

2017 IL App (1st) 161976-U  
No. 1-16-1976  
Order filed November 17, 2017

Fifth Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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|--------------------------------------|---|-----------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the       |
|                                      | ) | Circuit Court of      |
| Plaintiff-Appellee,                  | ) | Cook County.          |
|                                      | ) |                       |
| v.                                   | ) | No. 14 CR 8012        |
|                                      | ) |                       |
| DESMOND McCARTY,                     | ) | Honorable             |
|                                      | ) | Joseph Michael Claps, |
| Defendant-Appellant.                 | ) | Judge, presiding.     |

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PRESIDING JUSTICE REYES delivered the judgment of the court.  
Justices Hall and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for being an armed habitual criminal is affirmed, where the identification testimony of an eyewitness was sufficiently reliable to establish beyond a reasonable doubt defendant's actual possession of the firearm.

¶ 2 Following a bench trial, defendant Desmond McCarty was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)), and sentenced to 12 years' imprisonment. Defendant appeals, arguing that the State failed to prove beyond a reasonable doubt that he actually, or constructively, possessed a handgun. For the following reasons, we affirm.

¶ 3 Defendant was charged by indictment with one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)), four counts of unlawful possession of a weapon by felon (720 ILCS 5/24-1.1 (West 2014)), and six counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6 (a) (West 2014)). On April 30, 2015, defendant waived his right to a jury trial, and the case proceeded to a bench trial.

¶ 4 Orine Clark testified that, on April 19, 2014, at 11:15 a.m., she was sitting on her porch on South Damen Avenue when a black sport utility vehicle (SUV) parked across the street. Five men exited the SUV, ran across Damen Avenue, and stopped outside of the fence which separated her yard from the sidewalk. “At some point,” the five men returned to the SUV. As they did so, Clark noticed that one of the men in the group, whom she identified in-court as defendant, was waving a “black and gray” gun in his hand. By the time the men returned to the SUV, police arrived on the scene and prevented the SUV from leaving. Clark testified that when the police arrived, she noticed defendant run away from the SUV. The rest of the men were sitting in the SUV. A few minutes later, an officer returned to the scene with defendant. Officers directed Clark’s attention to a firearm lying in the SUV, and she identified it as the weapon that defendant had been holding before he ran away from the SUV.

¶ 5 On cross-examination, Clark testified that the man with the handgun had been wearing a yellow jacket. She acknowledged that she did not know anything about firearms, but concluded that the object the man was carrying was a handgun. She also acknowledged that she was 70 years old and that she had surgery to remove cataracts from her eyes, but that she did not suffer from any other vision problems. In the court room, Clark was not able to read the lettering on defendant’s shirt as he was sitting at counsel’s table, 25 feet from the witness stand. She was able

to read the shirt when defendant stood 12 feet from the witness stand. She testified that she saw the man with the weapon run toward the SUV, but that he did not get in the SUV or give the firearm to any of the other men. Clark acknowledged that she did not provide the officers with a description of the man with the handgun before the officers brought defendant back to the scene.

¶ 6 On redirect, Clark testified that she noticed defendant wearing the yellow jacket while he was in the police vehicle and did not see the shirt he was wearing underneath the jacket. On recross, Clark acknowledged that she did not see the yellow jacket when the men ran across the street, but stated that defendant was wearing a yellow jacket when “they brought [her] to the car.”

¶ 7 Officer Matthew Lopez testified that, on April 19, 2014, he responded to the call and arrived at South Damen and parked his marked police vehicle in front of an SUV so that it would not be able to leave the scene. As he approached the SUV, Lopez noticed one of the men, whom he identified in-court as defendant, walk northbound on Damen and eastbound through a lot “on the 6400 block.” Defendant was wearing camouflage pants and a black shirt. Lopez testified that defendant was within a foot of the SUV before he walked away. Upon reaching the SUV, Lopez observed that the rear passenger window was open. When another officer started to search the vehicle, Lopez saw a “blue steel” handgun on the rear passenger’s side floorboard. After another officer escorted defendant back to the scene, Clark identified him as the man who had been holding the firearm. She also identified the handgun in the SUV as the weapon that he had been holding. Lopez testified that the firearm was a .40 caliber semi-automatic handgun with 16 rounds of live ammunition.

¶ 8 On cross-examination, Lopez testified that he did not see defendant with a handgun and did not see him place anything in the SUV. He acknowledged that his police report did not include that defendant was standing near the SUV when the officers arrived on the scene. Lopez did not believe that defendant was wearing a yellow jacket when he was identified by the complaining witness. On redirect, Lopez stated that, although there were other people in the area of the SUV, Clark identified defendant as the person who had been holding the gun.

¶ 9 Officer Dante Clay testified that, on April 19, 2014, he responded to a call to help locate a suspect in the area of 64th Street and Damen Avenue. On South Honore Street, Clay noticed a man walking out of a vacant lot who he later identified in-court as defendant. Defendant was wearing a black shirt and camouflage pants. Clay conducted a field interview and, after defendant's name matched the name of the offender which had been relayed over police-radio, he placed him into custody. Clay transported defendant to 64th and Damen for a show-up.

¶ 10 On cross examination, Clay testified that he did not see defendant with a firearm, and that defendant was not wearing a yellow piece of clothing during the show-up identification. Clay testified that defendant was presented to the witness from 23 feet away during the show-up.

¶ 11 The parties stipulated that, in August 2011, defendant pled guilty to unlawful use of a weapon by felon and was convicted of possession of a controlled substance with intent to deliver in July 2003. The parties further stipulated that defendant did not have a Firearm Owner's Identification Card (FOID) in April 2014.

¶ 12 Defendant moved for a directed verdict, arguing that the State failed to prove that he possessed a firearm "other than a pistol," as required by three of the charged counts. He also argued that the State failed to prove beyond a reasonable doubt that he actually or constructively

possessed the handgun when the State failed to produce the actual weapon that was recovered and Clark's identification testimony was unreliable because of her poor eyesight and the fact that she testified that she noticed defendant wearing a yellow jacket. The trial court granted the motion as to the counts that required proof of a firearm "other than a pistol," but denied the motion as to all other counts. Defense rested without presenting evidence.

¶ 13 After argument, the trial court found defendant guilty of being an armed habitual criminal, two counts of unlawful possession of a weapon by felon, and two counts of AUUW. In doing so, the court addressed Clark's testimony and noted that "[a] lot was made about a yellow jacket, yellow whatever. I reviewed the testimony of the eyewitness. I believe her testimony to be clear and convincing. Her identification happened minutes after the offense. She was confident in her eyewitness identification." The court merged the unlawful possession of a weapon by felon and AUUW counts into the armed habitual criminal count and sentenced defendant to 12 years' imprisonment. Defendant filed a timely notice of appeal.

¶ 14 On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction. Specifically, he contends that the State failed to prove beyond a reasonable doubt that he actually, or constructively, possessed a handgun.

¶ 15 The due process clause of the fourteenth amendment protects defendants against conviction in state courts except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When determining the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. *People v. Wilkerson*, 2016 IL App (1st) 151913, ¶ 64. Accordingly, 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.’ ” *People v. Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)). “ ‘Under this standard, the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence.’ ” *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 61 (quoting *People v. Ross*, 229 Ill. 2d 255, 272 (2008)).

¶ 16 As relevant to this case, a person commits the offense of armed habitual criminal if he possesses a firearm after having been convicted of two or more qualifying felonies. 720 ILCS 5/24-1.7(a) (West 2014). Possession can be either actual or constructive. *People v. Tates*, 2016 IL App (1st) 140619, ¶ 19. To establish constructive possession, the State must prove beyond a reasonable doubt that a defendant (1) knew a firearm was present; and (2) exercised immediate and exclusive control over the area where the firearm was found. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. The State may establish knowledge through evidence of a defendant’s acts, declarations, or conduct, from which it may be inferred that he knew of the firearm’s presence. *Sams*, 2013 IL App (1st) 121431, ¶ 10. A defendant’s control over the location where a weapon is found gives rise to an inference that he possesses that weapon. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 17 On appeal, defendant does not dispute that he was previously convicted of two or more qualifying felonies. Rather, he contends that the State failed to prove beyond a reasonable doubt

that he actually or constructively possessed the firearm in question. Specifically, he argues that the eyewitness identification testimony of Clark, who saw him holding the handgun, is not sufficiently reliable to sustain his conviction under a theory of actual possession. He further argues that the testimony of officers Lopez and Clay, who did not see defendant holding a weapon, is insufficient to sustain his conviction under a theory of constructive possession.

¶ 18 After viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could conclude that defendant actually possessed the gun. “It is well established that a single witness’s identification is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification.” *People v. Starks*, 2014 IL App (1st) 121169, ¶ 48. When assessing identification testimony, this court relies on the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Id.* Those factors are: (1) the opportunity the witness had to view the offender at the time of the offense; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Id.* (citing *Biggers*, 409 U.S. at 199-200).

¶ 19 In considering the *Biggers* factors in relation to Clark’s identification, we conclude that they weigh in the State’s favor. First, Clark had ample opportunity to observe defendant. The record shows that this incident occurred at 11:15 a.m. and that it was not “dark” at the time. Clark testified that the group of men approached the fence in front of her house, which was approximately 12 feet from where she was sitting. During the show-up, Clark identified defendant from 23 feet away. Accordingly, this factor, which has been described as “the most

important factor” in determining the reliability of an identification, weighs in favor of the reliability of Clark’s identification of defendant. See *People v. Wehrwein*, 190 Ill. App. 3d 35, 39 (1989) (“The most important factor is whether the witness had an adequate opportunity to view the offender at the time of the crime”).

¶ 20 Second, Clark exhibited a high degree of attention to defendant’s conduct. She testified that she watched five men exit a black SUV, run across the street, and stop at the fence in front of her yard. As the men retreated to the vehicle, Clark saw defendant running and waving a “black and gray” handgun that he was holding in his hand. When police prevented the SUV from leaving the scene, Clark noticed defendant flee the scene. Clark’s detailed narration of events, coupled with the fact that defendant was waving a weapon, suggests a high degree of attention at the time of the crime. Accordingly, this factor weighs in favor of the reliability of Clark’s identification testimony.

¶ 21 Regarding the third factor, the accuracy of the witness’s prior description of the offender, Clark testified that she did not give the officers a description of defendant before she identified him in the show-up. Accordingly, this factor is neutral.

¶ 22 The fourth and fifth factors, the level of certainty demonstrated by the witness and the length of time between the crime and the identification, also weigh in favor of the reliability of Clark’s identification testimony. Clark unequivocally identified defendant as the man with the gun less than 20 minutes after the incident. Illinois courts have found that longer periods of time do not necessarily render identifications unreliable. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 26 (identification reliable where it was made within three months of crime); *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (identification reliable where it was made a year and



four months after crime.) Further, the trial court described Clark's in-court identification testimony as confident, clear, and convincing. Accordingly, these factors weigh in favor of the reliability of Clark's identification of defendant as the man with the gun.

¶ 23 In addition, we find that Clark's testimony was corroborated by that of Officer Lopez. Although details of their accounts differed, both Clark and Lopez testified that one man left the scene when police pulled in front of the SUV. Each of the witnesses testified that Officer Clay brought that same man back to the scene, and each witness identified that man as defendant.

¶ 24 Defendant nevertheless argues that three discrepancies between the testimony of Clark and the testimony of officers Clay and Lopez demonstrate Clark's limited opportunity to view the offender and low degree of attention at the time of the incident. First, Clark testified that defendant was wearing a yellow jacket when he was in the police car. When asked whether defendant was wearing the jacket before he got into the police car, Clark stated "I wasn't paying the jacket no attention then. I just noticed the guy." Officers Clay and Lopez both testified that defendant was not wearing a yellow article of clothing when they first saw him, and was not wearing a yellow article of clothing during the show-up identification. Second, Clark testified that defendant ran away from the SUV, while Lopez testified that he walked away. Third, Clark testified that the men other than defendant were sitting in the car when the police approached the SUV, while Officer Lopez testified that the men were standing outside of the car.

¶ 25 However, these alleged inconsistencies were fully explored at trial during cross-examination and closing arguments. Although Clark's credibility may have been affected by these alleged inconsistencies, it was the responsibility of the trier of fact, in this case the trial court, to determine Clark's credibility, the weight to be given to her testimony and to resolve any

inconsistencies and conflicts in the evidence. *People v. Starks*, 2014 IL App (1st) 121169 ¶ 51; *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); see also *People v. Nwosu*, 289 Ill. App. 3d 487, 493-94 (1997) (“The trier of fact is also given the function of resolving discrepancies or conflicts in the testimony. [Citation] It is not the function of this court to retry the defendant when considering a challenge to the sufficiency of the evidence”). We will not substitute our judgment for that of the trier of fact on these matters. *Sutherland*, 223 Ill. 2d at 242. As mentioned, this court will reverse a defendant’s conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant’s guilt. *Siguenza-Brito*, 235 Ill. 2d at 225. This is not one of those cases.

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

¶ 27 Affirmed.