

No. 1-11-2192

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. 10 CR 19273
)	
MARCUS BAILEY,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment entered on possession of contraband in a penal institution reversed where the evidence was insufficient to sustain the conviction.
- ¶ 2 Following a bench trial, defendant Marcus Bailey was found guilty of possession of contraband in a penal institution, and then sentenced to 54 months' imprisonment. On appeal,

1-11-2192

defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt, where the State failed to show that the object found in his possession constituted contraband within the meaning of the applicable statute. He further contends that he was deprived of a fair trial where the trial court failed to accurately recall the evidence presented by the State.

¶ 3 Defendant was charged with one count of possession of contraband in a penal institution in connection with an incident that occurred on the morning of September 10, 2010, at the Cook County jail in Chicago, Illinois. During that incident, defendant was found in possession of a metal object.

¶ 4 At trial, Cook County Jail Correctional Officer Louise Evans testified that she was on duty about 9 a.m. on September 10, 2010, when her attention was drawn to defendant because she was told that "he had a shank." Shortly thereafter, she found defendant in his cell and saw that he was holding a white face towel in his hands. Defendant complied with her request to leave his cell and enter the day room, and, in doing so, he held the towel in his left hand the entire time. In the day room, while defendant was being "shook down," Officer Evans saw defendant drop "a shank." The prosecutor immediately asked "what do you mean by a shank? Can you describe exactly what it was that fell out?" Evans answered "metal object, sharpened." Evans then testified she inventoried the item and identified People's Ex. 1 as "a copy of a photograph of the metal object that I saw."

¶ 5 On cross-examination, Officer Evans testified that Byron Mayes, defendant's cell mate on the day of the incident, was asleep in his bed when she arrived and asked defendant to step out of the cell. She further testified that Sergeant Hicks and Officer McFadden accompanied her to

1-11-2192

defendant's cell and were present when the incident occurred. At the conclusion of Officer Evans's testimony, Exhibit 1 was entered into evidence without objection, the State rested its case, and the trial was continued. Evans' incident report was also admitted into evidence and the report stated that "a long metal object" was recovered.

¶ 6 When the trial resumed approximately 7 ½ weeks later, Byron Mayes testified for the defense. Mayes acknowledged his three prior drug-related felony convictions, and testified that he was currently on parole. Mayes also testified that he was defendant's cell mate for approximately 3 ½ hours on the morning of the incident. He and defendant arrived at their cell around 4:30 a.m., and then went to breakfast. After they ate, Mayes was told to go to one side of "the room," and he complied. He then saw officers carrying defendant out of "the room." Mayes testified that he did not see anything in defendant's hand at that time.

¶ 7 On cross-examination, Mayes was asked what room he was referring to, and testified that it was "the cell room." Mayes further testified that after breakfast he did not enter "the room" again because "the lady told me to go on the other side of the room; well, the day room." Mayes further testified that when he was on the other side of the room his "focus" was on his own situation, and not on what was going on with defendant.

¶ 8 The parties then stipulated to the admission of the Cook County Department of Corrections incident report, which was written by Officer Evans and signed by Sergeant Hicks. Officers Evans and McFadden were listed as witnesses in the report, and the object found in defendant's possession was entered as a "long metal object." The defense then rested its case.

¶ 9 The State waived closing argument, and, after the defense presented its closing argument, the trial court found defendant guilty of possession of contraband in a penal institution. On

1-11-2192

appeal from that judgment, defendant first contends that the evidence was insufficient to prove that the sharpened metal object found in his possession constituted "contraband" within the meaning of the applicable statute.

¶ 10 The standard of review on a challenge to the sufficiency of the evidence 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. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). This standard applies to all criminal cases, whether the evidence is direct or circumstantial, and acknowledges the responsibility of the trier of fact to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences there from, and to resolve any conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). The weight to be given to the testimony of witnesses is a matter for the trier of fact and will not be disturbed unless clearly erroneous. *People v. Bullock*, 40 Ill. App. 3d 672, 674 (1976). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). "[A] court of review has a duty to carefully review the evidence and to reverse the conviction of the defendant when the evidence is so unsatisfactory as to raise a serious doubt as to the defendant's guilt." *People v. Estes*, 127 Ill. App. 3d 642, 651 (1984).

¶ 11 In this case, defendant was found guilty of possession of contraband in a penal institution. 720 ILCS 5/31A-1.1(b) (West 2010). To sustain that conviction, the State's evidence must establish that the item found in his possession fell within the statutory definition of contraband, which provides, in pertinent part:

"(c)(2) 'Item of contraband' means any of the following:

(v) 'Weapon' means any knife, dagger, dirk, billy, razor, stiletto, broken bottle, or other piece of glass which could be used as a dangerous weapon. Such term includes any of the devices or implements designated in subsections (a)(1), (a)(3) and (a)(6) of Section 24-1 of this Act, or any other dangerous weapon or instrument of like character." 720 ILCS 5/31A-1.1(c)(2)(v) (West 2010).

¶ 12 Here, the indictment charged defendant with committing "the offense of POSSESSING CONTRABAND IN A PENAL INSTITUTION in that HE POSSESSED AN ITEM OF CONTRABAND, A DANGEROUS WEAPON, TO WIT: A SHARP METAL OBJECT" in the Cook County Jail, a penal institution. At trial, Officer Evans testified that defendant dropped "a shank" and the prosecutor immediately asked "what do you mean by a shank? Can you describe exactly what it was that fell out?" She answered "metal object, sharpened." Evans then testified she inventoried the item and identified People's Ex. 1 as "a copy of a photograph of the metal object that I saw." Her incident report stated she recovered a "long metal object" without any further description. There was no explanation before the court as to the failure of the prosecution to present the item inventoried for identification and/or examination by the court. Defendant does not dispute that the item described by Evans was found in his possession, but he contends that the evidence presented was insufficient to establish beyond a reasonable doubt that the object fit within the statutory definition of "contraband."

¶ 13 The statute does not provide definitions for any of the terms listed as weapons, and we may thus look to a dictionary to determine their meaning. *People v. Kohl*, 364 Ill. App. 3d 495, 500 (2006). In his brief, defendant cites Merriam-Webster's Online Dictionary (<http://www.merriam-webster.com/dictionary>), where "knife" is defined as "a cutting instrument consisting of a sharp blade fastened to a handle," a "dagger" as "a sharp pointed knife for stabbing," a "dirk" as "a long straight-bladed dagger," a "razor" as "a keen-edged cutting instrument for shaving or cutting hair," a "stiletto" as "a slender dagger with a blade thick in proportion to its breadth," and "keen" as "having a fine edge or point: sharp."

¶ 14 According to defendant, the State presented insufficient detail regarding the characteristics of the metal object at issue, and thus failed to establish that it was contraband as defined above. The State disagrees and argues that the metal object in question was a shank or sharpened metal object that is considered contraband under section 5/31A-1.1(c)(2)(v) (720 ILCS 5/31A-1.1(c)(2)(v) (West 2010)) and cites *People v. Dal Collo*, 294 Ill. App. 3d 894-96 (1998) in support.

¶ 15 In *Dal Collo*, we affirmed the trial court's finding that a shank found in the defendant's possession qualified as a weapon under the unlawful possession of contraband in a penal institution statute. The defendant was found in possession of a two-and-a-half inch long metal clip, which was described by a correctional officer as having been sharpened on both its outer edges so that it was sharp enough to shave a beard or cause bodily injury or death. *Id.* at 895. Moreover, there was testimony from another correctional officer that defendant admitted that the clip had been "sharpened to a razor's edge" before he possessed it. *Id.* at 896. Based on this testimony, we found that the jury could have reasonably concluded that the sharpened metal clip

1-11-2192

was properly characterized as a razor, thereby falling within the definition of a contraband under the statute. *Id.*

¶ 16 In this case, Officer Evans testified that she recovered and inventoried a "metal object, sharpened" from defendant. Her incident report described the item as "a long metal object" without any characterization or description of the item being "sharp" or "sharpened." Our view of Exhibit 1, a photocopy of a photograph of that inventoried item, shows a flat object that resembles a metal clip with two long edges, and two shorter slightly curved edges at each end. It appears to be an office supply item commonly used to fasten documents. Using the above definitions as guidance, it is clear that this photocopy does not depict a knife, dagger, dirk or stiletto, which all requires the presence of a handle, and the item in this case does not have. While the item in question in *Dal Callo* was characterized as a razor, that conclusion was based on evidence that the item "had been sharpened to a razor's edge" and was altered and sharp enough to shave a beard or cause bodily injury or death. *Id.* at 895-97. Here, we find that the evidence presented in this case was not satisfactory to establish the metal object as contraband under the statute.

¶ 17 First, in this case, a photocopy of a photograph of the metal object was the only non-testimonial evidence presented concerning the nature of the item recovered. Without the actual object and absent any explanation for the absence of the inventoried item, the trier of fact was unable to assess its characteristics, including its weight, pliability, and sharpness. While there is nothing in *Dal Collo* to indicate that the court was in possession of the actual contraband, there was significant testimony about the object. One correctional officer testified that the clip was made of metal and was approximately 2 to 2 1/2 inches in length and been sharpened on the

outer edges so much so that it was sharp enough to shave a beard. He said that he considered the clip a shank because of its alterations and believed the clip was sharp enough to cause bodily injury or death. Another correctional officer testified that the clip was a dangerous weapon because it had the potential to maim a person. Evidence was also presented that defendant had described the item to a correctional officer as having been sharpened to a "razor's edge." *Id.* at 895.

¶ 18 Here, the photocopy of a photograph of the alleged contraband resembles a file clip and was described as a "shank," that was made of metal that had been "sharpened." There was no testimony as to what edges of the item had been sharpened. We are unable to ascertain from the photocopy whether the object recovered remained in its original form or if it had been altered. Furthermore, there was no testimony presented about the degree to which the item had been "sharpened," such as to "a razor's edge," if at all. The conclusory testimony of the recovering officer about an item that she inventoried, but did not present to the court or explain its absence, deprived the finder of fact the opportunity determine whether the item was a dangerous weapon.

¶ 19 The State suggests that even if the metal object could not be classified as any of the specific weapons of contraband, the object would qualify under the savings clause as "any other deadly or dangerous weapon." 720 ILCS 5/31A(c)(2)(v) (West 2010). Any other deadly or dangerous weapon refers to "weapons or instruments that are sharp and have the ability to cut or stab." *People v. Davis*, 199 Ill. 2d 130, 138-39 (2002). We disagree with this argument under the evidence in this record. There was no testimony presented regarding the degree of sharpness of the object or its ability to cut or stab, nor was there any testimony as to its actual or perceived dangerousness.

¶ 20 A conviction must be based upon proof beyond a reasonable doubt of every fact necessary to prove the crime and extreme caution must be employed to ensure a proper conviction. *In re Winship*, 397 US 358, 365 (1970). We do not substitute our judgment for that of the trial court unless the evidence is so unsatisfactory so as to cause a reasonable doubt as to sufficiency of the evidence as to each required element of proof. *People v. Crossno*, 93 Ill. App. (3d) 808, 820 (1981). In viewing the evidence presented in the light most favorable to the State (*Siguenza-Brito*, 235 Ill. 2d at 224), we find that the item in question was not sufficiently proved to fall within any of the definitions of a weapon that would constitute contraband under the statute. *Dal Collo*, 294 Ill. App. 3d at 896.

¶ 21 We do not come to this conclusion lightly. We recognize that the prohibition of dangerous weapons in penal facilities is necessary to protect correctional employees and inmates from violence. However, the fact that this object was taken from an inmate in a correctional facility does not reduce the State's burden of proof. This, coupled with the unexplained failure of the inventoried item being made available for introduction and inspection at trial, casts serious doubt over the sufficiency of the prosecution's evidence. The evidence in this case about the character, nature and condition of the metal object was simply insufficient to establish that it was contraband as defined by the statute. Accordingly, we reverse defendant's conviction. Given our disposition, we need not consider defendant's remaining claim.

¶ 22 For the foregoing reasons, we reverse defendant's conviction.

¶ 23 Reversed.