2012 IL App (1st) 111623-U

FIRST DIVISION
JANUARY 28, 2013

1-11-1623

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEMOND DAVIS, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 09 CR 20155 Honorable Raymond Myles, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved beyond a reasonable doubt that defendant committed the offenses of armed habitual criminal, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon. The trial court properly excluded hearsay testimony. The armed habitual criminal statute did not constitute an *ex post facto* law as applied to defendant. We order defendant's mittimus corrected to reflect the trial court's oral pronouncement that all three convictions be merged into a single conviction for the offense of armed habitual criminal.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Demond Davis was found guilty of the offenses of armed habitual criminal, aggravated unlawful use of a weapon (aggravated UUW), and unlawful use of a weapon by a felon (UUWF). He was sentenced to six years of imprisonment for the armed habitual criminal offense, three years of prison for the aggravated UUW offense, and two years of prison for the UUWF offense, all of which run concurrently. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he possessed a firearm where the police officers' testimony that they observed him throwing a

gun from a moving car was incredible. Second, defendant contends that he was denied the right to a fair trial when the trial court incorrectly ruled that defendant's testimony concerning a police officer's interrogation of him was hearsay. Third, defendant requests that his mittimus be corrected to reflect the trial court's oral pronouncement that all three convictions be merged into a single count of armed habitual criminal. Fourth, defendant contends that his armed habitual criminal conviction violated the *ex post facto* clauses of the United States and Illinois Constitutions because one of defendant's qualifying convictions occurred before the effective date of the armed habitual criminal statute. We affirm the judgment of the circuit court of Cook County and order defendant's mittimus corrected.

¶ 3 During defendant's trial, Officer Matthew Nomellini (Officer Nomellini) testified that at approximately 12:41 a.m. on October 23, 2009, he was approaching the intersection of 16th Street and Lawndale Avenue in an unmarked police car with his partner Officer Caballero. Officer Caballero was driving the vehicle when Officer Nomellini observed a gold four-door Buick fail to stop at a stop sign on Lawndale Avenue. The officers followed the vehicle and observed that it failed to stop at another stop sign at Ridgeway Avenue and 15th Street. As the officers continued to follow the vehicle, Officer Nomellini observed the front passenger throw a blue steel firearm out of the front passenger window and onto the street. He believed that the gun was thrown just as the car was still on 15th Street and about to turn onto Lawndale Avenue. Officer Nomellini testified that the vehicle was traveling "rather quickly," but that nothing obstructed his view of the passenger when the passenger discarded the gun. Officer Nomellini testified that he was approximately 30 feet from the Buick when the gun was tossed, that there were artificial street lights and that the streets were "pretty well-lit" in that area.

¶ 4 The officers then continued to follow the vehicle southbound on Lawndale Avenue and then westbound on 16th Street. The officers then stopped the vehicle at 3752 West 16th Street, after which additional police officers, including Sergeant Granius and Officer McKenna, arrived at the

scene. When Officer Nomellini approached the vehicle, he observed defendant in the front passenger seat. He did not see anyone in the rear passenger seat behind defendant, but observed someone seated in the driver's seat and in the rear passenger seat behind the driver. Officer Nomellini did not observe any of the three individuals in the vehicle change seats.

¶ 5 After the three vehicle occupants were detained, Officer Caballero, Sergeant Granius, and Officer McKenna left the scene. Officer Nomellini then received radio communication from Officer Caballero and subsequently placed defendant in police custody. Officer Caballero, Sergeant Granius, and Officer McKenna then returned to the scene with a large blue steel handgun, which was later identified as a 9 millimeter Intertech. Officer Nomellini recognized the recovered gun as the weapon that was tossed from the car.

¶ 6 On cross-examination, Officer Nomellini testified that he observed the car commit a traffic violation and followed it for three or four blocks before activating his emergency lights when he observed someone throw a gun out of the front passenger window. The driver and rear passenger were not arrested but were taken to the police station. Although the driver was issued traffic citations and a contact card was completed for the rear passenger, Officer Nomellini did not recall whether background checks were completed on them.

¶ 7 Officer Caballero testified to substantially the same facts as Officer Nomellini. He observed the front passenger toss a handgun over the roof of the car and onto the street as the vehicle was near the corner of 15th Street and Lawndale Avenue. Specifically, he testified that the gun was discarded approximately three houses south of 15th Street. There was an alley with a street light across from where the gun was discarded. He testified that the weapon was a blue steel handgun with a rope tied to it. After the vehicle was stopped, he approached and observed defendant in the front passenger seat. He then went with Sergeant Granius and Officer McKenna to retrieve the gun. Officer Caballero further testified that there was another passenger in the rear driver's side and that he did not observe any of the occupants change seat positions.

¶ 8 On cross-examination, Officer Caballero testified that he could see the passenger side of the vehicle even though the car was three houses south of 15th Street when the gun was tossed. Officer Caballero reiterated that as his car was at the corner of 15th Street and Lawndale Avenue, defendant's car had already turned onto Lawndale Avenue and was approximately three houses south of 15th Street when he observed defendant toss the gun. He also testified that his police report does not state that defendant tossed the gun *over* the car, but states that defendant tossed the gun *from* the car.

¶ 9 Sergeant Granius testified that he assisted Officers Nomellini and Cabellero after defendant's car was stopped. He then left the scene with Officers Cabellero and McKenna to look for the discarded gun. Sergeant Granius then found the gun, an Intertech 9 millimeter semi-automatic pistol with a shoestring attached to it, on the street at approximately 1511 South Lawndale Avenue. The gun, which was much larger than a regular handgun, had an extended clip and a black finish. The recovered gun was loaded with one bullet in the chamber. After recovering the gun, he returned to the scene and later to the police station where he inventoried the gun. Sergeant Granius maintained constant possession and control of the gun after retrieving it from the street. On cross-examination, Sergeant Granius testified that three people were transported to the police station.

¶ 10 The State entered certified copies of defendant's prior convictions for manufacture/delivery of a controlled substance under case numbers 07 CR 7266 and 98 CR 12084.

¶ 11 Defendant testified on his own behalf that on the night in question, he was in the car with three other people: his brother, Edward Collins, who was driving; Joseph Moore; who was in the front passenger seat; and Patrick Carter, who was sitting in the rear seat behind the driver. Defendant was seated behind the front passenger, and was intoxicated and asleep. He did not realize that police officers had approached the car until they had removed the driver from the car. The police then removed Carter, Moore and defendant from the car. He was handcuffed to Moore and the police searched both of them. After all of the occupants were searched, an officer approached them and asked where the recovered gun came from and who threw the gun. The police took all four

men to the police station. While at the police station, an officer spoke to defendant. However, defendant did not recall the identity of the police officer who spoke with him.

¶ 12 Defense counsel then asked defendant on direct examination, "[t]he officer that took you into the room by yourself, did he say anything to you?" The State objected that the question would elicit a hearsay response. Defense counsel responded that the statement he was going to elicit is that the officer asked defendant who threw the gun out of the car window and that defendant did not know. Defense counsel argued that the statement was not offered for the truth of the matter asserted because the fact that the officer had to ask who threw the gun goes to the officer's state of mind, which is an exception to the hearsay rule. The trial court sustained the objection.

¶ 13 Defendant then continued to testify that he was never in the front passenger seat, that he never tossed a gun out of the car, and that he does not know whether anyone else did. While at the police station, two officers said to each other that defendant had just gotten out of the penitentiary. Defendant believed that Officer Caballero, whom defendant identified as the "bald-headed" officer who was the second individual to testify on the stand, tried to interview defendant twice. After Officer Caballero interviewed defendant for the second time, Officer Caballero said that he knew defendant did not throw the gun out of the car, and if defendant would tell him who had the gun then defendant would not "get the case," but if defendant would not tell the officer, then the gun was "going on [defendant]."

¶ 14 On cross-examination, defendant testified he was not certain that it was Officer Caballero who told defendant that if defendant did not say who had the gun, defendant would "get the case." Defendant also did not see the gun in the car before the police pulled the car over. Defendant had fallen asleep as soon as he entered the car.

¶ 15 In rebuttal, the State presented certified copies of two of defendant's convictions for possession of a controlled substance under case numbers 06 CR 2008 and 03 CR 28225.

¶ 16 The trial court found that Officers Nomellini and Caballero testified in a credible manner.

It found that their testimony was substantially the same: the weapon came from the front passenger's side of the vehicle, where they said defendant was seated. The trial court believed the three officers' testimony that there were three people in the car, rather than four as defendant had described. The court found defendant's testimony incredible and found that the State proved its case beyond a reasonable doubt. The trial court found defendant guilty of the offenses of armed habitual criminal, aggravated UUW, and UUWF. He was sentenced to concurrent six years' imprisonment for the armed habitual criminal offense, three years for the aggravated UUW offense, and two years for the UUWF offense. The trial court "merged" the convictions of aggravated UUW and UUWF into the armed habitual criminal conviction.

¶ 17 On appeal, defendant contends, first, that the evidence did not prove beyond a reasonable doubt that he possessed a firearm where Officers Nomellini and Caballero's testimony that they observed him throwing a gun from a moving car was incredible. "When a defendant challenges 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, 319 (1979); *People v. Ross*, 229 Ill. 2d 255, 272 (2008). The reviewing court must also construe all reasonable inferences in favor of the prosecution (*People v. Bush*, 214 Ill. 2d 318, 326 (2005)) and does not retry the defendant (*Ross*, 229 Ill. 2d at 272). Rather, the trier of fact determines witness credibility, weighs testimony, and draws reasonable inferences from the evidence. *Id.* We will reverse a conviction where the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011). We will not reverse a criminal conviction "simply because the defendant tells us that a witness was not credible." *People v. Jonathon C.B.* (*In re Jonathon C.B.*), 2011 IL 107750, ¶ 60.

¶ 18 To prove beyond a reasonable doubt that defendant committed the offenses of armed habitual criminal, aggravated UUW, and UUWF, the State was required to prove that defendant possessed

a weapon. See 720 ILCS 5/24-1.7(a) (armed habitual criminal); 720 ILCS 5/24-1.6(a)(1) (aggravated UUW); and 720 ILCS 5/24-1.1(a) (UUWF).

¶ 19 Officer Nomellini testified that he observed the front passenger of the car throw a blue steel firearm out of the front passenger window and onto the street. The gun was loaded and had a string attached to it. He was approximately 30 feet behind the car when the gun was discarded and nothing obstructed his view. Officers Nomellini and Caballero continued to follow the vehicle after the front passenger tossed the gun from the car and subsequent stopped the vehicle on 16th Street. When Officer Nomellini approached the vehicle, he observed defendant in the front passenger seat. No one was in the rear passenger seat behind defendant. There were three people in the car and he did not observe anyone change seats in the car during all relevant times.

¶ 20 Officer Caballero testified substantially similar to Officer Nomellini, except that Officer Caballero testified that as the police vehicle approached the corner of 15th Street and Lawndale Avenue, defendant's car had already turned and was approximately three houses south of 15th Street on Lawndale Avenue. He observed the front passenger toss a handgun over the roof of the car, although his police report indicated that defendant tossed the gun *from* the car, and not *over* the car. Defendant argues that because Officer Nomellini testified to observing the gun being thrown while the car was still on 15th Street and just turning onto Lawndale Avenue, and Officer Caballero testified to observing the gun being thrown *after* the car turned onto Lawndale Avenue, that this constituted reasonable doubt. We disagree. Both officers testified to having unobstructed views of the car and to observing the front passenger toss the gun over the car. Both officers testified that when they stopped the vehicle, defendant was in the front passenger seat, and there were three occupants total in the car--including a rear driver's seat passenger. None of the occupants changed seat positions while the officers followed the car. Further, defendant argues that Officers Nomellini's and Caballero's testimony was incredible because they testified to observing a gun with a blue steel finish, while Sergeant Granius recovered a gun with a black finish. Again, we are not convinced that

the evidence was unreasonable, improbable, or satisfactory, as a result of those minor inconsistencies. The evidence showed that Sergeant Granius recovered the gun in the street near the corner of 15th Street and Lawndale Avenue, the area where the officers observed defendant throw the gun from the car.

¶ 21 Defendant's reliance upon the factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), is misplaced because identification was not an issue. It was undisputed that defendant was in the car, and that someone in the car threw a handgun from the car. The officers testified that they saw the gun as it was thrown from the front passenger window and then later discovered that defendant was seated in the front passenger seat. To the extent that defendant argues the *Biggers* factors are merely indicative of the deficiencies in the police officers' testimony, we reject this argument. These were trained officers who were located within a block of a suspect's car, and there can be no serious challenge raised as to either their ability to observe or their attention to the suspect's activity.

¶ 22 Finally, the trial court found the officers' testimony credible and defendant's testimony incredible. It believed the three officers' testimony that three people were in the car, rather than four as defendant testified. This court will not retry a defendant when considering a challenge to the sufficiency of the evidence, and we will bear in mind that the trier of fact is in the best position to judge the credibility of witnesses. *Jonathon C.B.*, 2011 IL 107750, ¶59. Giving due consideration to the trial court's opportunity to observe the witnesses, we find that, taken together, the State proved beyond a reasonable doubt that defendant possessed the recovered gun and find that the evidence was not so unreasonable, improbable, or unsatisfactory that no rational trier of fact would find defendant guilty beyond a reasonable doubt.

¶ 23 Defendant next contends that his right to a fair trial was denied when the trial court incorrectly ruled that testimony concerning the police interrogation of defendant was hearsay. The parties dispute whether this issue has been forfeited for appellate review. Where a defendant has

failed to make a timely objection, the reviewing court determines whether the forfeited issue may be reviewed under a plain error analysis and the burden lies with defendant to establish that the claimed error amounts to plain error. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). However, where the defendant has made a timely objection, this court determines whether the claimed error is harmless, which the State has the burden of proving. *Id.* The analysis for both plain error and harmless error would necessarily require this court to determine whether any error occurred at all. See *e.g.*, *People v. Bannister*, 232 Ill. 2d 52, 65 (2008) (in reviewing a plain error contention, this court determines whether error occurred at all). Because we conclude that there was no error, we will not reach the issue of whether to apply harmless error or plain error review.

¶ 24 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001); and *People v. Reid*, 179 Ill. 2d 297, 313 (1997). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Caffey*, 205 Ill. 2d at 89.

¶ 25 The Sixth Amendment guarantees the right of the defendant to present evidence in his defense. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls within an exception to the hearsay rule. *Caffey*, 205 Ill. 2d at 88. An out-of-court statement offered to show the effect on the listener's mind or why a listener acted the way he did is not hearsay and is admissible. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008).

¶ 26 As discussed, during defendant's testimony, defense counsel asked whether an officer who took defendant into an interview room at the police station had asked defendant anything. The State objected to this question on the basis that it would elicit a hearsay response. Defense counsel then explained that statement he was going to elicit was that the officer asked defendant who threw the gun out of the car window. The trial court then sustained the State's objection. Defendant argues

that the statement was not offered to prove the truth of the matter asserted, but rather was offered to prove the fact that the statement itself was made. Defendant further argues that the statement was offered to show the effect on the listener, thus, rendering the statement as nonhearsay. We conclude that the testimony that defendant attempted to elicit--in which the officer purportedly asked defendant who threw the gun out of the car--was hearsay because it was offered for the truth to show that the officer did not know who threw the gun. The record shows that both Officers Caballero and Nomellini testified that they knew defendant threw the gun out of the front passenger window because they observed the gun being tossed from that window and observed defendant seated in the front passenger seat, Defense counsel attempted to rebut this testimony with the statement at issue. See *e.g.*, *People v. Mercado*, 397 Ill. App. 3d 622, 632 (2009) (concluding that an out-of-court statement was hearsay where it was intended to establish the truth of the matter asserted).

¶ 27 Further, the statement was not elicited to show the effect on the listener, *i.e.*, to explain defendant's behavior subsequent to the officer's question. Defendant provides no argument as to what effect the question had on him, or how the statement resulted in certain behavior by the defendant. See *e.g.*, *People v. Hammonds*, 957 N.E.2d 386, 402-03 (2011) (trial court did not abuse its discretion in admitting police radio dispatch that was offered to prove the effect on the listener, namely, the officers' behavior after hearing the dispatch). Therefore, the trial court did not err because the statement was properly excluded at trial as inadmissible hearsay.

¶ 28 Defendant also contends that his armed habitual criminal conviction violated the prohibition against the *ex post facto* clauses of the United States and Illinois Constitutions because his qualifying convictions occurred before the effective date of the armed habitual criminal statute. 720 ILCS 5/24-1.7 (West 2008). Specifically, defendant argues that one of his qualifying convictions, a 1998 conviction for manufacture/delivery of a controlled substance, occurred before the armed habitual criminal statute became effective. The armed habitual criminal statute took effect in 2005 and prohibits receipt, sale, possession or transfer of a firearm by a person with at least two prior

convictions for certain enumerated offenses, including aggravated UUW and any controlled substance offense constituting at least a Class 3 felony. Pub. Act 94-398, eff. Aug. 2, 2005 (adding 720 ILCS 5/24-1.7). Defendant acknowledges that similar *ex post facto* challenges were rejected by *People v. Coleman*, 409 Ill. App. 3d 869, 879-80 (2011), *People v. Adams*, 404 Ill. App. 3d 405, 413 (2010), *People v. Bailey*, 396 Ill. App. 3d 459, 464 (2009), and *People v. Leonard*, 391 Ill. App. 3d 926 (2009). However, he contends that these cases were wrongly decided. We review defendant's challenge to the constitutionality of the armed habitual criminal statute *de novo*. *People v. Leonard*, 391 Ill. App. 3d 926, 931 (2009).

¶ 29 This court has held that the armed habitual criminal statute does not constitute an *ex post facto* law because it punishes a defendant not for his prior convictions preceding the statute but for the new act of possessing a firearm. *People v. Black*, 2012 IL App (1st) 110055, ¶ 19; *People v. Tolentino*, 409 Ill. App. 3d 598, 606-09 (2011); *Coleman*, 409 Ill. App. 3d at 879-80; *People v. Davis*, 408 Ill. App. 3d 747, 751-52 (2011). We follow our earlier decisions in rejecting defendant's contentions that his 1998 conviction is an element of the offense of armed habitual criminal and that defendant was punished in part for an act he completed before the statute was enacted. Accordingly, defendant's *ex post facto* challenge to the armed habitual criminal statute must fail.

¶ 30 Finally, we consider defendant's contention that his convictions and sentences on aggravated UUW and UUWF should be vacated due to merger or the one-act, one-crime doctrine. The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). If the same physical act forms the basis for two separate offenses charged, a defendant could be prosecuted for each offense, but only one conviction and sentence may be imposed. *People v. Segara*, 126 Ill. 2d 70, 77 (1988). Where guilty verdicts are obtained for multiple counts arising from the same act, a sentence should be imposed on the most serious offense. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997).

¶ 31 Here, the trial court stated on the record during sentencing for all three counts, that "[all three convictions] are all merged together." The State agrees with defendant that this Court should exercise its authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), which authorizes the reviewing court to order the clerk to amend the mittimus when the sentencing order does not conform with the trial court's oral pronouncement. Accordingly, we order defendant's mittimus corrected to reflect the trial court's oral pronouncement that all three convictions be merged into a single conviction for the offense of armed habitual criminal, with a six-year sentence of imprisonment.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and order defendant's mittimus corrected to reflect merger of the three convictions into a single conviction for the offense of armed habitual criminal.

¶ 33 Affirmed; mittimus corrected.