

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 18-CF-490
)	
KYLEN J. MAJOR,)	Honorable
)	Philip G. Montgomery,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BRIDGES delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* There was sufficient evidence that defendant was armed with a firearm while robbing the victim where (1) the victim described the object that defendant pressed against the back of his neck as a “real gun” based on its feel, (2) defendant threatened to “blow [the victim’s] head off” if he did not comply, and (3) security video suggested that defendant was pointing a handgun at the victim.

¶ 2 Defendant, Kylen J. Major, appeals from his conviction of armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2018)); he argues that the State failed to present sufficient evidence that he had a firearm when he robbed the victim. We hold that several lines of evidence combined to make the State’s evidence sufficient. We thus affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged with armed robbery while armed with a firearm, aggravated robbery (robbery by threat of force while claiming to be in possession of a firearm) (720 ILCS 5/18-1(b)(1) (West 2018)), and robbery (720 ILCS 5/18-1(a) (West 2018)). All charges stemmed from an incident in De Kalb on May 17, 2018, in which defendant held an object to the neck of Joshua Boyer, threatened to kill him, and took his wallet and a pack of cigarettes.

¶ 5 Defendant had a bench trial at which the primary contested issues were (1) the identity of the perpetrator and (2) whether the object held to Boyer's neck was a firearm. Only the latter issue is before us in this appeal.

¶ 6 The primary evidence that defendant used a firearm to rob Boyer was Boyer's testimony. Boyer testified on direct examination that defendant came up behind him, "the gun was pressed into [his] neck, and [defendant] said 'don't move, motherfucker, or I'll blow your fucking head off.' " Boyer never saw what was against his neck, but his experience with firearms allowed him to tell that the object was a "real gun" and not a BB gun:

"MS. COLLINS [(ASSISTANT STATE'S ATTORNEY)]: When he was taking things out of your pockets, was the gun still at the back of your head?

A. Yes.

A. It was more in my neck. I'm just being as accurate as possible.

Q. You're calling it a gun.

A. Yes.

Q. How do you know it was a gun?

A. I was raised with guns, I was raised around lots of guns, and—

Q. What about this situation made you believe it was a real gun?

A. It was metal, No. 1, and I— when the gun was pressed into my neck, I could feel the slide give.

And I'm not an expert, but I don't know any small-caliber-looking BB guns that are that small that are BB guns that are metal, because it had a slide, a slide specifically designed for a gas-operated pistol—

Q. I'm going to stop you here.

MR. CARLSON [(DEFENSE ATTORNEY)]: Objection, Judge.

MS. COLLINS: Q. I'm going to stop you here.

You felt that it was a gun.

A. Oh, yeah.”

Boyer also testified that this robbery was not the first time that he had had “a gun put to [his] neck.” He had been held up in Chicago with “a larger caliber gun,” but, because the perpetrator had not taken anything, Boyer did not report the incident to the police.

¶ 7 Boyer testified that, after defendant went through his pockets, he told Boyer to start walking. Defendant said that, “if [Boyer] turned around to look at him, he would blow [his] fucking head off.”

¶ 8 The State introduced portions of recordings from security cameras positioned on a fraternity house across the street from the sidewalk on which the robbery occurred. The recordings consisted of three clips. The first two clips show the robbery from two slightly different angles. Both are filmed at a distance, though the second clip shows a closer view than the first. The third clip is a zoomed-in version of the second clip. In the clips, the figure identified as defendant walks up behind Boyer, who stops and raises his hands. Defendant appears to hold his left hand several

inches away from Boyer's neck while searching the right side of Boyer's body with his right hand. Defendant then switches his hands so that his right hand is near Boyer's neck and his left hand is searching Boyer's body. The recordings' resolution is insufficient to show what defendant is holding. His hand position appears consistent with his holding a gun-shaped object. The hood of Boyer's sweatshirt appears to be raised over his head during the robbery.

¶ 9 At the end of the encounter, defendant removes his hand from Boyer's neck, and Boyer starts to walk forward. Defendant backs up, his left arm held straight in front of him. As he does so, the light catches something just over his hand with a shape and color consistent with a large- or medium-sized, silver-colored semi-automatic handgun. However, the recordings do not show any details of the object; indeed, the quality is only barely sufficient to suggest that something is there.

¶ 10 Leandrew Powell testified for the State that he was with defendant at the time of the robbery. He did not see defendant with a firearm during the robbery.

¶ 11 The court found sufficient evidence that defendant possessed a firearm during the robbery: “[Boyer] testified that he was raised around guns, and although he is no expert, he knew guns. He could feel the fact that the item that was placed in the back of his neck was a gun. He also indicated that he could feel the slide in the back of his neck, and as he testified again, he felt it was a gun.

* * *

The first [video] clip shows a person matching the defendant's description and [Powell] walking across the street from the [fraternity] house and walking into a building.

The second clip shows the victim walking back to his apartment after purchasing cigarettes. He was walking down or along the sidewalk.

The two individuals exit the building. The first individual is taller, wearing white or light-colored pants and a dark-colored hoodie. The second individual is much further back.

You can see Mr. Boyer put his hands up, and the person that had approached him *** riffling through his pockets. Initially this person has his left hand up pointed into the neck of Mr. Boyer, and he's using his right hand to go through Mr. Boyer's pockets. He then shifts his hands and goes through the victim's pocket with his left hand, and his right hand then contains or holds the object that he has pointing up to the neck of Mr. Boyer.

Eventually then Mr. Boyer starts walking away. The perpetrator starts backing up. He has his left hand raised in a position in what the Court would characterize as a shooting position pointed at the back of Mr. Boyer's neck. It's difficult to see, but at least from the Court's perspective, it looks like in the video that the person who committed this crime is holding a gun.

Clip 3 is a closer version of the robbery, but it's a little bit blurrier. It again shows the robbery. Again it's a little difficult to see, but appears as if the robber is holding a gun.

* * *

The third proposition for armed robbery is that the defendant carried on or about his person or was otherwise armed with a firearm.

As the defendant has pointed out, no weapon was recovered, and Mr. Boyer did not actually see the gun. That being said, Mr. Boyer testified he was familiar with guns and that it felt like a gun. Additionally, he testified that he could feel the slide moving as it was pressed into his neck.

The video, although I've indicated previously is blurry, does show a person holding

what appears to be a gun. Also, the person committing the crime indicated by his words that in fact he had a gun.

So I do find that the State has proved that the perpetrator was armed with a firearm.”

¶ 12 Defendant filed a posttrial motion. He challenged, in several respects, the sufficiency of the evidence. One of his points was that “[t]he Court erred in finding the testimony of [Boyer] credible that he could identify the ‘feel’ of a gun at the back of his neck, although he never saw one.”

¶ 13 The trial court denied the motion and sentenced defendant to 25 years’ imprisonment, which included the 15-year add-on to the Class X sentencing range for armed robbery while armed with a firearm. (720 ILCS 5/18-2(a)(2), (b) (West 2018)).

¶ 14 Defendant filed an untimely motion for reconsideration of the sentence and an untimely notice of appeal. However, the appellate defender later filed a timely motion for leave to file a late notice of appeal, which we granted.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues that the evidence that he used a firearm in the robbery was insufficient and that we thus should reduce his armed robbery conviction to aggravated robbery. He attacks as implausible Boyer’s testimony that he could tell, based on feel, that the object pressed to his neck was a “real gun.” The trial court’s acceptance of that testimony was, defendant claims, contrary to Illinois law. Defendant asks us to adopt the approach of *People v. Clifton*, 2019 IL App (1st) 151967, ¶ 33, that, “[w]hen analyzing a witness’s testimony, [a reviewing court] ignore[s] a witness’s subjective beliefs about the nature of the weapon.”

¶ 17 In response, the State asserts that we should take the details of Boyer’s testimony seriously and recognize the credibility of his identification:

“Defendant chose to rob the wrong victim in this case. Instead of someone who knew nothing about guns, defendant’s victim, Joshua Boyer, possessed a sophisticated knowledge of firearms. He was raised around firearms, he could hear the slide ‘give’ when defendant stuck the metal firearm in his neck, and he could tell that the firearm was not a BB gun because defendant’s firearm had a slide specifically designed for a gas-operated pistol. Further, Mr. Boyer had previously been the victim of an armed robbery. He was able to describe in great detail how defendant’s firearm was of a smaller caliber than the one previously used to rob him. Also, the trial court stated on the record that it found the victim to be a credible witness.”

¶ 18 The State urges us to reject *Clifton* in favor of other Illinois decisions affirming that a witness’s subjective beliefs are relevant to the issue of whether an object used in a robbery is a firearm for purposes of the armed robbery statute. The State suggests that (1) Boyer’s description of the object placed to his neck, (2) his impression that the object was a firearm, (3) defendant’s threat to kill him, and (4) the corroborating video evidence are, in combination, sufficient to support defendant’s conviction of armed robbery with a firearm.

¶ 19 In reply, defendant argues that the cases the State cites are distinguishable. It further contends that Boyer’s familiarity with guns was unlikely to give him the ability to recognize a “real gun” by its feel on his neck.

¶ 20 We review the sufficiency of the evidence under the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), as adopted by *People v. Collins*, 106 Ill. 2d 237 (1985). When a reviewing court decides a challenge to the sufficiency of the evidence, “ ‘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.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson*, 443 U.S. at 319). “Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution.” *People v. Davison*, 233 Ill. 2d 30, 43 (2009).

“Under [the standard of *Jackson* and *Collins*], the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. [Citation.] But merely because the trier of fact accepted certain testimony or made certain inferences based on the evidence does not guarantee the reasonableness of its decision. A conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of [the] defendant’s guilt.” *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

In reviewing the sufficiency of the evidence, “a reviewing court must give the State the benefit of all reasonable inferences.” *People v. Wheeler*, 226 Ill. 2d 92, 116 (2007). “Moreover, the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt.” *People v. Hall*, 194 Ill. 2d 305, 332 (2000).

¶ 21 The parties agree that, while we must defer to the trial court’s evaluation of the testimony at trial, we review *de novo* any inferences the court made from the security videos, as the court had no advantage over us in reviewing that evidence. See *People v. Radojicic*, 2013 IL 114197, ¶¶ 34-35 (*de novo* standard applied to review of a transcript, as opposed to live testimony).

¶ 22 To prove defendant guilty of armed robbery as charged, the State had to establish beyond a reasonable doubt that defendant knowingly took property from another by the use or threat of force while armed with a “firearm.” 720 ILCS 5/18-1(a), 18-2(a) (West 2018). “Firearm,” for

purposes of the armed robbery statute, is defined in section 1.1 of the Firearms Owners Identification Card Act (430 ILCS 65/1.1 (West 2018)). Under section 1.1, “ ‘[f]irearm’ means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas[.]” *Id.* Thus a “firearm” per section 1.1 is broader than a firearm understood in the conventional sense as using gunpowder as a propellant. Exclusions to section 1.1’s definition of “firearm” rest not on the type of propellant but on the type of projectile and the force of expulsion. Section 1.1 excludes a “pneumatic gun, spring gun, paint ball gun, or B-B gun which expels a single globular projectile not exceeding .18 inch in diameter or which has a maximum muzzle velocity of less than 700 feet per second.” *Id.*

¶ 23 Evidence sufficient to support a conviction of armed robbery with a firearm must include a factual basis on which the trier of fact can objectively conclude that the object used in the robbery is a firearm under section 1.1. See *Clifton*, 2019 IL App (1st) 151967, ¶ 33. The testimony of a single eyewitness can establish that an object is a firearm. *Id.*

¶ 24 We identify four lines of evidence in this case that cumulatively allow a reasonable trier of fact to conclude beyond a reasonable doubt that defendant possessed a firearm when he robbed Boyer. First, the security videos tend to establish that defendant held in his hand an object resembling a handgun. Second, defendant used language implying that he was armed with some type of gun. Third, Boyer testified that the feel of the object against his neck was consistent with that of a handgun. Fourth, Boyer had the subjective impression that defendant had a “real” handgun. We will elaborate on these points.

¶ 25 First, the security videos show the person identified as defendant having a posture consistent with a person holding a handgun in a firing position. Moreover, the second and third video clips show, as defendant backs away from Boyer, a glint above defendant’s hand consistent

with the presence of a light-colored semiautomatic handgun. The video suggests a medium- or large-sized gun, but the resolution of the video was insufficient for us to be certain that Boyer was incorrect that the gun was small. The videos are strong evidence that the object, which defendant was holding to Boyer's neck, was gun-shaped and was not, for instance, something like a pipe or a shoe with a stiletto heel.

¶ 26 Second, defendant threatened to “blow [Boyer's] head off” if he did not comply. Of course, robbers may bluff about having firearms. Indeed, as defendant points out, he had a history of such bluffing, namely his juvenile adjudication involving the use of a “realistic-looking BB gun” in a robbery. Nevertheless, defendant's words, as reported by Boyer, were highly probative as to whether he was armed with a firearm. A defendant's threat to shoot a robbery victim is circumstantial evidence that the robber was carrying a firearm during the robbery. *E.g.*, *People v. Toy*, 407 Ill. App. 3d 272, 289 (2011); *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007); accord *People v. DuPree*, 69 Ill. App. 3d 260, 264 (1979) (“It is a fair conclusion that when the robber announced that this was a ‘stick-up’ the complaining witness was being threatened with a dangerous weapon capable of being used to cause injury.”).

¶ 27 Third, Boyer testified that, when the object was pressed against his neck, he felt “metal” and also felt “the slide give.” Boyer recognized the slide as one “specifically designed for a gas-operated pistol.” Boyer also implied that, because of its small size, the gun could not have been a slide-equipped BB gun.¹ Based on the feel of the object against his neck, Boyer believed that it

¹ Taking the phrase “gas-operated” completely literally, “any device *** which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas,”—including excluded “pneumatic gun[s]” (430 ILCS 65/1.1(1), (1.1) (West 2018))—could

was a “real gun.” We disagree with defendant that Boyer could not have felt such particular sensations through his hood (which appeared to be raised in the video clips). Case law on pat-down searches recognizes that the shape, firmness, and even composition of an object can be felt through clothing. See, e.g., *People v. White*, 2020 IL App (1st) 171814, ¶ 26 (“Here, it may have been reasonable for [the police officer] to believe that a hard, cylindrical object felt through a layer of clothing may be a gun.”); *People v. Pritchett*, 75 Ill. App. 3d 127, 130 (1979) (officer had no right to remove and open envelope found in the defendant’s pocket during pat-down search where the officer acknowledged that the envelope “did not feel as if it contained a metal object or weapon”).

¶ 28 Fourth, Boyer formed a subjective impression that defendant had a gun, and *Boyer had a basis to form that impression*. On this point, we take guidance from decisions addressing the reliability of another type of subjective impression: the identifications of persons. Where such identifications are at issue, we consider factors that include “the opportunity the victim had to view the criminal at the time of the crime,” “the witness’[s] degree of attention” (*People v. Slim*, 127 Ill. 2d 302, 307-08 (1989)), and the witness’s familiarity with the suspect (*People v. McTush*, 81 Ill. 2d 513, 521 (1980)). Thus, despite the subjectivity of such identifications, we weigh their reliability by evaluating whether the evidence showed conditions tending to make the identification objectively plausible. Here, conditions were such that Boyer’s impression is entitled

be described as “gas-operated.” However, we must give the State the benefit of any reasonable inference as to what Boyer meant by saying the object had an “slide designed for a gas-operated pistol.” See *Wheeler*, 226 Ill. 2d at 116. Because Boyer commented that a BB gun that small would not be metal or have a slide, it is reasonable to infer that he was describing a conventional firearm that uses gunpowder ammunition.

to significant weight. Boyer heard defendant's threat implying the presence of a firearm and could form an impression whether it was a bluff or not. Moreover, as we noted, Boyer had an opportunity to sense some characteristics of the object at his neck. As is common when witnesses make identifications of persons, Boyer may have sensed more details about the object than he could put into words.

¶ 29 We do not agree with *Clifton* that we must “ignore a witness’s subjective beliefs about the nature of the weapon” (*Clifton*, 2019 IL App (1st) 151967, ¶ 33). For this statement, the *Clifton* court relied entirely on *People v. Ross*, 229 Ill. 2d 255 (2008). The State, citing one of our unpublished decisions as persuasive authority, notes that we remarked there that “*Ross* does not say that we must always ignore crime victims’ testimony about their beliefs as to the nature of the weapon that they saw” (*People v. Boose*, 2021 IL App (2d) 190416-U, ¶ 60). We continue to believe this about *Ross*.

¶ 30 In *Ross*, the defendant was convicted of armed robbery while armed with a dangerous weapon. See 720 ILCS 5/18-1, 18-2(a) (West 2004). The conviction was based on the defendant’s pointing a gun at the victim during the robbery. The supreme court explained that, under Illinois law, there was no “mandatory presumption that any gun is a dangerous weapon.” *Ross*, 229 Ill. 2d at 275-76. Rather, “the trier of fact may make an inference of dangerousness based upon the evidence.” *Ross*, 229 Ill. 2d at 276. Specifically, “[t]he State may prove that a gun is a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or bludgeon.” *Ross*, 229 Ill. 2d at 276. The supreme court noted that the State did not present either type of proof. First, as to the nature of the gun, (1) the victim testified that the gun was small, portable, and concealable, (2) the police officer who recovered the gun testified that it was a “ ‘4.5 BB caliber gun with a three[-]inch barrel,’ ”

and (3) an inventory sheet described the gun as a “ ‘pellet gun.’ ” *Ross*, 229 Ill. 2d at 258, 276. The State did not produce the gun at trial, and there was no evidence that the gun was loaded when the robbery occurred. Second, “there was no evidence that [the gun] was brandished as a bludgeon, and there was no evidence regarding its weight or composition.” *Ross*, 229 Ill. 2d at 277. Nonetheless, the trial court found that the gun was a dangerous weapon, specifically because the victim testified “ ‘that [he] was in fear of his life when he observed what he thought to be a small gun that could easily be concealed.’ ” *Ross*, 229 Ill. 2d at 258. The supreme court held that the trial court erred because its finding that the gun was a dangerous weapon was based not on the “objective nature of the gun” but, rather, on the “subjective feelings of the victim.” *Ross*, 229 Ill. 2d at 277.

¶ 31 The lesson to draw from *Ross* is that a trial court, in assessing whether an item is a dangerous weapon for purposes of the armed robbery statute, must not allow the victim’s subjective fear of the item to override objective evidence that the item is not dangerous. The present case concerns not the dangerousness of an object but its classification as a “firearm” under the armed robbery statute. To the extent that the inquiries are analogous and *Ross* has some application here, we note that, even in *Ross*, the supreme court relied on the victim’s beliefs as to the objective characteristics of the gun; the court discounted the victim’s emotional response as inconsistent with those objective facts. Here, Boyer did not testify to the emotion he felt when the object was put to his neck, nor would such evidence have been relevant to whether the object was a “firearm” under the statute. Most importantly, Boyer never suggested that his opinion that the object was a “real gun” was based on anything other than the objective characteristics as he subjectively perceived them. His impressions did not contradict other evidence of the nature of the

gun but, rather, were consistent with defendant's implication that the gun was capable of inflicting fatal damage.

¶ 32 As with the identification of persons, the weight given a subjective identification of an object as a firearm should depend on the ability of the witness to observe the object. Given an appropriate chance to observe, a witness may often be able to distinguish a conventional firearm from a toy gun or a pellet gun by various characteristics. When asked for specifics, the witness will often be able to provide some. However, finding words for exactly what makes one gun look "real" and another "fake" may not be easy for every witness. Thus, when a witness has an objective basis for forming a subjective impression that an object is a firearm, that impression should not be rejected, particularly when supported, as here, by the assailant's implication that the object could "blow [the witness's] head off."

¶ 33 Defendant argues that *People v. Elam*, 50 Ill. 2d 214 (1972), supports reversal here. We disagree. In *Elam*, the supreme court affirmed the defendant's conviction of armed robbery with a dangerous weapon. There, "the victim of the robbery[] was told by his assailant, and believed, that a small gun was pointed at his back"; however, no witness saw a gun during the incident. *Elam*, 50 Ill. 2d at 220. Further, "[t]he defendant was apprehended within minutes after the robbery, and a knife"—but not a gun—"was found on his person." *Elam*, 50 Ill. 2d at 220. The supreme court held that "the knife in question was a dangerous weapon and that the actual existence of a dangerous weapon in the possession of the accused at the time of the robbery was sufficient to fulfill [the dangerous weapon element of the offense] even though the weapon itself was neither seen nor accurately described by the victim." *Elam*, 50 Ill. 2d at 220.

¶ 34 Defendant suggests that *Elam* applies here because the supreme court implied that it was not persuaded that the defendant had a gun during the robbery, *despite* the defendant's remark that

he was so armed and the victim's belief that he was. *Elam* is readily distinguishable. Here, the State relied not just on (1) the defendant's implication that he had a gun but also on (2) the video evidence, which appeared to show defendant pointing a handgun at Boyer, and (3) Boyer's testimony that the object pressed against his neck felt like a "real gun."

¶ 35 Given the converging lines of evidence in favor of the conclusion that defendant was armed with a firearm, the trial court was not required to treat the *possibility* that defendant might have been holding something other than a firearm as rising "to a level of reasonable doubt." *Hall*, 194 Ill. 2d at 332.

¶ 36

III. CONCLUSION

¶ 37 For the reasons stated, we hold that the evidence was sufficient to support defendant's conviction of armed robbery with a firearm. Therefore, we affirm the judgment of the circuit court of De Kalb County.

¶ 38 Affirmed.