2019 IL App (1st) 151524-U

No. 1-15-1524

Order filed August 9, 2019

SIXTH DIVISION

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 1494
	)	
MARSHAWN WILSON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence presented at trial was sufficient to prove defendant guilty beyond a reasonable doubt of aggravated unlawful use of a weapon.

¶ 2 Following a bench trial, defendant Marshawn Wilson was convicted of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (3)(c) (West 2012)) and sentenced to two years of probation. On appeal, defendant contends that the State failed to prove him guilty

beyond a reasonable doubt where the only evidence that he ever handled a weapon was one police officer's brief glimpse of a hand throwing a gun-shaped object out of the passenger-side window of a car during a high speed chase, and the discovery of a gun on the roadside 10 minutes later. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the events of January 1, 2013. Following his arrest, defendant was charged by information with four counts of AUUW.[1] Prior to trial, the State nol-prossed two of the counts. Trial proceeded on the two remaining counts, one of which alleged that defendant knowingly carried a handgun in a vehicle and had not been issued a currently valid Firearm Owner's Identification (FOID) card, and the other of which alleged that defendant knowingly carried a firearm on or about his person and had not been issued a currently valid FOID card.

¶ 4 At trial, Chicago police officer Edward Garcia testified that on the night in question, he was working patrol with two partners, E. Carreno and R. Torres, in an unmarked squad car. Carreno was driving, Garcia was in the front passenger seat, and Torres sat in the back passenger seat. Shortly after 1 a.m., the officers were on the 5900 block of South Halsted Street when Garcia observed a vehicle travelling at a high rate of speed. The officers activated the squad car's emergency equipment and followed. When the speeding car stopped around 6230 South Halsted Street, all three officers exited their car and approached on foot. Garcia walked toward the passenger side of the stopped car. He could see that the car was occupied by two people, and in court, he identified defendant as the front-seat passenger.

[1] Victor Hamilton was also named in some of the counts of the information. However, Hamilton did not go to trial with defendant and is not a party to this appeal.

¶ 5 When Garcia got up to the area of the rear bumper, the car sped off. The three officers ran back to their squad car and followed, with their lights and sirens activated, and called for assistance. As the car travelled southbound on South Halsted Street, it failed to stop at several red lights. Around the area of 6402 South Halsted Street, Garcia saw "a passenger toss out what appeared to be a handgun out the window." Garcia clarified that this "passenger" was defendant, and that it was the passenger-side window from which the object was tossed. When asked to describe exactly what he saw being thrown, Garcia stated, "I saw what I believe to be a handgun thrown out the window." He explained that he had seen many handguns in his career and believed the thrown object was a handgun "[b]ecause of the way it was -- the way it looked. *** It had a handle. It was -- I don't know how to describe. It was the shape of a handgun."

¶ 6 Garcia acknowledged that he did not notice if the driver of the car was making "any movements or anything" at that point in time. He stated that South Halsted Street was well-lit with a lot of artificial lighting. Garcia also explained that the area on the west side of the 6400 block of South Halsted Street consisted of a big fenced-in piece of grassy land owned by a university, and stated that he did not see any people in the area.

¶ 7 Garcia testified that after the car turned left onto 66th Street, it was stopped. Garcia got out of the squad car, immediately approached defendant, and detained him. Garcia had a conversation with Chicago police sergeant Patrick Boyle, who had responded to the scene. Then, within minutes of detaining defendant, Garcia went back to the 6400 block of South Halsted Street and "positively identified the handgun that was found." At that point, the handgun was on the ground between the street and the curb, "right where [Garcia] observed the defendant throw

the gun out." Although several police officers were with the handgun, no civilians were around the area.

¶ 8 On cross-examination, Garcia agreed that he later learned the car's driver was also its owner, Victor Hamilton. When the car was stopped, Hamilton was searched and found to have bullets in his pockets. Bullets were also found in the car, but nothing of an illegal nature was found on defendant. Garcia acknowledged that at a preliminary hearing, he testified he was "probably about 25 to 30 feet" from the car when he saw an object being tossed from it. He agreed that he and his partners were travelling at a relatively high rate of speed, and that during the pursuit, he could not see the driver's hands. He also clarified that he did not see the window being lowered, but rather, just saw "a hand reaching out the window" and discarding an object. With regard to the handgun, Garcia answered the following questions:

> "Q. Officer, at the time you saw the object being thrown from the car, you couldn't say with positive assurance whether or not it was a handgun; is that correct?
>
> ***
>
> A. No, I couldn't be sure that my observation was 100 percent correct.
>
> Q. You observed a handgun, but you couldn't be sure; is that correct?
>
> A. From my observation, yeah, I believed it was a handgun.
>
> Q. Right, but you couldn't be sure; is that correct?
>
> A. I could not have been 100 percent sure.

Q. At that time when you saw the gun being tossed from -- you thought was a gun being tossed from the car, you didn't have time to identify anything singular about that gun; is that correct?

A. (No response.)

Q. Any details that might separate it from any other gun; is that correct?

A. No."

¶ 9 Chicago police sergeant Patrick Boyle testified that around 1 a.m. on the night in question, he responded to a call of a car in pursuit. He proceeded to the 6500 block of South Emerald Street, where he found that Garcia and Carreno had detained two men. In court, Boyle identified defendant as one of the detained men. After speaking with Garcia, Boyle went to the 6400 block of South Halsted Street. It took him "just a couple of minutes." When he arrived, other officers were on the scene, which had streetlights and was "a relatively well-lit area even at nighttime." No civilians were in the area.

¶ 10 Boyle got out of his car and started looking on the ground on the west curb near the sidewalk. He discovered a silver and black .45 caliber pistol on the roadway pavement near the curb. Boyle had two officers stand guard over the gun while he called Garcia. Boyle continued searching the ground on the sidewalk area and just to the west of the sidewalk along the property's fence, but he found nothing else that resembled or looked close to the gun. Garcia arrived at the scene, looked at the gun on the ground, and said it was "what [he] saw go out the window of the car." Boyle then took the gun from the ground, unloaded it, placed it in a bag, and transported it to the police station, where it was inventoried.

¶ 11 On cross-examination, Boyle stated that less than 10 minutes elapsed from the time he arrived at the 6500 block of South Emerald Street to the time he arrived at 6402 South Halsted Street.

¶ 12 The parties stipulated as to the chain of custody of the gun and defendant's date of birth. The State introduced a certified document from the Illinois State Police reflecting that defendant did not possess a FOID card. Defense counsel agreed the document was self-authenticating, and the trial court admitted it into evidence.

¶ 13 Defendant made a motion for a directed finding, which the trial court denied. The court thereafter found defendant guilty of AUUW, stating as follows:

> "There's only one possible defense in this case which wasn't raised. That is the so-called for lack of a better word, the hot potato defense, but it wasn't generated in this case. The officer said he saw this defendant throw a handgun out the window. And the circumstantial evidence was overwhelming. There was only one gun on the street. It's recovered within ten minutes exactly where that officer said he saw this defendant toss out the handgun. Finding of guilty."

¶ 14 Defendant filed an initial and a supplemental motion for a new trial. Following arguments, the trial court denied the motions. In doing so, the court stated:

> "The direct evidence was credible and strong. The officer said he saw the defendant's hand come out the window and toss an object that he believed was a handgun. Less than ten minutes later, the sergeant recovers the handgun. There is nothing else out there. There's no people out there. And the area was well lit. Defense motion for a new trial and / or reversal of ruling denied."

¶ 15 The trial court thereafter sentenced defendant to two years of probation.[2] Defendant's motion to reconsider sentence was denied. This appeal followed.

¶ 16 On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction. When reviewing the sufficiency of the evidence, the relevant inquiry is 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 crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 17 Defendant contends that the State failed to prove beyond a reasonable doubt that he possessed a handgun, either actually or constructively. He asserts that the State's evidence failed to establish that the object tossed out the car window was a handgun or that it was possessed by him and not Hamilton, where the only evidence supporting his conviction was (1) Garcia's brief glimpse, during a high-speed chase, of a hand emerging from a passenger side window and tossing out a handgun-shaped object, (2) the recovery, about 10 minutes later, of a handgun around the location of Garcia's observation, and (3) the fact that defendant was the sole passenger of the car. Defendant argues that the State's case was weak because only one of three

[2] The trial court did not specify which count it was imposing sentence on, or whether the counts merged, either in its oral pronouncements or on the half-sheet, court sheets, or sentencing order.

potential police eyewitnesses testified; Garcia was not 100 percent certain the object thrown was a gun; Garcia did not see Hamilton's hands at the time the object was thrown, leaving open the possibility that Hamilton did the throwing or that Hamilton may have flung a gun at defendant, who then instantaneously flung it out the window like a "hot potato"; defendant, as the passenger, had no say in Hamilton's decision to flee; while ammunition was found on Hamilton and in the car, none was found on defendant; and the object thrown from the car was left unsecured and undiscovered for about 10 minutes on a major street on New Year's Eve, "a holiday in which celebrations involving firearms are not exactly unknown," and therefore, a passerby may have collected the thrown object, and the recovered firearm may have been discarded by someone else.

¶ 18 A person commits AUUW, as charged in this case, when he (1) knowingly carries a firearm on or about his person or in any vehicle, except when on his land or in his abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, and (2) he has not been issued a currently valid FOID card. 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2012). The only element of AUUW at issue here is possession. Possession may be actual or constructive and is often proved with circumstantial evidence. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Where a case is based on circumstantial evidence, it is not necessary for each link in the chain of circumstances to be proved beyond a reasonable doubt; it is sufficient if all the evidence, considered collectively, satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 19 Actual possession exists where a defendant exercises present personal dominion over illicit material and has immediate and exclusive dominion or control over the material. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). "Dominion" includes attempts to conceal or throw away illicit material. *People v. Dismuke*, 2013 IL App (2d) 120925, ¶ 16; *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). Present personal touching of the illicit material is not required, and the requirement of "exclusive" possession does not mean that the possession may not be joint. *Schmalz*, 194 Ill. 2d at 82. Once possession has been shown, the trier of fact may draw an inference of guilty knowledge from the surrounding facts and circumstances. *Id*.

¶ 20 Viewing the evidence in the light most favorable to the prosecution, as we must, we conclude that there was sufficient evidence that defendant had actual possession of the recovered gun. At trial, the State presented evidence that as Garcia and his fellow officers pursued a fleeing car, Garcia saw defendant, who was riding in the front passenger seat, toss "what appeared to be a handgun" out the passenger-side window around the area of 6402 South Halsted Street. Garcia did not see any other people in that area. Within 10 minutes, Boyle searched that location and found a handgun on the ground on the west curb near the sidewalk. He found no other handgun-shaped object nearby, and also noted there were no civilians around. Garcia then returned to the location and positively identified the handgun, which was located "right where [he] observed the defendant throw the gun out," as the object defendant had tossed from the car's window. Garcia's and Boyle's testimony sufficiently establishes that defendant exercised present and personal dominion over the recovered gun as he attempted to throw it away. We cannot say that the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as

to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Defendant's challenge to the sufficiency of the evidence fails.

¶ 21 We are mindful of defendant's arguments regarding what he perceives as weaknesses in the State's case, but are not persuaded by them. First, that Garcia was the only one of the three pursuing officers to testify is of no import, as it is well-established that the testimony of a single witness, if positive and credible, is sufficient to convict. *Siguenza-Brito*, 235 Ill. 2d at 228. Second, even though Garcia was less than 100 percent certain that the object he saw being thrown was a gun, Boyle's discovery of nothing other than a gun in the location where the object landed sufficiently establishes the thrown object's identity. Third, defendant's theory that Hamilton may have reached over and thrown the gun himself is directly contradicted by Garcia's testimony that he saw defendant do the throwing. Moreover, while it is not beyond the realm of possibility that defendant may have only briefly touched the gun like a "hot potato," this is not an inference the trial court was obliged to make. See *People v. Smith*, 2014 IL App (1st) 123094, ¶ 13. "[S]peculation that another person might have committed the offense does not necessarily raise a reasonable doubt of the guilt of the accused" (*People v. Manning*, 182 Ill. 2d 193, 211 (1998)) and "the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt" (*Hall*, 194 Ill. 2d at 332). Fourth, Hamilton's decision to flee from the police had nothing to do with the trial court finding defendant guilty. Fifth, the presence of ammunition in the car and on Hamilton, but not on defendant's person, does not in any way foreclose the trial court's determination that defendant possessed the gun. Finally, defendant's suggestion that a passerby may have picked up the object that was thrown from the car and that

the recovered gun had been discarded by someone else is pure speculation. Both Garcia and Boyle testified that no such passerby were in the area. Moreover, as noted above, the existence of a possible explanation consistent with innocence does not establish a reasonable doubt of guilt, and did not require the trial court to disregard the inference which flowed normally from the evidence, *i.e.*, that defendant threw the recovered gun. See *id.*

¶ 22 The two cases upon which defendant primarily relies in making his arguments for reversal are distinguishable.

¶ 23 In *People v. Boswell*, 19 Ill. App. 3d 619, 620 (1974), an officer was pursuing a car occupied by four people when the officer saw the car's right front door open and, immediately thereafter, a package was dropped from the open door. When the car was stopped, the officer determined the defendant had been sitting in the right front side of the car. *Id.* A short time later, the officer found a plastic bag, which was later determined to contain in excess of 11 grams of cannabis, on the roadside. *Id.* at 620-21. The defendant was convicted of possession of cannabis. *Id.* at 620. This court reversed, finding that possession had not been proven. *Id.* at 621. The *Boswell* court reasoned that there was "no way of ruling out the possibility that the package could have been disposed of by another occupant of the vehicle." *Id.*

¶ 24 In *People v. Jackson*, 23 Ill. 2d 360, 362 (1961), the defendant, who was carrying a large handbag, fled from an agent with a warrant and locked herself in a bathroom of her apartment. *Id.* When she emerged, several agents inspected the bathroom and found defendant's purse lying open on the floor. *Id.* They also observed that a bathroom window opened on an airwell, and that seven other apartments in the building also had windows opening on the airwell. *Id.* On the surface of the debris at the bottom of the airwell, an agent found a package containing a number

of envelopes later determined to contain heroin. *Id.* The defendant was convicted of unlawful possession of narcotic drugs. *Id.* at 361. Our supreme court reversed, finding the evidence insufficient to show that the defendant ever had possession of the narcotics, as "the most that can be said is that the defendant had access to the area, in common with the tenants of seven other apartments and such other persons as might have had access thereto." *Id.* at 364.

¶ 25 In *Boswell* and in *Jackson*, no one saw the defendants in possession of the contraband. Here, in contrast, Garcia specifically testified that he saw defendant "toss out what appeared to be a handgun out the window." As such, *Boswell* and *Jackson* are distinguishable, and do not direct our decision.

¶ 26 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 27 Affirmed.