold the gun and could not know whether another person had placed the gun in the yard.

¶ 18 Though Officer Zapata did not see defendant holding the firearm, possession of the firearm can be reasonably inferred from the circumstances. Officer Zapata observed defendant toss an unknown object into a yard. Zapata was 40 to 50 feet away, sitting in the front passenger seat of a car that was traveling at a low rate of speed, the area was well lit, and his view of defendant was unobstructed. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 65 ("The testimony of a single credible witness may be sufficient to sustain a conviction, even if it is contradicted by the defendant.") After apprehending defendant, Zapata and Officer Staunton went to the area where Zapata had seen defendant drop the object. Here, they recovered a loaded handgun. Zapata and Staunton testified that the gun was lying on top of snow, demonstrating that it had not been there long. They also testified that no other objects were found in the area where the gun was found. This circumstantial evidence, when viewed in the light most favorable to the State, was sufficient for the trial court to determine that defendant possessed the firearm that the officers found. *People v. Brown*, 309 Ill. App. 3d 599, 609 (1999) (evidence that an officer saw a defendant drop an object, a gun was recovered from the spot where the object was dropped, and there were no other objects in the area, was sufficient to conclude that the defendant possessed the gun.)

¶ 19 Defendant contends that it is unreasonable to assume that he possessed the handgun as Zapata "could not have seen what had occurred on the street moments before," and that another person could have thrown the gun in the yard before the officers turned on to the street. However, proof beyond a reasonable doubt does not require the exclusion of every possible doubt. *Brown*, 309 Ill. App. 3d at 608. Rather," a conviction may be sustained wholly upon circumstantial evidence where the entire chain of circumstances leads to a reasonable and moral

certainty that the defendant committed the crime." *Id.* Here, the testimony of Officers Zapata and Staunton was sufficient for a rational trier of fact to conclude, beyond a reasonable doubt, that defendant was in possession of the gun recovered from the front yard of 3937 W. Grenshaw Street.

¶ 20 Defendant also argues that the State did not prove beyond a reasonable doubt that he possessed a firearm because it did not produce the handgun, or pictures of the handgun, in order to prove that it was small enough to be tossed through gaps in the fence. This court has held that the failure of the prosecution to introduce a weapon at trial does not impair an officer's credibility or raise a reasonable doubt of defendant's guilt. *People v. Angel P*, 2014 IL App (1st) 121749, ¶ 56. Officers Zapata and Staunton both gave estimates as to the size of the gun and the gaps in the wrought iron fence. It was in the purview of trial court to assess the credibility of the officer's testimony, and to make factual inferences therefrom. *Vaughn*, 2011 IL App (1st) 092834, ¶ 24. We do not find it improbable, unsatisfactory, or inconclusive to believe that a gun estimated to measure three to four inches long could be tossed through a fence gap of three to six inches, and we will not, therefore, overrule the trial court's determination that the gun was indeed tossed through the fence.

¶ 21 Finally, defendant argues that his own testimony should be accepted over the testimony of Officers Zapata and Staunton, as police testimony in "dropsy cases" is inherently suspicious. A “dropsy case” is one in which a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that the defendant dropped contraband in plain view. *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004). Defendant argues that this case is analogous to *People v. Marion*, 2015 IL App (1st) 131011, in which this court reversed the decision of a trial

court judge because we found the defendant's testimony more plausible than that of the police officer. However, the facts of *Marion* vary greatly from those of the case at bar.

¶ 22 In *Marion*, during a hearing on the defendant's motion to dismiss the indictments, he testified that one of the arresting officers offered not to pursue the charges against him if he helped the officers find guns in the area. *Id.* at ¶9. In contrast, one of the arresting officers testified that the defendant initiated the deal, telling officers he "could possibly get some rifles if he could get out of the arrest." *Id.* at ¶20. The arresting officer told the defendant that he "would talk to the State's Attorney and see if they could be more lenient with the case against him" if defendant could deliver rifles to the officers. The officer testified that the defendant then helped the officers find three handguns. *Id.* at ¶21. On cross-examination, the officer admitted that he did not include any mention of rifles in his police report. *Id.* at ¶21. The trial court denied the motion to dismiss, finding that "the idea of providing information came from the defendant," that the officer was "very credible," and that the testimony of the defendant was not credible *Id*. at ¶22.

¶ 23 This Court reversed the trial court's ruling, noting that, while a finding of fact made by a trial court in regard to a witness's credibility is entitled to great weight, we would not hesitate to reverse judgments of conviction " '[w]here the State's evidence is improbable, unconvincing and contrary to human experience.' " *Id*. at ¶26 (quoting *People v. Dawson*, 22 Ill. 2d 260, 264-65 (1961)). We found that the officer's testimony that defendant spontaneously offered to produce rifles makes "no sense at all when [the defendant] can produce only handguns, not rifles," and that such behavior would be "improbable, incomprehensible, and contrary to human nature." *Id*.

at ¶ 28. Therefore, we found that the officer's testimony was incredible, and should not have been accepted by the trial court. *Id.*

¶ 24 Unlike in *Marion*, the facts in this case do not warrant a rejection of the trial court's credibility findings. We do not believe that it is "improbable, incomprehensible, [or] contrary to human nature" for a person in possession of contraband to attempt to discard that contraband after noticing a police vehicle 40 to 50 feet away. Defendant contends that false testimony by police is "widespread," and that police testimony claiming that a defendant tried to dispose of contraband while in line of sight of police (or "dropsy" testimony) is inherently suspicious. Defendant cites a law review article which argues that police officers have multiple motives to give false testimony and frame innocent defendants.[1] Even if we accept these contentions as true, it would not follow that all police testimony claiming that a defendant dropped contraband is inherently unreliable.

¶ 25 Here, after considering all of the evidence in this case, the trial court found Officers Zapata and Staunton to be credible. We do not believe that the testimony of Officers Zapata and Staunton "is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt."*See Lloyd*, 2013 IL 113510, ¶ 42. As such, we will not disturb the trial court's findings, as it was in a "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *See Vaughn*, 2011 IL App (1st) 092834, ¶ 24. Viewing the evidence in the light most favorable to the prosecution, the trial court could have found the essential elements of the offense beyond a reasonable doubt.

[1] G. Chin & S. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. Pitt. L.Rev. 233, 248-49 (1998).

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

¶ 27 Affirmed.