2019 IL App (3d) 170069-U

Order filed June 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0069
v.	)	Circuit No. 16-CF-350
	)	
SPENCER DEMONTE WATKINS,	)	Honorable
	)	John P. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Carter dissented.

ORDER

¶ 1 *Held*: The court erred by admitting a photograph of defendant standing next to a person holding a gun.

¶ 2 Defendant, Spencer Demonte Watkins, appeals his conviction for unlawful possession of a weapon by a felon, arguing (1) he was not proven guilty beyond a reasonable doubt, (2) the court erred by admitting a photograph of him standing next to a person holding a gun, and (3) the State committed prosecutorial misconduct in closing arguments. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2016)). The case proceeded to a jury trial. Immediately prior to trial, defendant filed a motion *in limine* seeking to bar introduction of a photograph posted on Facebook. The photograph showed five men gesturing with their fingers. One of the men was holding a gun and had another gun sticking out of his waistband. Defendant was standing next to the man with the guns. The court denied the motion.

¶ 5 Anthony Nguyen testified that in the late evening of April 29, 2016, until the early morning of April 30, 2016, he was at a party. He left the party in an SUV driven by his brother, Tyler Nguyen. Anthony was sitting in the front passenger seat, and Thomas King and defendant were in the backseat. The SUV was pulled over by the Peoria police. Anthony and defendant fled the scene. Neither of them were apprehended that morning, but Anthony was apprehended a couple of days later. He was then interviewed by the police and shown a photographic lineup. The police asked Anthony if he could identify the other person who had been in the backseat of the SUV and had ran. He identified defendant.

¶ 6 The State showed Anthony the Facebook photograph and asked if he recognized it. Anthony stated that it was a photograph of him, Tyler, King, defendant, and a man named Chris. The photograph was posted to King's Facebook page. Anthony said that King was the individual holding the gun with another gun in his waistband and that defendant was standing next to King. Anthony stated that the gun in King's waistband was registered to Chris. Anthony did not know where the gun King was holding came from. He did not see what King did with that gun after the photograph was taken. Anthony did not see anyone else with those guns that evening, but there were multiple people at the party with firearms. Anthony stated that he was intoxicated, but did

not see defendant holding a gun. Everyone in the SUV was wearing the same clothing they had been wearing when the picture was taken. The picture also showed all of the men standing with defendant were making the same gesture with their hands as defendant.

¶ 7 Robert Allen testified that he was a Peoria police officer and was patrolling on April 30, 2016, at approximately 1 a.m. He pulled over an SUV for failing to come to a complete stop at an intersection. Tyler was driving the SUV and gave Allen his driver's license. Anthony and King also gave Allen their identification. Defendant refused to give Allen his identification. When Allen approached the vehicle and the window rolled down, he could smell the odor of cannabis. He then requested another officer respond for backup, and Officer Ian McDowell responded. Once McDowell arrived, Allen told the occupants of the SUV that he had smelled cannabis and asked them to exit the vehicle so that he could search it. Defendant and Anthony both fled the scene, and Allen chased after defendant. This was Allen's first foot chase. Defendant jumped a fence, and Allen did too.

¶ 8 They ran a few yards and ended up in an alley behind AutoZone. Allen caught up with defendant and instructed him at gunpoint to get down on the ground. Defendant did so. Allen then attempted to call for backup, and while doing so, defendant got up, started running again, and Allen again started chasing him. Defendant came to an abrupt stop, and Allen ran into him. Allen said,

> "I grab his left hand with my left hand, and I've got my duty weapon still in my right hand, and at this point I see him reach into his pants. He pulls out a gun.

> I give a little space, get on my radio, tell dispatch he's got a gun, and I push away to get back, and I fall down at this point. And the defendant—he runs off down through the alley and out of sight."

Allen stated that the gun was a small, black, semiautomatic handgun. He could not tell what make, model, or caliber the gun was. He had firearms training and made use of firearms as a police officer. Defendant was only three or four feet away from Allen at the time and the alley was "well lit." Allen was certain that defendant was holding a gun. Allen then stopped, as he said he was not going to chase an armed suspect or shoot someone in the back.

¶ 9 Allen was shown the Facebook photograph and identified Anthony, Tyler, King, and defendant and stated that they were all wearing the same clothing in the photograph that they were wearing when he pulled the SUV over, except defendant was wearing a hat in the picture. The gun King was holding appeared similar to the gun Allen saw defendant with, and Allen stated that it could have been the same gun. The traffic stop was video recorded. The video was published to the jury.

¶ 10 The area in which Allen chased defendant was subsequently searched. Only a cell phone was found in the area where defendant was on the ground. Officer McDowell testified that he responded to assist Allen. He searched the SUV, Tyler, and King and did not find any firearms.

¶ 11 Jacob Beck testified that he was a Peoria police officer. He participated in the investigation of the suspect that fled from the traffic stop. He knew that King, Anthony, and Tyler had been in the SUV, so he was monitoring their social media. He observed the Facebook photograph that was posted on King's Facebook page. It had been posted on April 29, 2016, around 10 p.m. He used the photograph to help identify defendant as the suspect. He took a photograph of the Facebook picture with his cell phone. He stated that the photograph fairly and

accurately depicted the image as it existed on King's Facebook. The photograph was removed from King's Facebook page around 7 p.m. on April 30, 2016.

¶ 12 Candice Fillpot testified that she was a detective for the Peoria Police Department. She interviewed defendant and he waived his *Miranda* rights and agreed to speak to her. She showed defendant the Facebook photograph. Defendant stated that he was the man standing next to King on the right and identified King as the man with the two guns. Defendant denied being in the SUV that was pulled over.

¶ 13 The parties stipulated that defendant had been previously convicted of a felony offense of burglary and was on mandatory supervised release at the time of the incident. The cell phone was examined and one previous call was to defendant's brother and another was to Anthony. Defendant was apprehended at his home. His mother consented to a search of the residence and the officers did not find any firearms.

¶ 14 The jury found defendant guilty. Defendant filed a motion for acquittal notwithstanding the verdict or for new trial alleging, *inter alia*, that he was not proven guilty beyond a reasonable doubt and that the court erred by denying his motion *in limine* to bar the Facebook photograph. The court denied the motion. Defendant was sentenced to nine years' imprisonment.

¶ 15 II. ANALYSIS

¶ 16 A. Sufficiency of the Evidence

¶ 17 Defendant first contends that he "was not proved guilty beyond a reasonable doubt of possession of a weapon by a felon where the officer[,] who encountered and temporarily apprehended the defendant[,] testified that he saw defendant possess a small, black handgun which was not recovered, but a small, black cellphone was found at the scene of the encounter." The State argues the evidence was sufficient.

¶ 18 It is the State's burden to prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). "When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

> "It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. [Citation.] Accordingly, a reviewing court will not substitute its judgment for the fact finder on questions involving the weight of the evidence or the credibility of the witnesses." *People v. Bradford*, 2016 IL 118674, ¶ 12.

On review, we will not reverse a criminal conviction based on insufficient evidence "unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *People v. Gray*, 2017 IL 120958, ¶ 35.

> "The testimony of a single witness is sufficient to convict if the testimony is positive and credible, even where it is contradicted by the defendant. [Citation.] Where the finding of the defendant's guilt depends on eyewitness testimony, a reviewing court must decide whether a fact-finder could reasonably accept the testimony as true beyond a reasonable doubt. [Citation.] Under this standard, the eyewitness testimony may be found insufficient 'only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt.' [Citation.] A conviction will not be reversed simply because

the evidence is contradictory or because the defendant claims that a witness was not credible." *Id.* ¶ 36 (quoting *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004)).

¶ 19 In order to prove defendant guilty of unlawful possession of a weapon by a felon, the State had to prove that (1) defendant knowingly possessed a firearm on or about his person, and (2) had been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2016). The parties stipulated that the second element was met. Therefore, defendant solely argues that the State did not prove that he knowingly possessed a firearm.

¶ 20 Here, Allen testified that he saw defendant pull out a firearm that Allen identified as a small, black, semiautomatic handgun. Allen stated that he was certain that defendant was holding a gun, though he could not tell what make, model, or caliber the gun was. Allen was only three or four feet away from defendant at the time and the alley was "well lit." Allen had firearms training and made use of firearms as a police officer. This testimony alone was sufficient to convict defendant. See *Siguenza-Brito*, 235 Ill. 2d at 228. Taking the evidence in the light most favorable to the State, we find that a rational trier of fact could have found defendant guilty beyond a reasonable doubt based on Allen's testimony.

¶ 21 In coming to this conclusion, we reject defendant's contention that "it was more reasonable that Officer Allen actually saw defendant's cellphone, not a firearm." First, we note that no witness testified and described the cell phone as small and black in spite of this description defendant asserts in this appeal. Moreover, the cell phone or photographs of the cell phone are not included in the record on appeal. Defendant now claims that the video recording of the traffic stop shows him holding a small, black cell phone when he exits the SUV. However, after reviewing the video, it is unclear what object defendant has in his hand as he exits the SUV.

Moreover, the jury was not required to accept this alternate theory. Allen testified that he was sure that defendant had a gun, and it was up to the jury to weigh the credibility. We cannot say that no reasonable person could have found beyond a reasonable doubt that defendant possessed a firearm. See *Gray*, 2017 IL 120958, ¶ 35.

¶ 22 B. Admission of the Facebook Photograph

¶ 23 Next, defendant contends that the court erred by allowed the State to admit the Facebook picture. We conclude that the court erred by admitting the picture because it was substantially more prejudicial than probative.

¶ 24 Evidence is generally admissible as long as it is relevant. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Evidence is relevant when it (1) renders a matter of consequence more or less probable, or (2) tends to prove a fact in controversy. *People v. Lynn*, 388 Ill. App. 3d 272, 280 (2009). Relevant evidence is inadmissible only if the prejudicial effect of admitting that evidence substantially outweighs any probative value. *People v. Hanson*, 238 Ill. 2d 74, 102 (2010). "Prejudicial effect" in the context of admitting evidence means that the evidence in question will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial. *Lynn*, 388 Ill. App. 3d at 278. In other words, the jury would be deciding the case on an improper basis, such as sympathy, hatred, contempt, or horror. *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). "It is the function of the trial court to weigh the probative value of the evidence against the risk of unfair prejudice it carries; we will not overturn a court's decision on that balancing process absent a clear abuse of that discretion." *People v. Roman*, 2013 IL App (1st) 110882, ¶ 23.

¶ 25 Here, the Facebook photograph presented was highly prejudicial. The picture portrayed Anthony, Tyler, King, defendant, and Chris at a party on the same night as the foot pursuit.

Before the foot pursuit, Anthony, Tyler, King, and defendant were in the same SUV during the traffic stop. Chris was not in the SUV by all accounts. Defendant was not holding a gun in the photograph. Moreover, all the men are making the same hand gesture, which a jury could interpret as a gang sign. See *id.* ¶ 24 ("There may be a strong prejudice against street gangs *** so a trial court should take great care when exercising its discretion to admit gang-related [evidence].").

¶ 26 The State argues that the photograph was relevant and had probative value for two purposes: (1) to show how the police had determined that defendant was the man who fled, and (2) to prove the item defendant had was a gun. The State argues, "Obviously, those guns that King had at the party and in the photo had to have gone *somewhere*." (Emphasis in original.)

¶ 27 First, the picture was not necessary to explain to the jury how the police determined that defendant was the fourth man in the SUV that night. The officer could have testified about his discovery of defendant on Facebook without admitting the picture into evidence. Second, Anthony testified that the gun in King's waistband belonged to Chris. Anthony did not know who owned the other gun.

¶ 28 Here, the photograph does not depict that either gun was in defendant's possession, nor was there any testimony to show that the guns left the party in the SUV. We cannot say that a picture of defendant standing next to King at a party while King was holding two guns makes it more probable that defendant possessed one of the guns after leaving the party. Considering the highly prejudicial nature of the photograph and the very low probative value, we conclude that the trial court abused its discretion by admitting the photograph. We, therefore, reverse defendant's conviction and remand for a new trial.

¶ 29 C. Prosecutor's Closing Argument

¶ 30 Lastly, defendant contends that the State committed prosecutorial misconduct during closing arguments as its comments were only intended to arouse the fears and prejudices of the jury. Because we remand for a new trial, we need not consider this issue.

¶ 31 III. CONCLUSION

¶ 32 The judgment of the circuit court of Peoria County is reversed and remanded.

¶ 33 Reversed and remanded.

¶ 34 JUSTICE CARTER, dissenting:

¶ 35 I respectfully dissent from the majority's decision in the present case. I would find that the trial court did not commit an abuse of discretion in determining that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice and in ruling that the photograph was, therefore, admissible. See Ill. R. Evid. 403 (eff. Jan. 1, 2011). Contrary to the majority, I believe that the photograph had strong probative value because it showed that King, who was in the backseat of the SUV with defendant, had two guns on his person earlier that evening, which made it more likely that there was a gun in the vehicle when the vehicle was pulled over by police. In addition, because the police did not find a gun on King's person or in the vehicle during the traffic stop, the photograph made it more likely that defendant had ran with the gun when he left the vehicle, a possible inference that was made stronger by Officer Allen's testimony that the gun in the photograph looked similar to, and could have been, the gun he had seen defendant carrying that evening. Based upon that analysis, I would uphold the trial court's evidentiary ruling and would affirm defendant's conviction and sentence.