2019 IL App (1st) 163299-U

SIXTH DIVISION
June 14, 2019

No. 1-16-3299

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DOMINIQUE MOORE, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 15 CR 1133 Honorable Alfredo Maldonado, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** There was sufficient evidence to support defendant's conviction of aggravated unlawful use of a weapon. The circuit court did not err in denying defendant's motion *in limine* seeking to impeach a police officer with his invocation of his fifth amendment right in a prior unrelated federal civil lawsuit. Affirmed.

¶ 2 Following a bench trial, defendant Dominique Moore was found guilty of aggravated unlawful use of a weapon (AUUW) for possessing a firearm without either a valid Firearm Owner's Identification (FOID) card or a concealed carry license, and he was sentenced to one year in prison. On appeal, defendant challenges the sufficiency of the evidence and claims that the court erred in denying his motion *in limine* that sought to use a police officer's invocation of

his fifth amendment right not to incriminate himself during the officer's questioning in a prior unrelated federal civil lawsuit. We affirm.

¶ 3 BACKGROUND

¶ 4 The State charged defendant by information with six counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6 (West 2016)). Counts I through III alleged that defendant knowingly carried a firearm and had neither a valid FOID card nor a valid license under the Firearm Concealed Carry Act (concealed carry license) (430 ILCS 66/1 *et seq.* (West 2016)). Counts IV through VI made substantially the same allegations but added that defendant's possession of a firearm took place on a public street.

¶ 5 Before trial, defendant filed a motion *in limine* seeking either to bar Chicago police officer Paul Zogg from testifying, or in the alternative, to allow defendant to use Zogg's repeated invocation of his fifth amendment right not to incriminate himself in a prior unrelated federal civil trial, Padilla, *et al.* v. City of Chicago, *et al.*, No. 06 C 5462 (N.D. Ill.). In particular, defendant pointed out that, during Zogg's deposition, Zogg invoked his fifth amendment right not to incriminate himself in response to 12 questions, as follows:

> "Q: How long have you been with the Chicago Police Department?
>
> A: I invoke the 5th Amendment.
>
> Q: Where was your first assignment within the Chicago Police Department?
>
> A: I invoke the 5th Amendment.
>
> Q: Can you describe your job duties in your current assignment?

A: I invoke the 5th Amendment.

Q: In your current capacity as an officer within the Alternate Response, do you have any requirements or guidelines with regard to the amount of or any amount of guns that you are supposed to remove from the streets?

A: I invoke the 5th Amendment.

Q: Did you ever see Officer Herrera show Noel Padilla a gun that Officer Herrera claimed he found in Alvarado's house?

A: I invoke the 5th Amendment.

Q: Did you ever conspire or agree with other police officers to falsely charge Noel Padilla with crimes that you know he did not commit?

A: I invoke the 5th Amendment.

Q: Are you aware of a term called creative writing as it might apply to the completion of arrest reports?

A: I invoke the 5th Amendment.

Q: As a member of the Special Operations Section, did you ever arrest anybody for a crime that you know they did not commit?

A: I invoke the 5th Amendment.

Q: As a member of the Special Operations Section, have you ever planted drugs on anybody?

A: I invoke the 5th Amendment.

Q: As a member of the Special Operations Section, did you ever confiscate drugs or guns and fail to properly inventory them?

A: I invoke the 5th Amendment.

Q: As a member of the Special Operations Section, did you ever falsely testify in Open Court?

A: I invoke the 5th Amendment.

Q: While you were a member of the special Operations Section, did you ever feel any pressure to get· guns or drugs off the streets?

A: I invoke the 5th Amendment."

Defendant argued that these responses were relevant as to Zogg's credibility.

¶ 6 After informing defendant that barring Zogg from testifying simply for asserting his fifth amendment right was "simply not going to happen," the court asked defendant how Zogg's assertions would impeach his trial testimony. Defendant responded that, in the context of a civil case, a witness may not assert a fifth amendment right not to incriminate oneself unless there is a good-faith basis to believe a response would be inculpatory. Defendant further argued that Zogg's invocation of his right was not being used against him, "just the fact that he testified that way." After further argument, the court denied defendant's motion primarily because defendant failed to provide any authority that a witness's fifth amendment assertion in a prior unrelated proceeding could be used for impeachment purposes. Defendant subsequently waived his right to a jury trial, and the cause proceeded to a bench trial.

¶ 7 The State first called officer Zogg to testify. Zogg stated that, at around 7:30 p.m. on January 5, 2015, he was conducting surveillance in front of a building at 520 North Springfield

Avenue in Chicago. Zogg said he also had a search warrant for that location and was observing the location to determine who was selling narcotics at that particular time. Zogg saw defendant standing on the sidewalk and parkway area in front of that location speaking to other individuals.

¶ 8 Zogg testified that he observed defendant at that location for about an hour before executing the search warrant. During that time, Zogg saw defendant speaking to a "co-arrestee" identified as "Mr. Knox." Zogg said that Knox would receive cash from individuals who would pull up to the building in cars, and Knox would then "tender items" to them. Zogg confirmed that defendant was in front of the building while Knox was conducting these exchanges.

¶ 9 Zogg then formulated a plan with other officers regarding a search of the building. Zogg explained that the house was a "known gang drug house where they're continually selling narcotics almost 24/7," so there was one team of officers that entered the front of the house and another team that entered the rear. At around 9 p.m., Zogg and other officers executed the search warrant. When the officers arrived, Zogg saw defendant and other individuals flee into the house. Zogg followed, entering the front of the house.

¶ 10 When Zogg entered the building, he saw defendant look down at him from the second floor and then run into the second-floor apartment. Zogg pursued defendant into the apartment and saw defendant run to the rear of the apartment, which contained an enclosed porch that had been converted into a bedroom. A set of stairs from this converted bedroom led to the back exit of the building. Zogg's view of the back bedroom was "slightly in front of me, to my left." Zogg noted that the interior of the apartment was well-lit and that there was nothing obstructing his view into the converted bedroom. Zogg admitted that, while he was assisting officers Ortega and "Chunno [*sic*]" in handcuffing Knox in the front of the apartment, defendant had left Zogg's

line of sight for "a few seconds." Defendant, however, then returned into Zogg's line of sight in the same back bedroom.

¶ 11 At that point, Zogg saw defendant lift up the mattress on the bed in the converted bedroom with defendant's left hand, "toss[]" a black semiautomatic handgun underneath the mattress, and then run into one of the "middle" bedrooms. Zogg sent the two officers to detain defendant. After other people in the apartment were detained and officer Dominguez photographed the gun, Zogg recovered it from under the mattress where defendant had thrown it earlier. Zogg then gave the handgun to officer Dominguez for further processing.

¶ 12 On cross-examination, Zogg agreed that he had obtained the search warrant on January 2, 2015, three days before it was executed. Zogg further explained that his surveillance initially was conducted on foot and then from a "covert vehicle," approximately 50 yards from defendant. Zogg further conceded that he never saw defendant outside of the building holding a weapon. When asked about his entry into the apartment, Zogg confirmed that the door had been closed and locked, so the officers had to force their entry inside. Zogg further noted that, when he and the other officers entered the apartment, he saw Knox throw "several" bags of cannabis under a Christmas tree. Zogg then saw defendant run through the kitchen into the back bedroom, which Zogg estimated was 70 feet from him, and then to the right, where the stairs leading out of the building were. When defendant reappeared in Zogg's line of sight, defendant already had the gun in the right hand before lifting the mattress with the left hand. Zogg could not recall whether he asked for the gun to be processed for fingerprints.

¶ 13 Chicago police officer Gustavo Dominguez then testified that he assisted in the execution of the search warrant. Dominguez confirmed that he also photographed the firearm and received it from Zogg. Dominguez added that, shortly before midnight on January 5, 2015, he advised

defendant of his *Miranda* rights. Defendant indicated that he understood those rights and agreed to speak to Dominguez. According to Dominguez, defendant "in summary" said to him, "If I could get you a 357, would you get rid of that gun you got from off of me?" On cross-examination, however, Dominguez conceded this statement was neither recorded nor memorialized in writing.

¶ 14 The parties then stipulated that, as of March 10, 2015, defendant had never been issued either a FOID card or a concealed carry license. The parties further stipulated that the recovered weapon was an operable semiautomatic "Taurus model PT 709 slim" pistol with two live cartridges and signs of firing residue in the firearm bore. The State then rested.

¶ 15 Defendant then testified on his own behalf, stating that, at around 9 p.m. on January 5, 2015, he went to his cousin Lacy Thomas's second-floor apartment at 520 North Springfield. Defendant denied being at the apartment at any point earlier that day. Defendant stated that, since it was "like six below" outside, he entered the building immediately after parking his car and did not initially walk around outside.

¶ 16 Defendant had been in the apartment charging his phone for approximately 30 minutes before the police arrived. Defendant testified that about 20 people were in the apartment and that people were coming and going between the first- and second-floor apartments. Defendant and his cousin were sitting in the living/dining room areas near the front of the apartment. Defendant was sitting on a chair near where his phone was charging.

¶ 17 Defendant then heard a loud noise and saw the police enter. Defendant testified that approximately 15 officers entered the apartment from the front and back entrances. The officers put everyone in handcuffs and brought him and 12 other people to the first floor. Defendant also denied being arrested in a bedroom. Defendant saw a canine unit go upstairs and heard a dog

bark after about 10 minutes. The officers then came back down and began releasing people. Defendant said that he and four or five others were brought to the police station.

¶ 18 Defendant believed he was being brought to the police station for "soliciting or trespassing," and he first learned at the station that he was being charged with a weapons offense. Defendant denied possessing a gun or putting one under a mattress. Defendant further denied going into a bedroom or making any statement to Dominguez. Instead, defendant stated that another officer asked defendant "to give them a gun in return for a gun." Defendant said that he responded, "I didn't have the first gun, why would I give you a second gun when I didn't have the first gun?" Defendant also testified that a wall blocked the view to the back bedroom and that a person could only see the doorways of the other rooms and not the room interiors.

¶ 19 On cross-examination, defendant testified that there were eight to ten other people in the apartment with him, including two women, one child, and six other men. Defendant said he was sitting alone in a chair in the living room and his cousin and the two women were sitting on the couch in the dining room. The other men were "all over the house," but defendant was unsure which rooms they were in. When the police entered the apartment, defendant was not shocked and explained that, since it was not his "house," he "just stayed put." Defendant admitted that he had neither a FOID card nor a concealed carry license. At the conclusion of defendant's testimony, the defense rested.

¶ 20 In rebuttal, Zogg testified that, when he entered the apartment, there were two men, Knox and another man named Green, in front of him. Zogg further reiterated that he saw a police officer escort defendant out of the middle bedroom on the second floor. Zogg also saw two women and two children come out of the same middle room where defendant was arrested. On

cross-examination, Zogg acknowledged that he did not include in the incident report that he saw defendant outside before he approached the building.

¶ 21 Defense counsel argued during his closing argument that there was "no way" Zogg could have seen defendant enter the rear bedroom because there was a wall and bathroom "directly blocking the view of that." Counsel further challenged officer Dominguez's credibility, noting that Dominguez failed to memorialize defendant's alleged offer to obtain another firearm if Dominquez disposed of the firearm the officers recovered from defendant. Counsel did not comment on the amount of drugs recovered or the basis of the search warrant.

¶ 22 Following closing arguments, the circuit court found defendant guilty of counts I through III of AUUW (possession of a firearm without a valid FOID card or concealed carry permit). The court specifically found that it observed the witnesses' demeanor and reviewed the various exhibits that were admitted into evidence. In particular, the court found that, in reviewing the floor plan of the apartment with the photographs of the apartment interior, it rejected defense counsel's argument regarding Zogg's testimony. The court stated that it "[couldn't] say that it would be an impossibility for Officer Zogg to have seen what he says he saw." The court, however, found defendant not guilty as to counts IV through VI because it did not hear any evidence from the State that defendant had possession of the gun on a public street. The circuit court sentenced defendant to a one-year prison term. This appeal followed.

¶ 23 ANALYSIS

¶ 24 Defendant first contends that the evidence was insufficient to support his conviction. Specifically, he challenges police officer Paul Zogg's testimony that Zogg saw defendant lift up a mattress in a bedroom near the back entrance of an apartment while Zogg was in a hallway

near the front entrance, about 50–70 feet away. Defendant argues that this testimony was not credible and contrary to human experience, warranting reversal of his conviction.

¶ 25 When presented with a challenge to the sufficiency of the evidence, this court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *People v. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not the function of this court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* at 211. It is not necessary that a trier of fact be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; rather, it is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the accused's guilt. *People v. Jones*, 105 Ill. 2d 342, 350 (1985). The testimony of a single witness, if positive and credible, is sufficient to convict, even if the defendant contradicts it. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Moreover, a trier of fact may believe as much, or as little, of any witness's testimony as it sees fit. *People v. Tabb*, 374 Ill. App. 3d 680, 692 (2007). A trier of fact's credibility determinations are entitled to great deference, but they are nevertheless not binding upon a reviewing court. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). In essence, we will not reverse a conviction unless the evidence is "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Evans*, 209 Ill. 2d at 209.

¶ 26 In relevant part, section 24-1.6 of the Criminal Code of 1961 provides that an individual commits the offense of AUUW when he knowingly carries on or about his person any pistol

without a currently valid concealed carry license or FOID card. See 720 ILCS 5/24-1.6(a)(1), (3)(A-5), (3)(C) (West 2016). Among other things, the State must prove the accused knowingly had possession of the pistol.

¶ 27 In this case, defendant admitted at trial—and thus does not contest—that he had neither a concealed carry license nor a valid FOID card. Instead, defendant argues that officer Zogg's testimony that he saw defendant conceal a pistol underneath a bedroom mattress at the rear of the apartment was not credible, and therefore the State lacked evidence that defendant had actual possession of the pistol.[1] We disagree.

¶ 28 Officer Zogg testified that, upon entering into the second-floor apartment, he saw two individuals in the front living room near the entry and defendant running to the rear bedroom. Zogg further testified that the apartment was well-lit and there was nothing obstructing his view into the converted bedroom. Zogg stated that his view of the back bedroom was in front and to his left, and although he lost sight of defendant for a few seconds while he helped detain one of the residents, defendant then reappeared into Zogg's line of sight. At that point, Zogg saw defendant throw a gun under a mattress in the rear bedroom, where it was later recovered. Two officers later arrested defendant in a middle bedroom, where Zogg saw defendant flee to after disposing of the weapon. Viewing the evidence in the light most favorable to the prosecution, as we must (*De Filippo*, 235 Ill. 2d at 384-85), we cannot hold that *no* rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. The State thus established defendant's possession of the weapon.

¶ 29 Although defendant claims that Zogg's vantage point would not have enabled him to see defendant dispose of the gun, the circuit court rejected precisely that argument at trial. This

[1] The State does not argue that defendant had constructive possession.

court may not retry defendant; it is the duty of the trier of fact (here, the circuit court) to determine the credibility of witnesses and resolve any conflicts or inconsistencies in the evidence. *Evans*, 209 Ill. 2d at 209-11.

¶ 30 Furthermore, we reject defendant's bald assertions that this case "evokes 'dropsy' cases" (*i.e.*, cases in which, to avoid the exclusionary rule, a police officer falsely states that an offender dropped contraband in plain view), as well as the equally unfounded claim that, because "no large quantity of drugs was recovered," it was "likely" that Zogg succumbed to pressure to "ensure that at least some convictions resulted from the recovery of items in the house." Defendant presents nothing but pure speculation as to both arguments, which will not create a reasonable doubt of guilt. See, *e.g.*, *People v. Stallings*, 211 Ill. App. 3d 1032, 1039 (1991), *appeal denied*, 141 Ill. 2d 556 (1991). We therefore reject defendant's first claim of error.

¶ 31 Defendant next contends that the circuit court erred in denying his pretrial motion *in limine* that sought to introduce evidence that, in a prior unrelated federal civil case, Office Zogg invoked his fifth amendment right not to incriminate himself in response to various questions posed to him during a deposition. Defendant argues that the proffered evidence was relevant impeachment evidence that went to the officer's "interest, bias, or motive to testify falsely." Defendant concludes that, in consequence, he was wrongly prevented from fully presenting a defense and is entitled to a new trial.

¶ 32 Under the state and federal constitutions, a criminal defendant is guaranteed a meaningful opportunity to present a complete defense. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; see also *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Nonetheless, the circuit court may prevent a defendant from introducing irrelevant or unreliable evidence. *People v. Hayes*, 353 Ill. App. 3d 578, 583 (2004); see also Ill. R. Evid. 402 (eff. Jan. 1, 2011) ("Evidence which

is not relevant is not admissible."). Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011); see also *People v. Blue*, 189 Ill. 2d 99, 122 (2000).

¶ 33 Nonetheless, although a circuit court's limitation on cross-examination "requires scrutiny, a defendant's rights under the confrontation clause are not absolute." *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999) (citing *People v. Jones*, 156 Ill. 2d 225 (1993)). Rather, the clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense desires." (Emphasis in the original.) *Id.* (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Even relevant evidence should not be admitted if its probative value is "substantially outweighed by the danger of *** confusion of the issues, or misleading the jury ***." Ill. R. Evid. R. 403 (eff. Jan. 1, 2011); see also *Blue*, 189 Ill. 2d at 122. A court may also bar evidence when its relevance is so speculative that it has little probative value. *People v. Mikel*, 73 Ill. App. 3d 21, 30 (1979). Therefore, "[t]o determine the constitutional sufficiency of cross-examination, a court looks not to what a defendant has been prohibited from doing, but to what he has been allowed to do." *Averhart*, 311 Ill. App. 3d at 497.

¶ 34 The admissibility of evidence sought to be excluded as irrelevant is committed to the sound discretion of the trial court, and we will only reverse a trial court's decision whether to admit evidence if the trial court abused its discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion occurs when the circuit court's decision is "arbitrary, fanciful or unreasonable," or where "no reasonable person would agree with the position adopted by the trial court." *Id.*

¶ 35 In this case, there was no abuse of discretion. The defense theory at trial challenged Zogg's ability to see defendant throw the gun under the mattress from where Zogg was standing. Defense counsel thoroughly cross-examined Zogg on this point and argued it during closing arguments. The circuit court acknowledged defense counsel's arguments but disagreed with counsel's claim that there was "no way" Zogg could have seen defendant in possession of the weapon. Defendant was therefore afforded an opportunity to present his defense in compliance with the confrontation clause. See *Averhart*, 311 Ill. App. 3d at 497.

¶ 36 In addition, defendant's proffered evidence was properly denied. Defendant sought to include evidence that Zogg had invoked his fifth amendment rights in an unrelated federal civil suit that took place eight years before the arrest in this case. The federal lawsuit did not either directly or indirectly involve defendant. Where, as here, the proffered evidence is too speculative (and thus unreliable), it loses its relevance and should be excluded. See *Hayes*, 353 Ill. App. 3d at 583; Ill. R. Evid. 402 (eff. Jan. 1, 2011). Since we cannot hold that the circuit court's decision was arbitrary, fanciful or unreasonable, or that no reasonable person would agree with its position, the court did not abuse its discretion. See *Becker*, 239 Ill. 2d at 234. Accordingly, we reject defendant's claim that the circuit court improperly denied his motion *in limine*.

¶ 37 Moreover, defendant's reliance upon *People v. Gibson*, 2018 IL App (1st) 162177, is unavailing. In that case, the defendant, who had been convicted of two murders and sentenced to life imprisonment, filed a complaint with the Torture Inquiry and Relief Commission that the police officer who testified at his criminal trial had physically coerced the defendant into making an inculpatory statement. *Id.* ¶¶ 1-2. The circuit court denied the defendant's claim, and this court reversed and remanded for further proceedings. *Id.* ¶ 142. The court held that courts

should take "careful note" when, "in the face of a credible allegation, an officer of the court is unwilling to assure the court that he and his colleagues did *not* physically coerce a confession, when he determines that a truthful answer could subject him to criminal liability." (Emphasis in the original.) *Id.* ¶ 108. This case, by contrast, does not involve an allegation that Zogg tortured defendant at any time. Zogg's invocation of his fifth amendment right involved a completely unrelated case (and a completely unrelated defendant) that took place around eight years before defendant's arrest. Defendant's reliance upon *Gibson* is therefore unavailing.

¶ 38 Finally, we note that defendant was sentenced on November 3, 2016, and filed a timely notice of appeal on November 30, 2016. However, the certificate in lieu of record was not filed until May 3, 2017, and defendant's opening brief was not filed until November 4, 2018, two years after the conviction. The State filed its brief on April 9, 2019, and the case became "ready" for disposition on May 2, 2019, when the deadline for defendant's reply brief passed without defendant filing that brief. This court extended deadlines for the briefs on eight occasions based upon representations of the attorneys that they were unable to prepare the briefs sooner due to their case backlog.

¶ 39 As required by the Illinois constitution, our supreme court has adopted rules to ensure "expeditious and inexpensive appeals." See Ill. Const. 1970, art. VI, § 16; Ill. S. Ct. R. 1, Committee Comments (rev. July 1, 1971). We have no doubt that the State's Attorney of Cook County and the State Appellate Defender work diligently on behalf of their clients despite their heavy caseload. Our own experience verifies this fact. This was not a complicated case, but we do not fault counsel for the delay. Nothing before us shows that they acted in a dilatory or desultory manner. We simply observe that something is seriously wrong with the system when the appeal of a one-year prison sentence cannot be resolved until almost *three* years after the

fact. This case provides a vivid example that both the prosecutorial and defense sides of the criminal justice system must be funded and staffed at levels sufficient to ensure prompt disposition of cases.

¶ 40 CONCLUSION

¶ 41 There was sufficient evidence to support defendant's conviction of aggravated unlawful use of a weapon, and the circuit court did not erroneously deny defendant's motion *in limine* seeking to impeach a police officer with his invocation of his fifth amendment right in a prior unrelated federal civil lawsuit.

¶ 42 Affirmed.