2012 IL App (5th) 100083-U

NO. 5-10-0083

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 90-CF-161
	)	
DEMARLOS RUSH,	)	Honorable
	)	Andrew J. Gleeson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not prejudiced by the use of the term "dangerous weapon" instead of "firearm" in the instructions to the jury.

¶ 2 After a jury trial, defendant, Demarlos Rush, was found guilty of armed robbery and sentenced as an adult by the circuit court of St. Clair County. Later, defendant filed a motion to vacate judgment on the ground that he was improperly sentenced as an adult. The circuit court dismissed the motion. On appeal, defendant raises issues as to whether the judgment was void due to improper instruction of the jury.

¶ 3 On January 8, 1990, Larry Harris attended class at East St. Louis Senior High School. On his way home, Harris was approached by a group that demanded Larry's San Francisco 49ers' Starter jacket. Harris did not give up the jacket until one of the group, whom he later identified as defendant, pulled out a gun and held it up to his head. Harris then gave up his jacket.

¶ 4 Defendant, who was born on June 12, 1973, was 16 years old on the date of the offense. Defendant was charged by information as an adult with armed robbery. The charge read: "The said defendant while armed with a dangerous weapon, a gun, took property, being one black starter jacket, from the person of Larry T. Harris, by threatening the imminent use of force ***." Ill. Rev. Stat. 1989, ch. 38, ¶ 18-2(a) (now see 720 ILCS 5/18-2(a) (West 2010)). This appeal concerns the nature of the weapon involved.

¶ 5 In addition to testimony from Larry Harris, the State presented testimony from Terrance Luster. Luster testified that he was with the group that had taken the jacket and that defendant had placed "the gun" right up against Harris's face. Luster claimed that defendant was the only one with the gun throughout the entire event. Luster described the gun as "a pistol" with "a long barrel" that "looked like a .32." On cross-examination, Luster was confronted with whether he saw defendant initially pull out the gun:

"Q. [Attorney for defendant:] You indicate someone at the bus stop said someone had a long barrel 38 gun, is that right?

A. Yes.

Q. And then you looked back and saw that [defendant] had a gun, is that right?

A. I had already seen it.

Q. You are saying now that you had already seen it?

A. Yes. When I turned around.

Q. But that isn't what you indicated to the police.

A. That's what I said.

Q. Your statement, Mr. Luster, is [']as me and Germain was walking away there was a crowd at the bus stop and one of them said someone had a gun. And I looked back and saw that [defendant] had a long barrel .38 gun.[']

A. Yes.

Q. Now are you saying you had already seen the gun?

A. Yes, and I looked back and saw it again.

Q. So you are saying this was when you saw it again and you said it was a long barrel .38.

A. I didn't really know what it was.

Q. Was there any particular reason you told the police that it was a long barrel .38?

A. Because it looked like one, it was kind of big so I figured it was a .38.

Q. Did you indicate earlier you thought it was a .32?

A. It looked like a .32 or .38 because it had a long barrel. I knew it couldn't have been a .22.

Q. You are pretty familiar with these type of weapons?

A. No. I just know what they look like cause my grandfather used to have guns."

¶ 6 Germain Day testified that he was standing at the bus stop when he saw some boys beating up on Harris and demanding his jacket. Day testified he saw defendant walk over to Harris "and pull the gun and put it up to his head." On cross-examination, Day admitted that he had given a statement implicating defendant and received a reduced sentence for robbery. Luster admitted that he had been arrested in relation to the robbery but was never prosecuted.

¶ 7 Defendant testified on his own behalf that he had not participated in the robbery and that he bought the jacket from Luster after the incident. Defendant asserted that he was at his aunt's house in Washington Park at the time of the offense. Defendant also asserted that, contrary to the description given of the gunman, he had a different hairstyle at the time of the robbery.

¶ 8 The trial court conducted a jury instruction conference. The preponderance of the instructions reviewed were those submitted by the State. After the conference, a set of instructions based on Illinois pattern instructions was issued to the jury. The jury was instructed as to the definition of armed robbery:

> "A person commits the offense of armed robbery when he, while carrying on or about his person, or while otherwise armed with a dangerous weapon, takes property from the person or presence of another by the use of force or by threatening the imminent use of force." Illinois Pattern Jury Instructions, Criminal, No. 14.01 (2d ed. 1981).

The jury was also instructed on the issues that the State needed to prove:

> "To sustain the charge of armed robbery, the State must prove the following propositions:
>
> FIRST: That the defendant took the black starter jacket from the person or presence of Larry Harris; and
>
> SECOND: That the defendant did so by the use of force or by threatening the imminent use of force; and
>
> THIRD: That the defendant carried on or about his person a dangerous weapon or was otherwise armed with a dangerous weapon at the time of the taking.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." Illinois Pattern Jury Instructions, Criminal, No. 14.02 (2d ed. 1981).

¶ 9 The jury returned a verdict of guilty. The trial court entered a judgment on the verdict and sentenced defendant to a six-year term of imprisonment as an adult. Defendant did not file a direct appeal.

¶ 10 In 2004, defendant filed a motion to vacate void judgment. Defendant alleged that he had been improperly prosecuted as an adult and that his counsel had failed to file a requested direct appeal. The trial court granted the State's motion to strike the pleading. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 I. JURISDICTION

¶ 13 The State contends that the trial court lacked jurisdiction to rule on the substantive merits of defendant's petition. Defendant's motion to vacate void judgment was filed well over a decade after his sentencing. The strongest language regarding the ability to attack void judgments appears to come from *People v. Jardon*, 393 Ill. App. 3d 725, 743, 913 N.E.2d 171, 186 (2009). *Jardon* stated:

> "The defendant also argues that the trial court erred in sentencing him as an adult pursuant to section 5-130(1)(c)(ii) of the Act. In response, the State initially asserts that the defendant has forfeited this argument by failing to raise it in the trial court. We do not agree.
>
> It is well established that 'a void judgment may be attacked at any time, either directly or collaterally, and courts have an independent duty to vacate void orders.' *People v. Mathis*, 357 Ill. App. 3d 45, 51, 827 N.E.2d 932 (2005), citing *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200 (2004); *People v. Wade*, 116 Ill. 2d 1, 5, 506 N.E.2d 954 (1987); see also *People v. Champ*, 329 Ill. App. 3d 127, 129, 768 N.E.2d 237 (2002). 'A judgment is void if the court entered it without personal or subject matter jurisdiction or if the court "lacked the power to render the particular

judgment or sentence." ' *People v. Santana*, 388 Ill. App. 3d 961, 964, 904 N.E.2d 132 (2009), quoting *People v. Rodriguez*, 355 Ill. App. 3d 290, 296, 823 N.E.2d 224 (2005). Also, a sentence that does not conform to a statutory requirement is void. *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445 (1995); *Santana*, 388 Ill. App. 3d at 964. An argument that a judgment is void is not subject to waiver. *Thompson*, 209 Ill. 2d at 27. Therefore, we reject the State's assertion that this issue may not be raised for the first time on appeal. See *Mathis*, 357 Ill. App. 3d at 53." *Jardon*, 393 Ill. App. 3d at 740, 913 N.E.2d at 186.

Noting *Jardon*'s review of the issue of voidness, we consider the substance of defendant's contention of voidness.

¶ 14 II. INSTRUCTIONS

¶ 15 Defendant contends that the trial court had no authority to sentence him as an adult. At the time of the offense, the Juvenile Court Act of 1987 (Juvenile Act) called for the automatic transfer of juveniles charged with offenses such as armed robbery when a firearm was used. Ill. Rev. Stat. 1989, ch. 37, ¶ 801-1 to 807-1. The Juvenile Act provided:

"§5-4. Criminal prosecutions limited. (1) Except as provided in this Section, no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of any ordinance of any political subdivision thereof.

* * *

(6)(a) The definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with first degree murder, aggravated criminal sexual assault, armed robbery when the armed robbery was committed with a firearm, or violation of the provisions of subsection 24-1(a)(12) of the Criminal Code of 1961, as amended.

These charges and all other charges arising out of the same incident shall be prosecuted pursuant to the Criminal Code of 1961, as amended.

***

(c) If after trial or plea the minor is only convicted of an offense not covered by paragraph (a) of subsection (6) of this Section, such conviction shall not invalidate the verdict or the prosecution of the minor under the criminal laws of this State; however, the court must thereafter proceed pursuant to Sections 5-22 and 5-23 of this Act. In all other circumstances, in sentencing the court shall have available any or all dispositions prescribed for that offense pursuant to Chapter V of the Unified Code of Corrections." Ill. Rev. Stat. 1989, ch. 37, ¶ 805-4 (now see 705 ILCS 405/5-130 (West 2010)).

¶ 16 Defendant asserts that, although he was properly charged, the jury did not find he had used a firearm. At the time of the offense, the statute governing armed robbery had no specific delineation for use of a firearm. Ill. Rev. Stat. 1989, ch. 38, ¶ 18-2 (amended by Pub. Act 91-404 (eff. Jan. 1, 2000)). The Illinois pattern instructions given to the jury mirrored the language of the sole provision of the statute that a robbery becomes an armed robbery when the defendant is "armed with a dangerous weapon." Illinois Pattern Jury Instructions, Criminal, Nos. 14.01, 14.02 (2d ed. 1981); Ill. Rev. Stat. 1989, ch. 38, ¶ 18-2.

¶ 17 Automatic transfer under the Juvenile Act, however, was applicable only in instances "when the armed robbery was committed with a firearm." Ill. Rev. Stat. 1989, ch. 37, ¶ 805-4(6)(a). Defendant contends that the jury failed to decide whether he met this requirement. Thus, he argues, under the terms of the Juvenile Act, he was "only convicted of an offense not covered" by the provision for automatic transfer. Ill. Rev. Stat. 1989, ch. 37, ¶ 805-4(6)(c).

¶ 18 The State presented overwhelming proof that a firearm was used in the course of the

armed robbery. Underlying defendant's appeal is the assertion that the trial court considered the terms "firearm" and "dangerous weapon" as equivalent. Illinois courts have divided the types of objects alleged to be dangerous weapons into four different categories. *People v. Thorne*, 352 Ill. App. 3d 1062, 1070-71, 817 N.E.2d 1163, 1170-71 (2004). *Thorne* explained:

> "[O]ur courts have defined the term by dividing objects alleged to be 'dangerous weapons' into four categories. [Citation.] The first category consists of objects that are dangerous *per se*, such as knives and loaded guns. [Citation.] The second category consists of objects that are never dangerous weapons, such as a four-inch plastic toy gun. [Citation.] The third category consists of objects that are not necessarily dangerous weapons but can be used as such, for instance, an unloaded gun or a toy gun made of heavy material, which are incapable of shooting bullets but can be used as a bludgeon [citation] or, as another example, fingernail clippers with a sharpened file [citation]. The fourth category consists of objects that are not necessarily dangerous but were actually used in a dangerous manner in the course of the robbery." *Thorne*, 352 Ill. App. 3d at 1070-71, 817 N.E.2d at 1170-71.

See *People v. Ligon*, 365 Ill. App. 3d 109, 116, 847 N.E.2d 763, 770-71 (2006).

¶ 19 Defendant ignores these classifications. Defendant argues that there is no mandatory presumption that a gun is also capable of being used as a firearm. He bases this argument on precedent involving objects that fall under the third *Thorne* category. *People v. Ross*, 229 Ill. 2d 255, 275-76, 891 N.E.2d 865, 878 (2008) (pellet gun); *People v. Ellis*, 94 Ill. App. 3d 777, 779, 419 N.E.2d 727, 728 (1981) (inoperable gun); *People v. Ligon*, 365 Ill. App. 3d 109, 116, 847 N.E.2d 763, 770 (2006) (BB gun); *People v. Hill*, 47 Ill. App. 3d 976, 977-78, 362 N.E.2d 470, 471 (1977) (unloaded air pistol); *People v. Ratliff*, 22 Ill. App. 3d 106, 107, 317 N.E.2d 63, 63 (1974) (.22 pistol designed to fire blanks); *People v. Trice*, 127 Ill. App.

2d 310, 320, 262 N.E.2d 276, 281 (1970) (starter pistol); see also *People v. Barnett*, 2011 IL App (3d) 090721, ¶ 5, 952 N.E.2d 669, 670 (conflicting evidence on whether there was a weapon and whether it was a BB gun). The discussion in these cases regarding the danger posed by objects that are not necessarily dangerous is irrelevant to the case at hand.

¶ 20 The State presented clear and uncontradicted evidence that the gun in this case was of the first category–a firearm that is dangerous *per se*. Harris and Day testified that defendant put a gun to Harris's head as if threatening to shoot. Luster described the gun as a pistol with a long barrel, either a .32 or a .38.

¶ 21 The evidence presented at trial leads to no other inference than that the dangerous weapon was a firearm. At trial, the use of a firearm was not contested. Instead, defendant contended that the case was one of mistaken identity. In the course of the armed robbery everyone understood the gun was a firearm. The unequivocal evidence was that the perpetrator placed a firearm next to Harris's head. The jury found that a dangerous weapon was used and no other weapon was mentioned by any witness. The jury, without any doubt, found that a firearm was used in the armed robbery.

¶ 22 The lack of precision in the wording of the instructions was harmless. Elsewhere the interchange of these terms has been found to be harmless. *People v. Burke*, 362 Ill. App. 3d 99, 102, 840 N.E.2d 281, 283 (2005); *People v. Fitzgerald*, 171 Ill. App. 3d 218, 221, 524 N.E.2d 1190, 1191 (1988). Defendant correctly recognizes that *Burke* and *Fitzgerald* dealt with indictments, not instructions, but both stand on the underlying principle that using the phrase "dangerous weapon" instead of "firearm" created no confusion when it was clear the weapon was a handgun. As with the indictments in *Burke* and *Fitzgerald*, the requirement of use of a firearm was met despite the use of the term "dangerous weapon" instead of "firearm." In the case at hand, no confusion can be imputed to the instructions, and defendant is unable to make a colorable claim of prejudice.

¶ 23 Accordingly, the order of the circuit court of St. Clair County is hereby affirmed.

¶ 24 Affirmed.