2016 IL App (1st) 151221-U

FIFTH DIVISION
November 18, 2016

No. 1-15-1221

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 13719
	)	
ANTOINE ATKINS,	)	
	)	Honorable
Defendant-Appellant.	)	Domenica A. Stephenson,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (i) the evidence was sufficient to convict defendant of unlawful use of a weapon by a felon and aggravated assault of a peace officer, and (ii) the trial court properly ruled on two motions *in limine*.

¶ 2 On July 15, 2009, Antoine Atkins (defendant) allegedly pointed a firearm at Chicago police officer Patrick Kinney (Kinney), and Kinney shot defendant in the wrist. After a jury trial in the circuit court of Cook County, defendant was convicted of two counts of unlawful use of a weapon by a felon and one count of aggravated assault of a peace officer and was sentenced to

twelve years' imprisonment. In this direct appeal, defendant advances three primary arguments. First, he challenges the denial of a motion *in limine* wherein he sought to cross-examine a key witness for the State – Sergeant Tyrone Pendarvis (Pendarvis) – regarding a motion filed pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) (*Franks* motion), in another unrelated criminal case. According to defendant, the circuit court of Cook County in that case granted the *Franks* motion, finding that Pendarvis "lied or acted in reckless disregard of the truth" in obtaining a search warrant. Second, defendant asserts that the trial court erred in granting the State's motion *in limine* prohibiting him from offering evidence that the weapon he purportedly pointed at Kinney was used by another individual in a prior, unrelated shooting. Third, defendant contends that he was not proven guilty beyond a reasonable doubt. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 After certain charges against defendant were dismissed, the State pursued two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) and one count of aggravated assault (720 ILCS 5/12-2(a)(6) (West 2008)).

¶ 5 Motion Regarding *Franks*

¶ 6 In a motion *in limine* filed in April 2014, defendant argued that Pendarvis had been the subject of a *Franks* motion in *People v. Darnell McGee* (12 CR 8385). The *Franks* motion in *McGee* alleged that Pendarvis had knowingly and intentionally made false statements to the court in order to obtain a search warrant. Defense counsel in this case represented that the *McGee* court had granted the *Franks* motion and had denied the State's motion to reconsider. Counsel provided the court with a copy of the *Franks* motion in *McGee* and indicated that the "[t]ranscript has been ordered but not yet received."

¶ 7 Defendant argued that the *McGee* court's ruling in 2013 granting the *Franks* motion had "indicated that 'at best' Pendarvis showed a 'reckless disregard for the truth' in seeking the warrant." Defendant requested permission to use that finding when cross-examining Pendarvis in the instant case. During a hearing, the State argued that Pendarvis' sole error in *McGee* was providing an incorrect apartment number. Defense counsel – who also had represented Darnell McGee – countered that the issue was "much more complicated than a scrivener's error." The trial court denied defendant's motion *in limine*.

¶ 8 Motion Regarding Weapon

¶ 9 The State filed a motion *in limine* in November 2014 requesting that the court prohibit defendant from referencing that "[t]he gun that the State contends the defendant held and pointed at both police officers was subsequently submitted for ballistic testing and analysis and the weapon was also used in the shooting of a barbershop." The barbershop shooting had occurred approximately five months prior to the incident herein. The State argued that defendant should be prohibited from introducing any testimony from witnesses in the police investigation regarding the barbershop shooting because it is "not relevant to the case at hand" and would confuse the jury.

¶ 10 After hearing arguments, the trial court granted the motion *in limine*, stating in part:

> "What you have here is somebody committed an armed robbery at the barber shop. We don't know who it was. It wasn't the defendant, but we don't know who it was with this 40 caliber handgun that's found – from what the parties are telling me found at the scene in this case.
>
> So in looking at it like that to allow that testimony would be speculative at best and not relevant because it's not specific. ***"

Defense counsel then made an offer of proof regarding the testimony of multiple witnesses to the barber shop shooting, *i.e.*, that defendant was not the shooter in the barbershop shooting on February 10, 2009. The trial court continued to grant the State's motion, noting that "[j]ust because somebody doesn't have a gun on one day doesn't mean that somebody else couldn't have it on another day."

¶ 11 The Trial

¶ 12 After opening statements, Pendarvis testified that on July 15, 2009, at approximately 11:30 p.m., he and Kinney were conducting field interviews in the vicinity of 118th Street and Yale Avenue (Yale). The officers heard what sounded like several gunshots coming from approximately 115th Street and Yale. Pendarvis reported the apparent gunfire over the emergency communications system, and the officers drove in their unmarked vehicle toward the direction of the continuing gunfire. Although Pendarvis had estimated thirty shots were fired in his initial report, he testified at trial that there may have been more than fifty shots.

¶ 13 The officers witnessed several individuals near 116th Street and Yale waving their arms and pointing. According to Pendarvis, he and Kinney after exiting their vehicles proceeded to the area where the individuals on the street were pointing. Pendarvis walked down a side drive at 11616 South Yale, and Kinney entered the yard at 11612 South Yale.

¶ 14 Pendarvis walked quickly along the side of the house. He testified that there was some haze in the air and a "distinctive smell of gunpowder." Pendarvis observed many shell casings in the side drive and yard. When he reached the corner of the yard, he noticed two individuals in the yard moving toward him. According to Pendarvis, the two men "had their hands to the side where you could see the guns." He testified that their firearms had extended clips which made them appear "very large." The men held the weapons in a "casual" manner, as if they "weren't

trying to engage." Pendarvis described one individual as a tall African-American male with a short haircut who was wearing a white shirt, and the other individual as an African-American male of medium height with dreadlocks, who was wearing a maroon shirt. Pendarvis identified the man wearing the maroon shirt as defendant.

¶ 15 Pendarvis testified that he attempted to "get as close to the house as possible" so as to safely "engage these individuals." He identified himself as a police officer and ordered the men to drop their weapons. According to Pendarvis, "[t]he individual who had the white T-shirt on raised his gun towards my location, and I shot one round, I believe I shot two." Both men jumped over a fence and fled northbound.

¶ 16 Pendarvis testified that he then heard Kinney state, "Chicago Police, drop the gun, drop the gun." Pendarvis heard, but could not view, two or three rounds being fired from that yard. After the shooting ceased, he stepped out and observed defendant on the ground. The other man "was still jumping over the yard," so Pendarvis "parallel[ed] him through the alley."

¶ 17 While pursuing the man northbound through the alley, Pendarvis heard Kinney over the radio. According to Pendarvis, Kinney indicated that "shots are being fired by the police and that individual were [*sic*] approaching him from the street." Pendarvis called a "10-1," *i.e.*, "when a police officer calls in distress" seeking immediate assistance. In his sixteen years as a police officer, including two years as a sergeant, Pendarvis had never before called a 10-1.

¶ 18 Pendarvis testified that he decided to terminate his pursuit of the other individual and returned to assist Kinney. Kinney had defendant at gunpoint on the ground as civilians approached defendant to observe what was transpiring. After additional officers arrived at the location, Pendarvis witnessed items being removed from defendant's pocket during a search by "Officer Antonsen," including a cellular telephone and a "foot long" magazine, *i.e.*, a container

for ammunition that is inserted into a firearm. Pendarvis did not notice any knife recovered from defendant's pocket, although he had not observed the entire search.

¶ 19 On cross-examination, Pendarvis indicated that there had been a "roundtable" within a few hours after the incident. A roundtable is an informal meeting which occurs subsequent to a shooting when an officer discharges a firearm. Those in attendance include the officer, representatives of the Chicago police department, and the Independent Police Review Authority (IPRA). Although he had stated that defendant held a chrome-plated firearm, Pendarvis had not informed the roundtable participants that the men had extended-clip firearms. Pendarvis testified that he did not think that anyone asked the question.

¶ 20 During an IPRA interview in March 2011, Pendarvis had indicated that his statement was made under duress but testified at trial that such disclaimer was "standard." Pendarvis had stated during the IPRA interview that he and Kinney had been dressed in plain clothes. During trial, however, Pendarvis testified that they had been in "full uniform" and that he "misspoke" during the earlier interview. He also had not indicated during the roundtable or the IPRA interview that he had witnessed defendant being searched and items being removed from his pocket. He again explained that the question was never asked. Pendarvis further stated during the IPRA interview, "I couldn't tell you what he looked like to this day." During defendant's trial, he confirmed making the earlier statement, noting: "As far as giving an exact description, no, I couldn't remember, but the day, the day [*sic*] that the incident happened, I remember him having dreads[.]" Defense counsel questioned Pendarvis regarding the accuracy of the lighting in the crime scene photographs. Pendarvis acknowledged that a police department truck with spotlights that had arrived in the alley after the incident provided additional illumination in the photographs. Pendarvis also testified that he had informed IPRA that he had fired his weapon

twice, but noted at trial that "everyone was telling me it was one."

¶ 21 Kinney, the State's next witness, testified that he was in uniform and his weapon was drawn and held at a "low ready" as he walked down a gangway at 11612 South Yale. A battery-operated flashlight was attached to his firearm and was turned on. As Kinney approached the end of the gangway, he heard Pendarvis scream out "Chicago police" and then heard a gunshot. He did not know whether Pendarvis had been shot.

¶ 22 Kinney heard the chain link fence rattling and then observed an African-American male in a white t-shirt coming over the fence. Kinney testified that the individual was holding a "silver object" that appeared to be a firearm. Seconds later, another individual wearing a maroon t-shirt came over the fence. According to Kinney, the second individual was holding a "larger frame" blue steel handgun. Kinney's firearm with the attached flashlight was "raised up" to provide him with a clear view. He testified, "I then began to announce my office, and I screamed out, 'drop the gun' and then at that point, the defendant turned his firearm towards me, and in fear for my life, I fired." Kinney identified defendant in court as the individual in the maroon shirt.

¶ 23 Kinney shot defendant in the forearm of the same hand in which defendant held the firearm. He was five to ten feet away from defendant at that time. After Kinney fired two rounds, the firearm dropped from defendant's hand and landed on the ground. Defendant then fell to the ground and began crawling northbound toward the chain link fence. The man in the white shirt had dropped his firearm, hopped over the fence, and ran.

¶ 24 Kinney continued to point his firearm at defendant and ordered him to show his hands. Defendant crawled to the fence and turned around, at which point Kinney could view his hands. Kinney called in a "10-1" because civilians started approaching him. Kinney estimated that

"about a hundred" officers arrived, including Officer Antonsen. After the yard was secured, Kinney observed several items throughout the yard: the firearm defendant was holding; the firearm dropped by the individual in the white shirt; and a magazine, a piece of paper, a glove, a hat, and "off to the west of where the defendant leaned against the fence, there was another firearm with a big long extended magazine."

¶ 25 When he observed the blue steel handgun at the scene, Kinney testified that he "could tell that a projectile or round was stove piped in the firearm," *i.e.*, "the ejector did not properly eject the last shell casing out of the bullet, so it gets stuck in there." According to Kinney, stove piping does not occur unless the person holding the firearm pulled the trigger.

¶ 26 On cross-examination, Kinney testified that he had informed the roundtable participants that he thought he had fired four shots. During the trial, he described himself as "excited and fearful" at the time of the shooting. Kinney acknowledged that certain crime scene photographs did not reflect the correct lighting because the truck with spotlighting arrived after the incident. During the roundtable and in his March 2011 statements to IPRA, Kinney never mentioned that he had a flashlight on his weapon. According to Kinney, "that question was never asked."

¶ 27 As part of standard police protocol, Kinney was required to turn over his weapon after the shooting. Although he turned over his firearm and live ammunition, he did not turn over the flashlight attached to the firearm. Kinney testified that he had told IPRA that he "had a flashlight," which he believed had "covered it."

¶ 28 Kinney further testified on cross-examination that he did not observe defendant holding "the gun with an extended clip" or holding a "silver gun." He also did not observe the man in the white shirt holding a "silver gun with an extended clip." Kinney testified that he could determine on the night of the shooting what type of firearm defendant dropped: a Beretta.

Kinney did not witness defendant being searched and never noticed anyone remove a foot-long clip from defendant's pants. According to Kinney, both defendant and the man in the white shirt were holding firearms with "regular magazines that sat at the bottom of the handle." Later on that evening, Kinney noticed a silver clip lying on the ground.

¶ 29 Officer Richard Antonsen (Antonsen) testified that he and his partner had responded to the "10-1." Upon arriving at the rear of the house on South Yale, Antonsen observed defendant "along the fence." After confirming that Kinney was unharmed, Antonsen "immediately searched [defendant's] waistband for any other weapons, went into his pockets, front and rear, and then proceeded down his legs to his ankles." He found a "cell phone, piece of paper, and magazine with live rounds in it." The piece of paper was a rental agreement that included defendant's name. Antonsen testified that he recovered the magazine from defendant's front right pocket.

¶ 30 Describing how he searched defendant, Antonsen stated that defendant's left hand was handcuffed to the fence and he was sitting up against the fence. Antonsen lifted defendant "a little bit," and defendant was bleeding as he was searched. Antonsen placed the recovered items toward defendant's feet, out of his reach. On cross-examination, Antonsen confirmed that he had not documented in any written report that he had searched defendant. He testified that the magazine recovered from defendant's pocket was not an extended or extra long magazine. Antonsen acknowledged that his initials were not on the evidence bag or the inventory slips and that he knew both Pendarvis and Kinney before the night of the shooting.

¶ 31 Kurt Murray (Murray), a forensic scientist for the Illinois State Police (ISP), was qualified as an expert in the field of firearm and toolmark identification. Murray testified that he received five firearms for examination in this case, two of which were marked as having

belonged to the police officers. He test-fired each of the firearms and found all to be in operating condition. Murray also had received various cartridge cases, *i.e.*, fired bullet fragments, as well as unfired cartridges and magazines/clips.[1]

¶ 32 Murray testified that the officers' firearms were a Springfield Armory, Model XD 45ACP semi-automatic pistol and a Smith & Wesson, Model 6946, 9-millimeter luger semi-automatic pistol. The three other firearms Murray received were: (a) a Smith & Wesson, Model 910, 9-millimeter semi-automatic pistol; (b) a Bryco Arms, Model Jennings 9, semi-automatic pistol, with a "silver-type finish"; and (c) a Beretta, Model 9640, Smith & Wesson caliber semi-automatic pistol with a "dark magnetic barrel and slide with a dark alloy frame." Murray was able to identify and connect certain bullet fragments or cartridge cases back to certain weapons. Specifically, he testified that six discharged cartridge cases were identified back to the Beretta firearm. Murray further testified that eighteen discharged cases were identified as having been fired from the same firearm, but that firearm was not recovered or submitted to Murray for his examination.

¶ 33 On cross-examination, Murray testified, in part, that a magazine he had examined that was not included with any firearm "fit and functioned with" both Smith & Wesson firearms. Murray confirmed that the inventory sheet for the magazine was incomplete and only included the address where it was recovered.

¶ 34 Kenan Hasanbegovic (Hasanbegovic) and Veronica Jackson (Jackson), ISP forensic scientists, were qualified as experts in forensic biology. Hasanbegovic testified that he had tested a magazine manufactured by Smith & Wesson and found five bloodstains. Jackson testified that she had preserved buccal swabs from defendant and six swabs from three different

[1] Murray testified that "clip" is a "slang term for magazine."

firearms for DNA testing. Jennifer Belna (Belna), an ISP scientist who was qualified as an expert in the field of forensic DNA analysis, testified that no human DNA profile was identified on the three firearms. Belna was also unable to generate a DNA profile from defendant's buccal standard.

¶ 35 The State moved *in limine* to play the Office of Emergency Management and Communications (OEMC) audio recording of civilians dialing 911 in connection with the events herein. Over defense objections, the trial court granted the motion. In describing the content of the tape outside of the presence of the jury, the court stated, in part, "they're calling in to give basically locations that I just saw somebody go through my yard, the police are now chasing them with a flashlight." During the testimony of Jill Maderak, an OEMC employee, the audio recording was played for the jury.[2]

¶ 36 Moira McEldowney (McEldowney), an ISP forensic scientist, was qualified as an expert in fingerprint identification. She had tested certain magazines, cartridges, and firearms – including the Beretta pistol – but was unable to detect any latent impressions that were suitable for comparison. She was also unable to recover any fingerprints from the cellular phone. McEldowney testified that fingerprints may not be detected on an item for a variety of reasons, *e.g.*, the smoothness or dryness of the item's surface or environmental conditions such as extreme heat or cold. She also noted that the grip areas on many handguns are textured and testified that it is more common than not that fingerprints are not found on a handgun.

¶ 37 Detective Brian Forberg (Forberg) testified that he was present when evidence technicians from the Chicago police department processed the scene. Forberg identified various photographs from the crime scene. He described one of the items in the photographs as a blue

[2] None of the recordings or other exhibits are included in the record on appeal.

knit cap with apparent blood stains on it. Forberg described multiple firearms as stovepiped. A folding knife also was recovered at the scene. Forberg testified that he did not believe the City of Chicago did trajectory testing, and it was not done in this case. According to Forberg, "the case was solved when Mr. Atkins was placed into custody."

¶ 38 The parties stipulated, among other things, that defendant's blood was on the cellular telephone and magazine and that defendant had a qualifying offense. After the State rested, the trial court denied defendant's motion for a directed verdict. Defense counsel then presented another stipulation: that an investigator took gunshot residue samples from the hands of defendant, Cornelius Moore (Cornelius) and Michael Carr (Carr); and gunshot residue tests were performed in the early morning hours on July 16, 2009.

¶ 39 Ellen Chapman (Chapman), an ISP forensic scientist, was qualified as an expert in the examination and detection of trace particles in evidence, including gunshot residue. She determined that the hands of defendant, Cornelius and Carr contained particles characteristic of "background samples," *i.e.*, they essentially tested negative. For all three individuals, she concluded that they may not have discharged a firearm, and if they did discharge a firearm, then the particles were removed by activity, were not dispositive, or were not detected by Chapman's procedure. On cross-examination, Chapman testified that "[a]nything that contacts the surface of the hand is going to potentially remove" the gunshot residue, *e.g.*, bleeding or medical treatment. Chapman acknowledged that she found one particle of gunshot residue from defendant's right hand, but stated that three particles are needed for a "positive" finding.

¶ 40 Nadine Farlow (Farlow), a friend of defendant for twelve years, testified that on July 15, 2009, she attended a "going away" party for Roderick Moore (Roderick) because he was shortly turning himself in to law enforcement authorities. The party was held outdoors and included

more than thirty participants. During the party, she heard multiple loud shots as she and defendant stood in the street. The shots were coming from the opposite side of the street, "like through a gangway, a driveway, around a house" directly across the street. According to Farlow, the partygoers scattered and sought cover.

¶ 41 Farlow further testified that, after the shooting stopped, the partygoers emerged and starting "checking on everyone." As Farlow returned to retrieve her vehicle, defendant asked if she was "okay." She did not see defendant with any firearms or other weapons during the party, and she could not recall the clothing he was wearing that evening. On cross-examination, Farlow confirmed that she did not notice what occurred in the backyard.

¶ 42 Jerome Brown (Brown) testified that he knew defendant for twenty years and had "taken him on as like a little brother." During the party, Brown heard "[p]robably a hundred, maybe more" gunshots originating north of the party. After hearing the gunfire, Brown ducked behind a vehicle. When he emerged after the shooting ceased, Brown noticed defendant although he could not remember defendant's clothing. According to Brown, defendant inquired whether he had seen defendant's son. Brown then observed defendant "walk toward the area where the gunshots was [*sic*]" as the police arrived at the scene.

¶ 43 Brown further testified that he did not witness defendant with a firearm. Prior to the gunfire, Brown never observed defendant walking to the area across the street where the shots had originated. On cross-examination, Brown confirmed that the police officers had their weapons drawn as they ran on either side of a house. He testified that he had heard more shots after the police arrived. Brown did not observe what occurred in the backyard.

¶ 44 Andrea Ruff (Ruff), a friend of defendant for twenty years, testified that she noticed defendant standing on the sidewalk as she arrived at the party. After subsequently hearing "a

whole bunch of shots," Ruff ducked behind a vehicle. When the shooting stopped, defendant asked if Ruff was "okay." As she walked toward her vehicle to depart from the party, she witnessed defendant walking across the street toward the area where the gunshots had originated. She believed he had a telephone in his hand at that time. After defendant walked down a gangway, Ruff lost sight of him, and the police arrived a couple of minutes later.

¶ 45 Defense counsel asked, "Did you see the police go the same area that you saw [defendant] go to?" Ruff responded, "Not through the same – I think they went through the – they went across the street, but they went to the other side." She confirmed that a second group of officers arrived some time after the initial officers arrived. Ruff recalled that defendant was wearing jeans and a maroon shirt. On cross-examination, Ruff testified that she did not view what transpired in the backyard because she had already walked to her vehicle.

¶ 46 John Hampton (Hampton), a friend of defendant for twenty-five years, testified that, at the time the shooting started, "kids was [*sic*] out, parents, people sitting on the porch. It was a hot night." He and his wife crouched behind a vehicle as forty to sixty shots were fired during the party. According to Hampton, defendant commenced looking for his son after the gunfire ceased. Hampton testified, "He was shouting first his son name [*sic*] and then at that point he started walking across the street because mainly that's where the kids was [*sic*] at." Hampton further testified that defendant did not have anything in his hands.

¶ 47 A police vehicle arrived, and the officers went to the same area where defendant had walked. Hampton testified that he subsequently heard three or four shots. After additional police officers arrived at the scene, Hampton learned that defendant had been shot because other people starting shouting, "Twon [Antoine] got shot." On cross-examination, Hampton confirmed that he was never in the backyard and never observed anything that happened.

¶ 48 Courtney Bell (Bell), defendant's girlfriend on July 15, 2009, testified she was at her sister's home at 88th Street and Kimbark Avenue in Chicago on that evening. When Bell spoke with defendant by telephone at approximately 11:00 p.m., she intended to go to the party. Bell testified that she received another call from defendant at some point between 11:45 p.m. and midnight. Defendant told her, "Don't come. There's shootings over there." He also informed Bell that he was looking for his son. During the telephone conversation, Bell heard defendant say, "Why did you shoot me." According to Bell, the telephone hung up. Bell testified that defendant sounded "scared" as he spoke.

¶ 49 Bell attempted to dial defendant back once but no one answered. She testified that she did not attempt to call again because defendant's friend had contacted Bell and informed her that defendant was at the hospital. On cross-examination, Bell testified that their telephone conversation lasted approximately 60 seconds, that she never heard anyone yell "police," and that there was a "lot of commotion" but she did not hear any gunshot. Bell did not know who had shot defendant, although she thought it had just happened at the time of their telephone conversation.

¶ 50 Defendant testified that the party on July 15, 2009, was a "get together" for his friend Roderick. The party was held at Roderick's house in the Roseland neighborhood because Roderick was the subject of federal electronic monitoring – allowing him to travel only 90 feet from his house – and had a 10:00 p.m. curfew. Defendant arrived at the party shortly after 10:00 p.m., and he estimated between 30 and 40 people attended. He was familiar with Roseland because his 14-year-old son lived there. His son's best friend resided at 11616 South Yale, and another friend lived across the street at 11617 South Yale, the location of the party.

¶ 51 Defendant testified that he had drank two shots of tequila but was not intoxicated. While

offering a toast at the party, defendant heard between fifty and one hundred shots ring out. He ducked and "kind of ran down the side of the cars." Defendant testified that he was not wearing gloves or a ski mask and had not brought a firearm to the party. When the gunfire ceased, defendant began to check on the partygoers and look for his son. Earlier in the evening, defendant had observed his son walking back and forth between the party and his friends' homes.

¶ 52 Defendant walked up the driveway "next door to the house next to" where he thought the shots originated. As he walked, he called Bell on his cellular telephone and directed her not to attend the party due to the gunfire. Because there was a tree and a fence at the end of the gangway, defendant walked to the right so he could look past the tree, while remaining on the telephone with Bell. He did not find his son.

¶ 53 Defendant testified that he next walked toward the alley because he wanted to look down the alley. After hearing a shot, defendant "started to walk back away from the alley." Defendant testified that as he walked back toward the gangway: "That's when I heard 'police.' And I couldn't see anything, so I looked towards where I heard the sound and I got shot right – almost right then." Defendant indicated that "[n]ot much" time elapsed between when he heard someone yell "police" and when he was shot. He stated, "I heard 'police,' and I kind of just, you know, Put your hands in the air, and I got shot." According to defendant, he never had a firearm in his hand with either a long one-foot clip or a regular clip. Defendant indicated that he was holding his telephone with his right hand to the right side of his face when he was shot.

¶ 54 Defendant then testified that he was tackled after he was shot. Although it was dark outside, he deduced that the person who tackled him was a police officer. The officer directed defendant to show his hands; he had dropped his telephone. According to defendant, no one shone a flashlight in defendant's face prior to someone yelling "police" and tackling him.

Defendant believed he and the officer were the only two individuals in the backyard.

¶ 55 Defendant testified that the officer was "on top" of him, pushing him into the ground and pulling his arms back in an effort to handcuff him. Other officers subsequently arrived. Defendant testified that he had landed on something sharp; he told the officers "something is sticking me." He then testified: "So I was lightly tussling back trying to move and they were choking me and stepping on my neck and pushing their knee in my back, and eventually they handcuffed me." According to defendant, he was handcuffed behind his back and was never handcuffed by one hand to a chain link fence next to firearms.

¶ 56 Defendant testified that he did not have a firearm but he was carrying a knife on a belt clip. He indicated that the knife was taken off of his belt at the hospital. Defendant testified that he never saw Officer Antonsen[3] before and that he was not searched in the manner described by Antonsen. Defendant further noted that the lighting in the photographs introduced at trial did not reflect the actual lighting on the night of the incident. According to defendant, many officers arrived at the scene before the ambulance arrived. Defendant showed the jury a scar on the bottom side of his right wrist.

¶ 57 On cross-examination, defendant testified that he was on the sidewalk and standing in front of the gangway when the police vehicle arrived. At the time, he was speaking with two men who were also arrested, including Carr. Defendant testified that he was searched at the hospital and that he did not remember being searched at the scene. According to defendant, a recovered written lease and a cellular telephone were his but a magazine was not. Defendant displayed for the jury where the bullet exited his forearm.

¶ 58 Defendant testified two or three officers struggled to place him in handcuffs. He

[3] The transcript references "Officer Atkinson," which we presume should read "Officer Antonsen."

acknowledged that it was "possible" that they checked his pockets while this occurred. Defendant also testified that an officer kicked the clip of bullets that defendant had fallen on.

¶ 59 The jury found defendant guilty of aggravated assault of a peace officer, unlawful use of a weapon by a felon (firearm ammunition), and unlawful use of a weapon by a felon (firearm).

¶ 60 Posttrial Matters

¶ 61 The trial court denied defendant's posttrial motion for judgment notwithstanding the verdict and motion for a new trial. Defendant was sentenced to concurrent terms of imprisonment of twelve years on each of the unlawful use of a weapon convictions and three years on the aggravated assault conviction. After the trial court denied his motion to reconsider sentence, defendant filed this timely appeal.

¶ 62 ANALYSIS

¶ 63 Defendant raises three arguments on appeal. First, defendant asserts that the trial court erred in not allowing cross-examination of Pendarvis regarding a prior court finding in a *Franks* hearing. Second, he contends that the trial court erred in precluding evidence that the weapon he was charged with pointing at Kinney had been previously used by another party in a separate shooting. Finally, defendant contends that he was not proven guilty beyond a reasonable doubt. We address each argument in turn.

¶ 64 As an initial matter, we note that two of defendant's arguments challenge rulings on motions *in limine*. A motion *in limine* is "addressed to the trial court's inherent power to admit or exclude evidence." *People v. Williams*, 188 Ill. 2d 365, 369 (1999). "A trial court's decision on a motion *in limine* will not be disturbed absent an abuse of discretion." *People v. Melton*, 2013 IL App (1st) 060039, ¶ 58. See also *People v. Wheeler*, 226 Ill. 2d 92, 133 (2007) (applying abuse of discretion standard when evaluating evidentiary rulings). 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 court. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

¶ 65 *Franks* Motion in *McGee* Case

¶ 66 Defendant contends that Pendarvis was a "significant witness" for the State because "he was one of only two police witnesses in the back of the house at the time the defendant was shot." Defendant thus asserts that the officer's credibility was "crucial." Defendant argues because he was precluded from questioning Pendarvis regarding a "previous court finding in a *Franks* hearing that [Pendarvis] lied or acted in disregard of the truth," the trial court committed reversible error. As discussed below, we reject defendant's contention.

¶ 67 The United States Supreme Court in *Franks* held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 155-156. "In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material fact set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id*. at 156.

¶ 68 During the hearing on the motion *in limine*, defense counsel in the instant case represented that both the "preliminary hearing" on the *Franks* motion and the "hearing after testimony" resulted in rulings in favor of the *McGee* defendant. Although we presume counsel's

representations were not misleading, the trial court does not appear to have been provided with any transcripts, affidavits or court orders regarding the disposition of the *Franks* motion in *McGee*. We would be hard-pressed to conclude that the trial court abused its discretion in denying the motion *in limine* where it received relatively minimal information regarding the *Franks* proceeding in that case. We further note that, based on the plain language of the *Franks* motion itself, the key issue in *McGee* was that Pendarvis allegedly included the wrong apartment number in a complaint for a search warrant. Although problematic, such a statement does not appear to represent an egregious violation that would be relevant here.

¶ 69 Defendant, furthermore, provides no authority regarding the use of a *Franks* ruling to impeach a witness in an unrelated proceeding, instead citing *People v. Phillips*, 95 Ill. App. 3d 1013 (1981). His reliance on *Phillips*, however, is misplaced. The defendant in *Phillips* shot and injured an off-duty Chicago police officer whose blood alcohol concentration was .247. *Id.* at 1015, 1018. Defense witnesses testified, among other things, that the officer had produced a firearm from his vehicle after an incident involving the defendant's brother. *Id.* at 1017. The defendant testified that he shot the officer because he thought the officer was about to shoot his brother. *Id.* at 1018. Following a jury trial, the defendant was convicted of attempted murder and other offenses. *Id.* at 1014.

¶ 70 Prior to the trial in *Phillips*, the State had filed a motion *in limine* to preclude the defense from using information from police department files which revealed that the officer had been suspended fifteen times, including two instances where he improperly displayed his weapon and then filed a false report. *Id.* at 1015. The trial court granted the motion, but the appellate court reversed. *Id.* The appellate court noted that "[a] witness' character cannot generally be impeached by prior misconduct but evidence of prior misconduct may be used to impeach a

witness if it shows his bias, interest or motive to testify falsely." *Id.* at 1019. The court found, among other things, that the officer could have been motivated to testify falsely against the defendant to avoid other disciplinary measures, *i.e.*, suspension or termination, and to avoid the loss of his medical coverage. *Id.* at 1021.

¶ 71 The court in *People v. Collins*, 2013 IL App (2d) 110915, ¶ 19, noted that the evidence in the *Phillips* officer's personnel file "was not remote or uncertain, because it was directly related to the defendant's theory of the case." The "defendant in *Phillips* argued that he shot the officer because the officer was improperly using his own weapon in a threatening manner," and the "personnel file showed that the officer had been suspended in the past for improperly displaying his weapon." *Id.* In the instant case, Pendarvis' alleged reckless disregard for the truth in connection with a search warrant in *McGee* was unrelated to his ability to personally witness defendant's possession of a firearm. As the trial court herein observed, "[i]t was a different hearing, different circumstances, completely unrelated to this case." In any event, the defense was otherwise offered wide latitude in its cross-examination of Pendarvis and quite effectively challenged the officer regarding inconsistencies between his trial testimony and his statements at the police roundtable and the IPRA interview.

¶ 72 Based on the foregoing, we cannot conclude that the denial of defendant's motion *in limine* was arbitrary, fanciful or unreasonable or that no reasonable person would take the view adopted by the trial court. Therefore, the trial court did not abuse its discretion in denying the motion.

¶ 73 Use of Firearm in Another Shooting

¶ 74 The trial court granted the State's motion *in limine* and prohibited defendant from referring to the use of the weapon by someone else in a shooting at a barbershop which occurred

approximately five months prior the events herein. Defendant challenges this ruling on appeal, arguing that the "sole evidence supporting [his] possession of the gun" was the "incredible" testimony of Kinney. "Had the defendant been able to prove to the jury that the instant gun had actually been possessed previously by someone else," defendant contends, "the inescapable fact would be there was another unknown individual at the scene of the shooting."

¶ 75 Defendant cites a single decision in support of his argument: *People v. Herrera*, 257 Ill. App. 3d 602 (1994). In *Herrera*, the defendant was charged with murder in connection with the fatal shooting of Enrique SiFuentes (SiFuentes). *Id.* at 603. The prosecutor made an oral motion *in limine* during trial to exclude any evidence that the weapon which was used in the SiFuentes shooting might also have been used in two other shootings later that same night; the court reserved ruling on the motion. *Id.* at 604. Multiple witnesses for the State testified that the weapon used to shoot SiFuentes had been passed between the defendant and fellow gang members before and after the shooting. *Id.* at 605-608. The trial court granted the motion *in limine*, thus precluding defense counsel from asking questions regarding the two other shootings. *Id*. Defendant was ultimately convicted of murder. *Id.* at 613.

¶ 76 In affirming the ruling of the trial court, the appellate court stated that "[t]he fact that someone else might have had possession of and might have used the gun later was not probative of defendant's guilt because it did not establish that defendant did not have possession of the gun at the time SiFuentes was killed." *Id.* at 616. Since "the subsequent location and possible use of the gun had no bearing on the issue of whether defendant fired the shot that killed SiFuentes," the court concluded that "this evidence did not make the issue of defendant's guilt more or less probable." *Id.*

¶ 77 Defendant distinguishes *Herrera*, arguing that that case involved "extensive evidence that

the gun in question had been passed around by others" whereas, in the instant case, "the jury heard absolutely no evidence about the gun changing hands." We are not persuaded by defendant's argument, and we find the rationale of *Herrera* applicable herein. The fact that another individual possessed a firearm in February 2009 at the time of the barbershop shooting does not make it any more or less probable that defendant possessed the same firearm on July 15, 2009. *E.g.*, *People v. Lynn*, 388 Ill. App. 3d 272, 280 (2009) (providing that evidence is relevant when it tends to prove a fact in controversy or render a matter at issue more or less probable). As the State accurately observes, "a speculative theory that someone other than defendant fired the gun at some previous and unspecified time had no bearing on whether or not defendant possessed the firearm and then pointed the firearm at Officer Kinney on the night of the incident." As such, we do not consider the trial court's characterization of the evidence relating to the barbershop shooting as "speculative" and "not relevant" to be arbitrary, fanciful or unreasonable. Accordingly, the trial court did not abuse its discretion in granting the State's motion *in limine*.

¶ 78 Sufficiency of the Evidence

¶ 79 Defendant contends that the State did not prove beyond a reasonable doubt that he committed the offenses of aggravated assault and use of a weapon by a felon because "the evidence the prosecution offered in its case in chief was improbable, unconvincing, and contrary to human experience." Specifically, defendant argues that his trial testimony – coupled with the testimony of Courtney Bell – proves that he was holding his cellular telephone at the time he was shot. According to defendant, "[i]t is highly improbable he also had a gun in one hand and a cellular telephone in the other." He further asserts that he "certainly did not jump over that fence with a gun in one hand and a cellular telephone in the other." Defendant thus posits that "[t]he

only appropriate inference to draw" is that Kinney accidentally shot defendant when he mistakenly believed defendant's cellular telephone to be a firearm.

¶ 80 "In reviewing the sufficiency of the evidence in a criminal case, our inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *People v. Baskerville*, 2012 IL 111056, ¶ 31. "Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State." *Id*. "A defendant's conviction will only be reversed where the evidence is so unsatisfactory, unreasonable or improbable that it raises a reasonable doubt as to defendant's guilt." *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 52. This same standard of review applies regardless of whether the defendant received a jury or bench trial. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 81 Defendant was convicted of two counts of unlawful use of a weapon by a felon: one based on a firearm and the other based on firearm ammunition. Under Illinois law, it is unlawful for a person to knowingly possess a firearm or firearm ammunition if the person has been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2008). During the trial court proceedings, defendant stipulated that he had a qualifying offense. Kinney and Pendarvis testified at trial that defendant held a firearm. Antonsen and Pendarvis testified that a magazine was recovered during a search of defendant, and Antonsen testified that the magazine contained live rounds. The parties stipulated during trial that defendant's blood was on a magazine. Based on the foregoing evidence, we cannot conclude that no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

¶ 82 A person commits aggravated assault when he intentionally engages in conduct that places another person in reasonable apprehension of receiving a battery and, in doing so, he

knows the individual assaulted is a peace officer who at the time is engaged in the execution of his official duties. 720 ILCS 5/12-2 (West 2008). Pendarvis and Kinney each testified that they were in uniform and had identified themselves as police officers to defendant. Various defense witnesses indicated that police officers arrived at the scene. Kinney testified that defendant pointed a weapon at him and that he feared for his life. Once again, based on the foregoing evidence, we cannot hold that the evidence was so unsatisfactory, unreasonable or improbable that it raises a reasonable doubt as to defendant's guilt on the aggravated assault count.

¶ 83 Defendant contends that none of the witnesses at trial who attended the party saw him with a firearm. Conversely, Pendarvis and Kinney testified that he possessed a firearm. Although defendant challenges the officers' credibility, the jury was "responsible for determining a witness's credibility and the weight to be given to a witness's testimony, as well as drawing any reasonable inferences from the evidence." *Alvarez*, 2012 IL App (1st) 092119, ¶ 51. We will not reverse a conviction simply because the evidence is contradictory or because the defendant claims that a witness was not credible. *Siguenza-Brito*, 235 Ill. 2d at 228. In any event, none of the defense witnesses other than defendant viewed what transpired in the yard between the officers and defendant.

¶ 84 Defendant further asserts that "all the evidence offered taken as a whole demonstrated the physical improbability that defendant could be on the cellular telephone talking to his girlfriend with one hand and firing a gun at the police all at the same time." He characterizes Bell's testimony as "unanswered" and asserts that the evidence that he was on the telephone at the time he was shot was "uncontroverted." Pendarvis and Kinney each testified, however, that defendant held a firearm – not a cellular telephone – and Antonsen testified that he recovered a telephone from defendant's pocket. We must give due consideration to the fact that it was the trial court

and the jury that observed and heard these witnesses. *Wheeler*, 226 Ill. 2d at 114-15.

¶ 85 Defendant also raises questions as to where he was "hiding the gun or a gun with an extended clip." This court, however, is "not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances." *Id.* at 117. Although we recognize that there were certain inconsistencies and gaps in the evidence presented at trial, we conclude that a rational trier of fact could have found defendant guilty beyond a reasonable doubt of unlawful use of a weapon by a felon and aggravated assault. We thus affirm defendant's convictions and sentences.

¶ 86 CONCLUSION

¶ 87 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in its entirety. The State's request for fees and costs is hereby denied.

¶ 88 Affirmed.