FIRST DIVISION
MAY 11, 2015

No. 1-13-1380



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 10 C4 40219 |
| | ) | |
| CONG TROUNG, | ) | Honorable |
| | ) | Noreen V. Love, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt of armed robbery when the victim testified that defendant pointed a gun at him and there was no evidence in the record indicating that the object was not a "real gun."

¶ 2 Following a bench trial, defendant Cong Troung was found guilty of armed robbery and sentenced to a total of 21 years in prison and assessed a total of $709 in fines and fees. On appeal, defendant contends that he was not proven guilty of armed robbery beyond a reasonable doubt because the evidence at trial was insufficient to establish that the object he possessed was a "firearm" as defined by statute. He also contends that his mittimus must be corrected to reflect

the correct amount of presentence custody credit and he also challenges the imposition of certain fines and fees. We affirm the judgment and correct the mittimus.

¶ 3 At trial, the victim Tony Luna testified that on the afternoon of February 9, 2010, he was cleaning the snow from his mother's vehicle when he noticed a maroon car containing defendant and another man drive by. These men stared at the victim. The victim returned to cleaning the car and when he looked back, the men were standing approximately six feet away. Defendant was pointing a gun at him. The victim described the gun as a "silver automatic." Defendant asked whether the victim was a Latin Count because this was the "4GM's hood." At trial, the victim explained that defendant was asking him if he was from a rival gang.

¶ 4 After the victim indicated that he was not a Latin Count, defendant approached, while pointing the gun at the victim's chest, and asked the victim to take off his shoes. As the victim bent over to comply, his necklace hung out of his shirt. Defendant "snatched" the 14-carat gold necklace with the hand that was not holding the gun. After taking the necklace, defendant took out his phone and took pictures of the victim and the front license plate of the victim's mother's vehicle. Defendant then walked away. The other person never said anything and did not hold the "semiautomatic" gun at any point. The victim called 9-1-1, and later identified defendant in a photographic array and a line-up.

¶ 5 During cross-examination, the victim testified that although he did not own a gun and had not taken any firearms training, he knew the difference between an automatic and a pistol from watching television. He had never had a gun in his possession and had never seen "those guns" up close. The victim described the gun held by defendant as all silver and about six inches long.

He denied initially telling officers that two white men were in the maroon car; rather, he stated that the car contained one Asian man and one Hispanic man.

¶ 6 During re-direct, the victim testified that at one point, the gun held by defendant was within six inches of his body pointed at his chest. The gun was made of metal and he thought it was a "real gun," that was the reason he started to take off his shoes.

¶ 7 Detective Miguel Rios testified that after defendant was taken into custody, defendant was placed in a line-up and identified by the victim. Defendant's cell phone was inventoried. It did not contain photographs of the victim or his mother's vehicle.

¶ 8 Officer Surillo testified that the victim described the person with a handgun as a male Asian. He admitted that his report indicated that "offenders" were white, but explained that in certain reports anyone who was not African-American is referred to as "white." He then stated that the report indicated on a subsequent page that the person with the gun was Asian.

¶ 9 Defendant denied holding the victim up at gunpoint, photographing the victim, and taking the victim's necklace. He could not remember where he was on February 9, 2010, because it had "been so long." Defendant used to belong to the 4GMs, however, he had stopped being a member of the gang five years prior. Although the Latin Counts are a rival of 4GMs, no one "claims" the territory where the alleged robbery occurred. He denied carrying weapons, but had been to a gun range in the past.

¶ 10 In its closing argument, the defense argued that the victim knew a lot about guns for someone who had never owned or touched a gun. The defense further argued that the object was never recovered, so there was no way to know if it was a "real" weapon, whether it was loaded or capable of firing, or whether it was just a "look alike." The State responded that the victim

treated the object like a "real gun" and gave up his belongings like it was a "real gun" when it was six inches from his face.

¶ 11 In finding defendant guilty of armed robbery, the court stated that guns are on television all the time and that "a lot of kids" get their information from television. The court also noted that "they" get information from video games where there are all kinds of weapons and guns and you pick out the weapon that you play with, so kids are familiar with "it" whether or not they have seen it up close. The court believed the victim's testimony that defendant was the person who came up to him with a silver automatic gun and forcibly removed the necklace. Defendant was subsequently sentenced to 6 years in prison for the armed robbery. He was also subject to a 15-year sentencing enhancement because the offense was committed with a firearm.

¶ 12 On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt of armed robbery because the State failed to introduce sufficient evidence at trial from which a trier of fact could conclude that the object defendant possessed met the statutory definition of a firearm. In the alternative, defendant contends that the trial court determined his guilt based upon facts not in evidence when the court found that "the modern young adult had substantial firearms experience from watching television and playing video games." The State responds that the victim's unequivocal and credible testimony established that defendant possessed a firearm during the robbery.

¶ 13 In assessing the sufficiency of the evidence, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. We do not substitute our judgment for that of the fact finder on issues

involving the weight of evidence or witness credibility because the fact finder resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the evidence presented at trial. *People v. Brown*, 2013 IL 114196, ¶ 48. A trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with a defendant's innocence and elevate them to reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. A defendant's conviction will be reversed only where the evidence is so unreasonable or improbable that a reasonable doubt remains regarding a defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 14 A person commits robbery when he knowingly takes property from the person or presence of another by the use of force or by threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2010). A person commits armed robbery when he violates section 18-1 and he carries on or about his person or is otherwise armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). Under the Criminal Code, a "firearm" is defined as any device which is designed to expel a projectile by the action of an explosion, or expansion or escape of gas, with various exclusions, such as BB guns and antique firearms (see 430 ILCS 65/1.1 (West 2010); 720 ILCS 5/2-7.5 (West 2010)).

¶ 15 Here, taking the evidence in the light most favorable to the State, as we must, the evidence at trial established that defendant approached the victim while holding a silver gun and then took a gold chain. Although the victim described the gun as both an automatic and semiautomatic, he testified that he knew the difference between a pistol and an automatic, that the object was inches from his body, and that he believed that it was a real gun. This court cannot say that no rational trier of fact could have found defendant possessed a firearm when the victim

testified that he obeyed defendant's instructions to remove his shoes because defendant pointed a silver gun at him. See *Baskerville*, 2012 IL 111056, ¶ 31.

¶ 16 Defendant contends, however, that because the victim admitted that he did not have hands-on experience with firearms and the alleged firearm was never recovered, there was insufficient evidence upon which the trial court could conclude that the object was an actual firearm. He relies on *People v. Ross*, 229 Ill. 2d 255 (2008), in which the victim testified the defendant pointed a handgun at him during a robbery, but the "gun" recovered by the police was actually a BB gun. *Ross*, 229 Ill. 2d at 258. In that case, our supreme court determined that the evidence was insufficient to prove that the BB gun was a "dangerous weapon" because there was no evidence regarding the weight and composition of the BB gun, or whether it was loaded. *Id.* at 276-77. Unlike *Ross*, however, in the instant case nothing in the record suggests the object defendant had in his possession was anything other than a "real gun."

¶ 17 We reject defendant's apparent assertion that one must have a certain level of familiarity with firearms in order to testify credibly that an object is actually a firearm. To the contrary, our supreme court has held that eyewitness testimony that the offender was armed with a firearm combined with circumstances under which the witness was able to see the object, is sufficient to allow a reasonable inference that the weapon was a "real gun." *People v. Washington*, 2012 IL 107993, ¶¶ 35-37, see also *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 51-52 (where there was no evidence that the firearm at issue was a toy or fake weapon, the victim's testimony and the circumstances in which she viewed the weapon, along with a videotape and photograph of the offense, supported a finding that the defendant was armed with a firearm). To the extent that defendant argues that *Washington* and *Malone* were wrongly decided because the possession of a

firearm is an element of the offense of armed robbery that must be proven beyond a reasonable doubt and a witness's testimony that an object is a firearm is insufficient absent either the recovery of the object at issue or some other corroboration, we decline defendant's invitation to depart from the prior holding of this court, and we are bound by the decision of our supreme court.

¶ 18 Here, as in *Washington*, taking the victim's testimony and the circumstances under which he was able to observe the firearm in the light most favorable to the State, a rational trier of fact reasonably could have inferred that defendant possessed a "real gun" (*Washington*, 2012 IL 107993, ¶¶ 35-37) during the robbery. The defendant's argument suggests that although the victim's testimony as to being stealthily approached by defendant and another man, who demanded to know victim's gang affiliation then ordered him to remove his shoes and forcibly took a gold chain from his neck may be credible testimony regarding the occurrence, the portion of the testimony regarding the presence of a gun was not credible. However, the trial court found the victim's testimony to be credible in its entirety, declining to parse it into segments in order to buttress the defendant's argument which seeks to negate the use of a firearm.

¶ 19 Defendant also contends that the trial court relied on facts that were not in evidence when it concluded that the victim testified credibly about the firearm because the victim learned about firearms from television and video games. We disagree.

¶ 20 During its closing argument the defense argued that the victim knew a lot about firearms for someone who had never owned or touched one and that because the object was not recovered there was no way to know if it was a "real gun." In finding defendant guilty, the court addressed the defense argument that the victim's lack of hands-on experience with firearms was fatal to his

credibility *vis-à-vis* whether the object at issue was a "real gun" when it stated that television programs or video games could be the source of the victim's knowledge. In any event, it was for the trial court, as the trier of fact, to determine the victim's credibility and what weight, if any to assign to his testimony (*Brown*, 2013 IL 114196, ¶ 48).

¶ 21 We are unpersuaded by defendant's reliance on *People v. Bowie*, 36 Ill. App. 3d 177 (1976). In that case, the court determined that the trial court misapprehended the evidence at trial when the trial court stated during closing arguments, that there had been no testimony that the defendant was bleeding, yet the record showed that the defendant had, indeed testified on direct examination that he was bleeding. See *Bowie*, 36 Ill. App. 3d at 180. Here, however, the trial court observed that young people learn about firearms from television and video games.

¶ 22 The victim testified that he knew about firearms from watching television and that defendant pointed a firearm at him. The trial court found him to be credible as evidenced by its verdict and we will not substitute our judgment for that of the trial court on this issue. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59 (the trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that the trial court observed the witnesses testify). This court reverses a defendant's conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as a defendant's guilt (*Brown*, 2013 IL 114196, ¶ 48), this is not one of those cases. Consequently, we affirm defendant's conviction.

¶ 23 Defendant next contends that the mittimus must be corrected to reflect 81 days of presentence custody credit. The State agrees that defendant is entitled to 81 days of presentence custody credit when defendant's bond was revoked on January 28, 2013, and he was sentenced

on April 19, 2013. Therefore, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the clerk of the circuit court to correct the mittimus to reflect 81 days of presentence custody credit.

¶ 24 Defendant also contends, and the State agrees, that pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)), he is entitled to a $405 credit based on 81 days of presentence custody. The parties agree that defendant was assessed certain fines that may be offset by the presentence custody credit: the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2010)); the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2010)); the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West 2010)); and the $30 Children's Advocacy Center fine (55 ILCS 5/51101(f-5) (West 2010)). Therefore, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, the $5 Drug Court fine, and the $30 Children's Advocacy Center fine be offset by defendant's presentence custody credit.

¶ 25 The parties also agree that the $250 DNA analysis fee should be vacated because defendant was assessed the fee in connection with a prior conviction (see *People v. Marshall*, 242 Ill. 2d 285, 303 (2011)). Therefore, we vacate the $250 DNA analysis fee.

¶ 26 Accordingly, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's mittimus to reflect: (1) 81 days of presentence custody credit; (2) a $405 credit based on 81 days of presentence custody credit; (3) that the $10 Mental Health Court fine; the $5 Youth Diversion/Peer Court fine; the $5 Drug Court fine, and the $30 Children's Advocacy Center fine are all offset by defendant's presentence custody credit; and (4) the vacation of $250 DNA analysis fee. Following these offsets and corrections,

defendant now has a new total due of $409. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 27 Affirmed; mittimus corrected.