2012 IL App (1st) 102941-U

FIRST DIVISION
DATE: JUNE 4, 2012

No. 1-10-2941

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. 08 CR 12133
	)	
FRANK HARRIS,	)	Honorable
	)	John A. Wasilewski,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* The victim's testimony was not so "unbelievable and nonsensical" as to cast doubt on the trial court's clear credibility determination or demonstrate that the State failed to prove defendant guilty of aggravated battery with a firearm beyond a reasonable doubt. Defendant's conviction for unlawful use of a weapon by a felon did not violate the one-act, one-crime rule.

¶ 2 Following a bench trial, defendant Frank Harris was convicted of aggravated battery with a firearm and unlawful use of a weapon by a felon. The trial court sentenced defendant to concurrent terms of 12 years' and 7 years' incarceration, respectively. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt and, alternatively, that his conviction for

unlawful use of weapon by a felon must be vacated because it violates the one-act, one-crime rule. We affirm.

¶ 3 Both defendant and the victim Wendell Sanford had, at some point, sold cannabis in the general vicinity of 81st and Cottage Grove in Chicago. On June 12, 2008, Sanford and defendant got into a verbal argument regarding the sale, or gift, of cannabis to a young woman. Following the argument, one of the men returned with a handgun and Sanford was shot in the arm and abdomen. According to the State's theory of the case, defendant was angry because Sanford had deprived him of a sale by giving the woman cannabis, and shot Sanford in retaliation. According to defendant's theory, Sanford grew angry because defendant refused to give cannabis to the woman for free, left and returned with a handgun, and initiated a confrontation. During that confrontation, defendant's theory continues, defendant grabbed the handgun and shot Sanford in self-defense.

¶ 4 At trial, Sanford testified that in 2008 he knew defendant because they both sold cannabis in the area around 81st and Cottage Grove. On June 12, 2008, Sanford encountered defendant and purchased some cannabis from him. He then left to go speak with a Navy recruiter because he was interested in joining the Navy. Sanford returned to the corner of 81st and Cottage Grove after speaking with the recruiter. A young woman spoke to defendant and then approached Sanford. Sanford remembered that the recruiter had told him that recruits were not supposed to test positive for cannabis and decided to give his cannabis to the young woman. Defendant approached Sanford and said" I don't want nobody over here selling no weed." Sanford and defendant then got into a "conflict." They exchanged insults and Sanford asked defendant if he wanted to fight. They then parted company and Sanford returned to his home.

¶ 5 Sanford further testified that he returned to the area later that evening to pick up some food at a nearby restaurant. Sanford stayed in the restaurant to eat and saw defendant pacing outside. When Sanford finished eating, he left the restaurant and then heard defendant calling him into an

alley. When Sanford did not enter the alley, defendant walked over to him. Defendant "upped a pistol" and began shooting at Sanford. Sanford was hit twice and fell to the ground. Defendant continued shooting until Sanford could hear the apparently empty gun clicking.

¶ 6 Triston Wilson testified on behalf of defendant. On June 12, 2008, Wilson was selling cannabis with defendant. When defendant made a sale, Wilson would run up to his sister's apartment and retrieve the drugs from their hiding place. A young woman approached defendant and asked to buy some cannabis. While she was speaking to defendant, Sanford approached and tried to "serve" her. The woman said she did not want Sanford's cannabis and that she wanted defendant's. Wilson went up to the apartment to retrieve the cannabis. When he returned, Sanford was "going off" on defendant and threatening to shoot him for taking all of the customers. They argued for 5 to 10 minutes and Sanford walked away.

¶ 7 Wilson further testified that Sanford returned "thugged out," meaning he had pulled up his pants and turned his hat toward the back. Wilson feared violence and walked away, but defendant remained where he was. Sanford approached defendant and pulled a handgun from his pocket. Defendant and Sanford "tussled," Wilson heard a gunshot, and Sanford ran toward the restaurant. Defendant called to Wilson, and he and Wilson ran through an alley where defendant discarded the gun in a garbage can.

¶ 8 Defendant testified that on June 12, 2008, he was selling cannabis near the intersection of 81st and Cottage Grove. While he was doing so Sanford arrived and sat down near him. When a young woman arrived and wanted to buy cannabis, defendant sent Wilson up to the apartment to retrieve it. Sanford began "playing" with the woman, and told defendant that she was his type and that she should get the cannabis for free. Defendant told the woman that Sanford was just playing with her and that she would have to pay. Sanford continued "playing" and defendant told him to stop

playing with the woman and stop playing with his money. Sanford grew angry and began using profanity. Defendant attempted to calm the situation, and eventually Sanford walked away.

¶ 9 Sanford returned and started pacing near the corner. He had his hat cocked back like he was a "thug" or in "guerilla mode." Sanford approached defendant, and defendant said "man I ain't on nothing." Before defendant could say any more, Sanford reached for his waistband and retrieved a handgun. Defendant grabbed for the gun, and he and Sanford "tussled" over it. While they were fighting over the gun, it went off. Defendant looked down and realized he was holding the gun. Sanford grabbed at defendant, and defendant fired a shot. Sanford then turned and ran away. Defendant ran through an alley and discarded the gun.

¶ 10 After hearing all of the evidence and the parties' arguments, the trial court ruled as follows:

> "All right, I watched the witnesses very carefully, listened to each witness['s] account and considered the manner in which the witnesses testified, motives or biases each witness may have and the reasonableness of their testimony in light of all the evidence.
>
> It does boil down to the credibility issue. That is true. This witness Triston [Wilson], he is not believable at all. He is an extremely poor witness. As far as the Defendant's version of events, I don't believe his version as well.
>
> I believe that the Defendant shot the victim without justification."

The trial court found defendant guilty of aggravated battery with a firearm and unlawful use of a weapon by a felon, and subsequently sentenced defendant to concurrent terms of 12 years' and 7 years' incarceration respectively.

¶ 11 On appeal, defendant first contends that his convictions should be reversed because the State failed to prove him guilty beyond a reasonable doubt because Sanford's testimony was "unbelievable and nonsensical."

¶ 12 When faced with a challenge to a criminal conviction based on 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.' " (Emphasis in original.) *In re M.I.*, 2011 IL App (1st) 100865, ¶ 31, appeal pending, No. 113776, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not our role to retry defendant, and we must bear in mind that it was the trier of fact who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 279-80 (2004). "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Id.* at 280.

¶ 13 Defendant argues that Sanford's testimony "taxes the gullibility of the credulous." See *People v. Wright*, 147 Ill. App. 3d 302, 318 (1986). For example, defendant argues that it is "wholly unbelievable" that an admitted drug dealer would simply give away cannabis. However, even if defendant were correct on this point, it is a collateral issue. The central issue was who introduced a gun into the altercation between defendant and Sanford, not what disagreement between the two precipitated the original verbal argument. The trial court was in the best position to determine whether Sanford's account was completely truthful, untruthful in only collateral matters, or completely unworthy of belief. The trial court found Sanford credible, and his account of giving cannabis away is not so incredible that it requires us to overturn the whole of the trial court's credibility findings and reverse defendant's conviction.

¶ 14 Similarly, we reject defendant's other challenges to Sanford's testimony, including defendant's claim that it is "unbelievable" that the young woman would approach Sanford after speaking to

defendant, presumably because the only reason she would speak to Sanford was if she was unsuccessful in obtaining cannabis from defendant. Likewise, we reject defendant's conjecture that a drug dealer like defendant would not care if someone interfered with his sales so long as the person giving away his illegal wares had originally purchased them from the dealer.

¶ 15 Ultimately, defendant merely chips away at collateral issues and asks us to raise them to a reasonable doubt about the primary issues in this case. Although Sanford, Wilson and defendant all described very different versions of the events, they all agreed that a young woman attempted to buy cannabis from defendant, defendant and Sanford had an argument about the sale, defendant shot Sanford during a subsequent confrontation, and defendant fled and disposed of the weapon in an alley. The witnesses, of course, disagreed on who initiated the confrontation and who introduced the weapon into the encounter. The trial court resolved the credibility question against defendant, and we are presented with nothing in the record sufficient to leave us with an abiding conviction that that credibility determination was incorrect. Accordingly, we cannot say that no rational trier of fact would have found defendant guilty beyond a reasonable doubt.

¶ 16 Defendant also contends that his conviction for unlawful use of a weapon by a felon must be vacated because, if allowed to stand in conjunction with his aggravated battery with a firearm conviction, the two convictions would violate the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551, 565 (1977). There are two steps to a *King* analysis. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). First, we must determine whether the defendant's conduct consisted of a single physical act or of separate acts. *Id. citing People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). Second, if the defendant committed multiple acts, we must determine whether any of the other offenses are lesser-included offenses. *Id.* If the offenses are based on separate physical acts and do not consist of lesser-included offenses, then the multiple convictions can stand. *Id.* at 389-90.

¶ 17 We find the recent case of *People v. Dawson*, 403 Ill. App. 3d 499 (2010) instructive. In *Dawson*, the reviewing court held that unlawful use of a weapon based on possessing an uncased firearm in an automobile was not a lesser included offense of aggravated discharge of a firearm, and that circumstantial evidence showed that the defendant had a handgun in his vehicle both before and after he fired it from the automobile. *Dawson*, 403 Ill. App. 3d at 513-14. Here, the evidence warrants a similar result. If we accept Sanford's account, as the trial court did, defendant possessed the weapon for a least some short period of time before the shooting and again for some period of time after the shooting and before he disposed of it in the alley. These acts were distinct from the act of shooting the weapon and sufficient to support a separate conviction for unlawful use of a weapon.

¶ 18 Defendant attempts to analogize this case to the inapposite case of *Ball v. United States*, 470 U.S. 856 (1985). In *Ball*, the defendant was convicted of both receipt of a firearm by a felon and possession of a firearm by a felon. The issue before the Supreme Court was one of statutory interpretation, *i.e.*, whether Congress intended to allow simultaneous punishment for violation of the two overlapping criminal statutes. *Id.* at 861. There was no argument made by the United States that the two convictions were based on separate physical acts. Accordingly, the *Ball* case sheds no light on the outcome in this case, and we will follow the well-reasoned opinion of this court in *Dawson.*

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

¶ 20 Affirmed.