

2018 IL App (1st) 161517-U

No. 1-16-1517

Order filed October 31, 2018

Third Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 1547
)	
TRISTAN KYE,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction for aggravated unlawful use of a weapon affirmed where the police officer's testimony that he observed defendant with a gun was credible.
- ¶ 2 Following a bench trial, defendant Tristan Kye was convicted of aggravated unlawful use of a weapon (AUUW). He was sentenced to 24 months' probation, 80 hours of community service, and 2 days in the Cook County Department of Corrections, time considered served. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt

because the testimony from Chicago police officer Dean Korbas, the only witness who claimed to observe defendant with a gun, was inconsistent with the officer's prior testimony, and contradicted by the photographic evidence and 911 calls. We affirm.

¶ 3 At trial, Korbas testified that about 1 p.m. on December 5, 2012, he was driving an unmarked SUV with his partner, John McDermott, near an alley at 112th and Throop Streets. Korbas observed three young men loitering at the entrance to the alley. As Korbas drove closer, defendant fled through the alley. Defendant was wearing a red hoodie. Korbas identified defendant in court. Korbas followed defendant in his vehicle. Defendant ran about half a block and jumped over a wooden fence into a yard. The fence was about four feet high and had wooden slats with gaps between the slats. McDermott exited the SUV, jumped the fence, and pursued defendant on foot. Korbas continued observing defendant from the SUV. Defendant ran through the yard to the front of the house. Korbas observed defendant discard a handgun to his right, near an evergreen bush in front of the house. Korbas was about 60 feet away and saw the gun leave defendant's hand. Defendant fled down 112th Street, and Korbas lost sight of him.

¶ 4 Korbas drove through the alley and headed west on 112th Street. He observed defendant run through a gangway and into a backyard. Korbas exited his vehicle. He and McDermott entered the yard and heard voices inside the house. They knocked on the door and a woman answered. The officers asked her if anyone had entered her home. She replied "[y]es, get him out of here. He don't belong here." Defendant was sitting in the front room with two other young men. The officers removed defendant from the house and detained him by the police vehicle.

¶ 5 Korbas left defendant with McDermott and went to recover the weapon. Korbas walked west on 112th Street until he found the wooden fence. He walked to the front of that house and

found the weapon on the ground in front of an evergreen bush. Korbas recovered the weapon and observed that it was a 9-millimeter handgun loaded with 15 live rounds. Korbas placed defendant under arrest. At the police station, Korbas checked the serial number of the handgun and learned that it was stolen. Korbas relayed that information to Officer Flores.

¶ 6 In court, Korbas identified a photograph of the fence with horizontal wooden slats. In the same photograph, Korbas identified a bush by the front of the house where he saw defendant throw the weapon. Korbas testified that his SUV was elevated higher than a regular car.

¶ 7 On cross-examination, Korbas testified that when defendant fled through the alley, the other men stood there for a few seconds, then ran south. The officers pursued defendant because he ran first. Korbas testified that he had a very good view of defendant when he discarded the gun under the bush. He acknowledged that at the preliminary hearing, he testified that he did not have a good view of defendant as he ran through the yard. Korbas never called the Office of Emergency Management and Communications (OEMC) during the incident. He believed McDermott called OEMC about 1305. Korbas estimated that three to four minutes elapsed between the time defendant discarded the weapon and the time he recovered it.

¶ 8 On redirect examination, Korbas testified that he returned to the bush and recovered the weapon based upon his own recollection of seeing defendant throw it. He was not directed to the location by the OEMC.

¶ 9 The State presented a stipulation that Officer Flores interviewed defendant at the police station. After being advised of his *Miranda* rights, defendant stated “I didn’t know the weapon was stolen. I got it from somebody.” The State also presented a certificate from the Illinois State Police indicating that defendant was never issued a firearm owner’s identification (FOID) card.

¶ 10 Chicago police dispatcher Noemi Otero, called by the defense, identified three documents called department event queries. The first transmission regarding a traffic pursuit was received at 1305. A transmission received from an officer at 1306:50 indicated “[i]nside house.” At 1312:51 and 1313:23 the police checked the names of two men. At 1313:45, police checked defendant’s name. The second query reflected a 911 call received at 1312. The caller stated that the male teen subjects whom the police chased and had in custody down the street threw a gun in the bushes while running at that location. The third query reflected a 911 call received at 1319. The caller stated that the gun was in the front bush, and that the police were not looking in the right place.

¶ 11 On cross-examination, Otero acknowledged that the times indicated on the documents reflected the times the transmissions were entered into the computer, not necessarily the times when the calls were received. A 911 call is time-stamped when the operator finishes creating the event in the computer, and the operator could have been on the phone with the caller for several minutes. Defendant presented a stipulation that Otero’s testimony referred to this case.

¶ 12 Private detective John Laskey was hired by the defense to investigate defendant’s arrest. Laskey measured the fence in the alley and found that it was four feet two inches in height. The distance from the fence to the evergreen bush in front of the house was approximately 104 feet. Laskey photographed the location while seated in his car to see if he could observe the bush from the officer’s vantage point in the alley. He took one set of photos while seated in an Audi sedan, and a second set while seated in a Ford SUV. Laskey testified that he was not able to see through or over the fence while seated in either vehicle. Laskey’s photos were admitted into evidence.

¶ 13 James Hamp testified for the defense that his mother lived in the house on 112th Street where the police found defendant. Defendant was good friends with Hamp’s nephew, who lived

in the house. Hamp was on the enclosed front porch when this incident occurred. Hamp observed two police officers enter the backyard. The officers came to the front door and asked Hamp if anyone had run inside the house. Hamp replied “[n]o, sir.” Hamp and his mother gave the officers permission to search the house. Hamp’s nephew, defendant, and two young men were inside the house. Hamp did not know that they were there. The police removed defendant and the two young men from the house. The police detained the men for 40 minutes, then arrested defendant and released the others.

¶ 14 The trial court noted that the photograph presented by the State was a view looking over the fence into the yard. The court found that a person would be able to see through the openings between the slats, and that the evergreen bush at the corner of the house was visible. The court found that the bush was also visible in defendant’s first photograph, but the second photograph was out of focus. The court found that if Korbas was seated as normal in the driver’s seat of the SUV, his view would have been very different than the limited view depicted in defendant’s second photograph. The court reviewed all of the evidence in detail and found that, based on the totality of the testimony, defendant was proven guilty of AUUW beyond a reasonable doubt.

¶ 15 In his posttrial motion, defendant argued that Korbas’ testimony was not credible and was contradicted by defendant’s evidence. The trial court stated that the two photographs presented by defendant did not appear to be taken at eye level, but instead, by someone holding the camera down low. The court expressly stated “[i]f someone who was seated in the vehicle was looking, this would not have been what they would have seen. They would have seen over the fence.” The court stated that it was “not impressed” with Laskey’s testimony regarding the photographs. The court further noted that Otero testified that the 911 calls are time-stamped as received when the

events are created. The court found that Korbas' estimate of three to four minutes to locate the weapon was not far off from the timing of the 911 calls, or the checking of defendant's name in the computer. The court further found that Korbas' testimony from the preliminary hearing showed that he did not have good sight of defendant as he ran through the yard, but he did have good sight of him when he tossed the weapon at the end of the yard. The trial court denied defendant's motion. The court sentenced defendant to 24 months' probation, 80 hours of community service, and 2 days in jail, time considered served.

¶ 16 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because the testimony from Korbas, the only witness who claimed to observe defendant with a gun, was inconsistent with the officer's prior testimony, and contradicted by the photographic evidence and 911 calls. Defendant argues that Korbas' trial testimony that he had a good view of defendant when he tossed the gun under the bush was impeached with his prior testimony from the preliminary hearing where Korbas acknowledged that he did not have a good view of defendant as he ran through the yard. Defendant further argues that Laskey's testimony and photos cast doubt on Korbas' testimony that he was able to see defendant running through the yard because the fence would have blocked his view. In addition, defendant claims that the 911 calls show that Korbas' testimony is not credible because the call reporting that the police were searching in the wrong location was received at 1:19 p.m., which was 10 minutes after Korbas claimed that he had recovered the gun. Defendant further asserts that the fact that the police were searching for the gun shows that Korbas did not see defendant toss it under the bush.

¶ 17 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether, after viewing the evidence in the light most favorable to the State,

any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 18 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)), nor simply because defendant claims that a witness was not credible or that the evidence was contradictory (*Siguenza-Brito*, 235 Ill. 2d at 228). The testimony of a single witness, if positive and credible, is sufficient to sustain a conviction. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 19 To prove defendant guilty of AUUW as charged in this case, the State was required to show that he knowingly carried a firearm on his person when he was not on his own land or in his own home or place of business, and he had not been issued a currently valid FOID card. 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2012).

¶ 20 Here, we find that defendant's challenges to the credibility of Korbas' testimony are unpersuasive where the record shows that the trial court thoroughly considered these same

arguments and found they were without merit. Korbas testified that as he and McDermott pursued defendant through an alley in an SUV, he observed defendant jump over a four-foot wooden fence into a yard. McDermott jumped over the fence and chased defendant on foot. As Korbas remained in the driver's seat of his SUV in the alley, he observed defendant run through the yard to the front of the house. He then observed defendant toss a handgun to his right, near an evergreen bush in front of the house. Korbas testified that he was about 60 feet away and saw the gun leave defendant's hand. Korbas further testified that after defendant was detained, Korbas walked on 112th Street until he found the wooden fence, then walked to the front of that house and recovered a loaded nine-millimeter handgun from the ground in front of the evergreen bush.

¶ 21 Defendant first claims that Korbas' trial testimony that he had a good view of defendant when he tossed the gun under the bush was impeached with his prior testimony from the preliminary hearing where Korbas acknowledged that he did not have a good view of defendant as he ran through the yard. The trial court rejected this argument. The court pointed out that Korbas' testimony from the preliminary hearing specifically indicated that he did not have a good view of defendant as he ran through the yard. However, Korbas expressly testified at trial that he had a clear view of defendant when he tossed the weapon near the bush at the end of the yard. The record thus reveals that rather than impeaching Korbas' trial testimony, his testimony from the preliminary hearing showed that the clarity of Korbas' view of defendant varied depending on defendant's location in the yard. Korbas had a better view of defendant when he was near the bush by the front of the house than when he ran through the yard. It was the trial court's responsibility to determine the veracity of Korbas' testimony regarding his observations

of defendant. *Siguenza-Brito*, 235 Ill. 2d at 228. The trial court found this testimony credible, and we find no reason to disturb that determination.

¶ 22 Defendant next claims that Laskey's testimony and photographs cast doubt on Korbas' testimony that he was able to see defendant running through the yard because the wooden fence would have blocked his view. The trial court found no merit in this argument. Three photographs of the fence and view of the yard were submitted into evidence – one from the State, and two from defendant, taken by Laskey. When viewing these photos, the trial court found that a person would be able to see through the openings between the wooden slats, and that the evergreen bush at the corner of the house was visible in the State's photograph and defendant's first photograph. The court pointed out that defendant's second photograph was out of focus. Significantly, the court found that if Korbas was seated as normal in the driver's seat of the SUV, his view would have been very different than the limited view depicted in defendant's second photograph.

¶ 23 At the hearing on defendant's posttrial motion, the trial court again rejected this argument. The court stated that the two photographs presented by defendant did not appear to be taken at eye level, but instead, by someone holding the camera down low. The court expressly stated "[i]f someone who was seated in the vehicle was looking, this would not have been what they would have seen. They would have seen over the fence." The court stated that it was "not impressed" with Laskey's testimony regarding the photographs.

¶ 24 This court has viewed the three photographs included in the record. All three photos are taken from the alley looking into the yard. The State's photograph appears to have been taken at the same level as someone who would be seated in an SUV. This photo shows that one can clearly see over the four-foot fence and into the yard, and the evergreen bush at the front corner

of the house is clearly visible. Both of defendant's photos were taken at a much lower level, looking directly at the fence from a height of less than four feet. In defendant's first photo, the yard and the bush are visible when looking through the openings between the slats. Defendant's second photo is a close-up of the top two slats of the fence. Some grass is visible between the slats. Other than the two slats, the rest of the photo is out of focus.

¶ 25 The record reveals that the trial court's finding that defendant's photos did not accurately depict the view from someone seated in an SUV was reasonable. It was the trial court's duty to weigh this evidence and draw reasonable inferences from it. *Siguenza-Brito*, 235 Ill. 2d at 228. The trial court's finding is supported by the record, and we will not disturb its ruling.

¶ 26 Finally, defendant argues that the 911 calls show that Korbas' testimony is not credible because the call reporting that the police were searching in the wrong location was received at 1:19 p.m., which was 10 minutes after Korbas claimed that he had recovered the gun. Defendant further asserts that the fact that the police were searching for the gun shows that Korbas did not see defendant toss it under the bush. The trial court also rejected this argument. The court noted that Otero testified that the 911 calls are time-stamped as received when the events are created in the computer, not necessarily at the same time that the calls come in to the OEMC. The court found that Korbas' estimate that three to four minutes elapsed between the time defendant discarded the weapon and Korbas recovered it was not far off from the timing of the 911 calls, or the checking of defendant's name in the computer. It was the trial court's duty to weigh and resolve any perceived conflicts in this evidence, and we find no reason to disturb that determination on review. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 27 Determining the credibility of Korbas' testimony was within the province of the trial court. The record reveals that the court's rulings were reasonable and supported by the evidence. Viewed in the light most favorable to the State, we find that the evidence was sufficient for the trial court to find defendant guilty of AUUW beyond a reasonable doubt.

¶ 28 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.