No. 124563

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-17-0258
Plaintiff-Appellant,	)	
	)	There on Appeal from the Circuit Court of the First Judicial Circuit, Cook County, Illinois No. 14 CR 10466
v.	)	
JASPER McLAURIN,	)	The Honorable Thaddeus L. Wilson, Judge Presiding.
Defendant-Appellee.	)	

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

After a September 2016 bench trial, the Circuit Court of Cook County convicted defendant Jasper McLaurin of six counts of unlawful use or possession of a weapon by a felon (UUW) (Counts 2-7), two counts of aggravated unlawful use of a weapon (AUUW) (Counts 9 and 11), and one count of being an armed habitual criminal (AHC) (Count 1). C7, 22-28, 30, 32; R. CC-67-70.[1] Counts 2-7, 9, and 11 merged into Count 1, and the court sentenced defendant to a term of seven years of imprisonment. C54; R. GG-19. The Illinois Appellate Court, First District, reversed the convictions on appeal, finding that "the state failed to meet its burden to prove beyo[n]d a reasonable doubt possessory firearm offenses where there was no evidence that the item observed in the defendant's possession was a device 'designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas,' as defined by the statute." *People v. McLaurin*, 2018 IL App (1st) 170258, ¶ 27 (quoting 430 ILCS 65/1.1 (2014)); *see also id.* ¶¶ 28-32.

No question is raised on the sufficiency of the pleadings.

ISSUE PRESENTED

Whether the People presented sufficient evidence of defendant's possession of a "firearm" and "firearm ammunition" to sustain convictions for

[1] "C__" denotes the common law record, and "R. __" denotes the report of proceedings.

unlawful use of a weapon, aggravated unlawful use of a weapon, and being an armed habitual criminal.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612(b)(2), 603, and 606. This Court allowed leave to appeal on May 22, 2019. *People v. McLaurin*, 124 N.E.3d 492 (Ill. May 22, 2019) (Table).

STATUTES INVOLVED

720 ILCS 5/2-7.5 (2014)

§ 2-7.5. "Firearm". Except as otherwise provided in a specific Section, "firearm" has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act.

720 ILCS 5/2-7.1 (2014)

§ 2-7.1. "Firearm" and "firearm ammunition". "Firearm" and "firearm ammunition" have the meanings ascribed to them in Section 1.1 of the Firearm Owners Identification Card Act.

430 ILCS 65/1.1 (2014)

§ 1.1. For purposes of this Act:

* * *

"Firearm" 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; excluding, however:

> (1) any 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;
>
> (1.1) any pneumatic gun, spring gun, paint ball gun, or B-B gun which expels breakable paint balls containing washable marking colors;

(2) any device used exclusively for signalling [sic] or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission;

(3) any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition; and

(4) an antique firearm (other than a machine-gun) which, although designed as a weapon, the Department of State Police finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

"Firearm ammunition" means any self-contained cartridge or shotgun shell, by whatever name known, which is designed to be used or adaptable to use in a firearm; excluding, however:

(1) any ammunition exclusively designed for use with a device used exclusively for signalling [sic] or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission; and

(2) any ammunition designed exclusively for use with a stud or rivet driver or other similar industrial ammunition.

* * *

720 ILCS 5/24-1.7(a)(2) (2014)

§ 24-1.7. Armed habitual criminal.

(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:

* * *

(2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05[.]

720 ILCS 5/24-1.1(a) (2014)

§ 24-1.1. Unlawful Use or Possession of Weapons by Felons or Persons in the Custody of the Department of Corrections Facilities.

(a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the Department of State Police under Section 10 of the Firearm Owners Identification Card Act.

* * *

720 ILCS 5/24-1.6 (2014)

§ 24-1.6. Aggravated unlawful use of a weapon.

(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; or
>
> (2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm; and
>
> (3) One of the following factors is present:

* * *

> (C) the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card[.]

* * *

STATEMENT OF FACTS

Defendant was charged with one count of AHC, six counts of UUW, and four counts of AUUW, all of which were predicated on his May 25, 2014 possession of a firearm (and the ammunition with which it was loaded). C21-33.

At trial, the State called Chicago Police Department (CPD) Sergeant Nicheloe Fraction, who testified that she was conducting unrelated surveillance at around 10:30 a.m. when she observed defendant "exit [an] apartment building carrying a silver handgun," cross the street, and get into a white conversion van. R. CC-10-13. Fraction was approximately fifty feet away at the time, sitting in the driver's seat of an unmarked police car parked at the corner of the street. *See* R. CC-10-13, 19-20. From her unobstructed vantage point, R. CC-13, Fraction saw defendant hold the gun "in a grip [such] that the barrel was coming out the one side [of his hand] and the handle was on the other side," R. CC-20. A twelve-year CPD veteran, Fraction attested to her familiarity with handguns. R. CC-9, 16-17.

Fraction was alone and in plain clothes, R. CC-10-11, so she radioed for backup and followed immediately behind the van until marked police units arrived and pulled the van over, R. CC-14, 21-23, 27. She then pulled into a parking lot across the street, from which point she could only see the driver's

side of the van. R. CC-22-23, 26-27. The van's three occupants were eventually ordered out of the vehicle and "directed to an area where [she] could see them," R. CC-27-28, and Fraction identified defendant as "the gentleman I saw carrying the handgun into the rear passenger side of the van," R. CC-15; *see also* R. CC-24, 27-28. Approximately twenty minutes later, after returning to the police station, Fraction identified a handgun recovered at the scene by CPD Officer Jessie Rodriguez as the same color and size as the handgun that she saw defendant holding when he entered the van. R. CC-16, 24-25.

The State called Rodriguez next. In addition to recovering the gun, Rodriguez was the officer who pulled over the van in response to the dispatch request for a vehicle stop. *See* R. CC-30-31, 35-36. Rodriguez testified that he stopped the van on the northbound side of the street, pulling his squad car up alongside the driver's side of the van. R. CC-30-31. Another police car had parked in front of the van, and a police wagon had boxed the van in by parking behind it. R. CC-44-45. Before anyone approached the van, Rodriguez "gather[ed] information from the officer that had witnessed the person with the weapon[, Sergeant Fraction,] . . . to make sure that [h]e had all the proper information" and was prepared to safely deal with a person reported to have a firearm. R. CC-45-46. He then spoke with the driver, before asking all three occupants to exit the van. R. CC-31-32.

After Fraction confirmed that Rodriguez "had the correct car" and "the correct person," Rodriguez patted down the three suspects and searched the van for the "chrome gun" that Fraction had described. R. CC-33-34. Rodriguez then "looked on the ground underneath the conversion van" and spotted a "chrome gun" "toward[] the passenger side rear, almost in the middle of the conversion van." R. CC-34-35; *see also* R. CC-37; R. CC-51-53. Rodriguez affirmed that defendant had exited the van from a rear, passenger's side door that "open[ed from] the middle of [the] van." R. CC-33.

Rodriguez crawled under the van to retrieve the gun and, finding that that it was "loaded," "cleared it," "remov[ing both] the magazine" and a "bullet from the chamber." R. CC-35-36. He observed that the firearm was nine-millimeter in caliber. R. CC-37. Rodriguez kept the gun in his care and custody until he was able to inventory it at the station, R. CC-35-36, and officers arrested defendant at the scene, R. CC-36-37. Rodriguez did not see anyone place or throw anything underneath the van or open any of the van's passenger's side doors prior to being ordered out of the vehicle, and he explained that he would have been unable to see anything like that from his position on the driver's side of the van. R. CC-39-40, 43.

Finally, the State submitted four stipulations in its case-in-chief: (1) that on May 25, 2014, defendant was on parole for a prior offense, which parole was not scheduled to be discharged until December 14, 2014, R. CC-55; (2) that defendant had never been issued a Firearm Owner's Identification

(FOID) Card, R. CC-55-56; (3) that defendant had previously been convicted of UUW on June 13, 2011 (Case No. 10 CR 1284101), R. CC-56; and (4) that defendant had previously been convicted of aggravated battery with a firearm on February 16, 2006 (Case No. 05 CR 237201), *id.*

The trial court denied a motion for directed verdict on Counts 1-7, 9, and 11, but granted it with regard to Counts 8 and 10, which had charged defendant with AUUW without a concealed carry license (as opposed to the charges predicated on defendant's lack of a FOID card). *See* R. CC-56-61; C29, 31.

Defendant neither testified nor presented any witnesses. *See* R. CC-61-62.

After hearing closing arguments, R. CC-62-67, the trial court found defendant guilty of AHC (Count 1), all six counts of UUW (Counts 2-7), and the remaining two counts of AUUW (Counts 9 and 11), R. CC-67-70; *see also* C7. The court pointed to Fraction's testimony that she "s[aw] the defendant in plain daylight come out of a building[and] walk near her vehicle holding a firearm" and emphasized that Fraction "testifie[d] clearly and plainly and without impeachment that she saw a firearm, and that the defendant was the person holding that firearm." R. CC-67-68. The court noted that as a police officer, Fraction was "familiar with firearms, works with firearms, [and is] trained with firearms," and it determined that her testimony as to "the way that the defendant [wa]s holding the firearm . . . [wa]s consistent with not

being able to say exactly what type of firearm because of the way the defendant's hand was in the middle of [it]." R. CC-67.

The trial court then turned to Rodriguez's testimony, noting that after stopping the van that Fraction saw defendant get into, Rodriguez "look[ed] under the vehicle [] close to the door area where the defendant exited out of, *and only the defendant*, [and] s[aw] a weapon that matche[d] the description of size and color given by Officer Fraction." R. CC-68 (emphasis added). The court also highlighted Rodriguez's testimony that "the weapon was fully loaded and had to be unloaded by the officer when it was recovered." R. CC-68-69.

Citing controlling precedent of this Court and the Illinois Appellate Court that "the State need not present a firearm in order for the trier of fact to find the defendant possessed one," the trial court found that "the witnesses['] unequivocal testimony that they observed the defendant carrying a firearm is sufficient. The unequivocal testimony in this case is that the defendant was seen on the street carrying a firearm." R. CC-69-70. Thus, the court found defendant guilty of Counts 1 through 7, 9, and 11. R. CC-70.

At sentencing, the trial court merged Counts 2-7, 9, and 11 into Count 1 and sentenced defendant to seven years of imprisonment. C54; R. GG-19.

The appellate court reversed the trial court's judgment on the ground that "the state failed to meet its burden to prove beyo[n]d a reasonable doubt [the] possessory firearm offenses where there was no evidence that the item

observed in the defendant's possession was a device 'designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas,' as defined by the statute." *People v. McLaurin*, 2018 IL App (1st) 170258, ¶ 27 (quoting 430 ILCS 65/1.1 (2014)); *see also id.* ¶¶ 28-32. Finding that this Court's holdings in *People v. Wright*, 2017 IL 119561, and *People v. Washington*, 2012 IL 107993, do not extend to possessory firearm offenses, the appellate court reasoned that an "item possessed cannot be inferred [to be a firearm] from circumstantial evidence" in "possessory firearm offenses." *McLaurin*, 2018 IL App (1st) 170258, ¶¶ 23-24. It then relied on *People v. Crowder*, 323 Ill. App. 3d 710 (2d Dist. 2001), to conclude that "[a]bsent proof, either by inspection or analysis or by other verifiable means, that the item possessed is a device which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas, there is no basis to determine whether the item is a firearm." *McLaurin*, 2018 IL App (1st) 170258, ¶¶ 24-25. Thus, the court reasoned, "Fraction's testimony that she observed defendant in possession of an item that she believed was a firearm, standing alone, was not sufficient to sustain defendant's conviction." *Id.* ¶ 28.

In so ruling, the appellate court also claimed that the trial court had "found that Rodriguez's testimony regarding the recovered gun was not relevant to its finding that defendant illegally possessed a firearm." *Id.* ¶ 22; *see also id.* ("The court expressly found that the possessory offense was based

solely on Fraction's observations of defendant when he walked past her vehicle."); *id.* ¶ 26 ("The trial court was clear that defendant's conviction is based solely on Fraction's testimony that from fifty feet away she observed him walking on the street holding what appeared to be a gun in his hand.").

In a special concurrence, Justice Mikva disagreed that "the evidence needed to prove the illegal possession of a firearm is somehow different than the evidence needed to prove that a defendant possessed a firearm during a robbery." *McLaurin*, 2018 IL App (1st) 170258, ¶ 34 (Mikva, J., specially concurring). But she concurred with the majority's conclusion that Fraction's testimony did not establish defendant's guilt beyond a reasonable doubt. *Id.* ¶ 35.

STANDARD OF REVIEW

In a sufficiency of the evidence challenge, this Court "determine[s] 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." *People v. Wright*, 2017 IL 119561, ¶ 70 (quotations omitted; emphasis in original); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

ARGUMENT

I. The Eyewitness Testimony of Two Veteran Police Officers Sufficed to Prove Beyond a Reasonable Doubt that Defendant Possessed a Firearm and Firearm Ammunition.

This Court should affirm defendant's convictions for AHC, UUW, and AUUW because when viewed in the light most favorable to the State, the combined testimony of Sergeant Fraction — that she observed defendant carry a firearm into a van — and Officer Rodriguez — that after pulling the van over, he recovered a loaded, nine-millimeter firearm matching Fraction's description underneath the van right where defendant had exited the van — was not so unreasonable, improbable, or unsatisfactory that no rational trier of fact could have found that defendant possessed a "firearm" and "firearm ammunition" beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307 (1979), requires that a court considering a sufficiency challenge ask only whether any rational trier of fact could have found the required elements of the charged crimes beyond a reasonable doubt. *People v. Gonzalez*, 239 Ill. 2d 471, 478 (2011). All reasonable inferences from the evidence must be drawn in the State's favor, *id.*, with the same standard applying whether the evidence is direct or circumstantial, *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). The testimony of even a single witness, if positive and credible, is sufficient to convict. *People v. Gray*, 2017 IL 120958, ¶ 36. And the trier of fact, not the reviewing court, is the ultimate arbiter of issues of credibility or weight of the evidence.

People v. Jackson, 232 Ill. 2d 246, 280-81 (2009). This standard affords "'full play to the responsibility of the trier of fact fairly to . . . draw reasonable inferences from basic facts to ultimate facts.'" *Id.* at 281 (quoting *Jackson*, 443 U.S. at 319). Accordingly, this Court will not reverse the trial court's judgment "unless the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Newton*, 2018 IL 122958, ¶ 24 (citing *People v. Wright*, 2017 IL 119561, ¶ 70).

Applying this standard here, the evidence more than sufficed for the trial court to conclude that the object that defendant possessed was a firearm (loaded with firearm ammunition). Sergeant Fraction, a twelve-year CPD veteran intimately familiar with handguns, testified that she observed defendant "carry[] a silver handgun" across a Chicago street in broad daylight and get into a white conversion van. R. CC-9-13, 16-17, 19. Her view of defendant and the firearm was unobstructed, R. CC-13, and she explained in detail how defendant held the gun "in a grip [such] that the barrel was coming out the one side [of his hand] and the handle was on the other side," R. CC-20. Fraction followed the van until backup arrived to execute a traffic stop, R. CC-14, 21-23, 27, and during that stop, Officer Rodriguez recovered a chrome firearm matching Fraction's description, which had been discarded underneath the van, right where defendant had exited the vehicle, R. CC-33-37, 51-53; R. CC-16, 24-25. Rodriguez, an officer with

more than fifteen years of experience at the time, *see* R. CC-29, identified the firearm as a nine-millimeter caliber handgun, and seeing that it was loaded, he "cleared it," "remov[ing] the magazine" as well as a "bullet from the chamber," R. CC-35-37.

Viewed in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that the item that defendant possessed was a real firearm (loaded with real firearm ammunition) and that the evidence was therefore sufficient to find defendant guilty of the AHC, UUW, and AUUW offenses charged in Counts 1, 2-7, 9, and 11. As discussed *infra* in Section II, the trial court could infer that the firearm was real without the firearm itself having been admitted into evidence or direct evidence that the firearm met the mechanical specifications outlined in section 1.1 of the FOID Act. *See Wright*, 2017 IL 119561, ¶¶ 71-77 (expanding holding of *People v. Washington*, 2012 IL 107993, that rational trier of fact may infer from eyewitness testimony that defendant possessed a "real gun" to offenses requiring proof of possession of "a firearm, as defined in the FOID Act"); *see generally* 720 ILCS 5/2-7.5 (2014); 720 ILCS 5/2-7.1 (2014); 430 ILCS 65/1.1 (2014); 720 ILCS 5/24-1.7(a)(2) (2014); 720 ILCS 5/24-1.1(a) (2014); 720 ILCS 5/24-1.6(a)(1)-(2), (a)(3)(C) (2014); C21-33. And although neither officer was in a position to witness defendant stash the firearm underneath the van after it was stopped, R. CC-22-23, 26-27; R. CC-39-40, 43, it was within the province of the trial court, as the trier of fact, to

reasonably infer defendant had done so from the circumstantial evidence that a firearm matching Fraction's description of the gun she saw defendant carrying into the van was recovered mere inches from where defendant stood after the van was stopped. R. CC-33-37, 51-53; R. CC-16, 24-25; *Jackson*, 232 Ill. 2d at 281 (citing *Jackson*, 443 U.S. at 319).

The appellate court also erred in finding that the State had not provided "proof, either by inspection or analysis or by other verifiable means" that the item that defendant possessed was, in fact, a firearm. *McLaurin*, 2018 IL App (1st) 170258, ¶ 25. To the contrary, that is exactly what Rodriguez verified through his testimony that he recovered a loaded, nine-millimeter firearm and promptly disarmed it by removing the magazine clip and emptying a bullet from the chamber. R. CC-35-37; *see Wright*, 2017 IL 119561, ¶¶ 74-77 (distinguishing *People v. Ross*, 229 Ill. 2d 255 (2008), as lacking "evidence that the gun was loaded" and "evidence regarding its weight or composition"). That defendant hid the gun under the van is additional circumstantial evidence corroborating that the gun was real: if it were not, he would not have tried to hide it.

The appellate court further erred in disregarding Rodriguez's testimony. As a legal matter, regardless of whether a trial court relied on certain testimony in reaching its verdict, "[o]nce a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the*

evidence is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319 (emphasis in original); *id.* at 319 n.13 ("The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached" and "does not require scrutiny of the reasoning process actually used by the factfinder — if known."); *see also People v. Cooper*, 194 Ill. 2d 419, 433 (2000) (citing *Jackson*, 443 U.S. at 319 n.13); *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007) (appellate court must consider "all of the evidence, not just the evidence convenient to [one party's] theory of the case"); *People v. Curtis*, 296 Ill. App. 3d 991, 1000 (4th Dist. 1998) ("In a jury trial, the jury provides no explanation whatsoever for its verdict. In a bench trial, even though it may be desirable for the trial court to explain its decision, the court's election not to comment or its failure to specifically mention certain portions of the testimony does not permit a defendant on appeal to claim that those portions not mentioned played no role in the court's determination."); *People v. Mandic*, 325 Ill. App. 3d 544, 546-47 (2d Dist. 2001) (same).

And as a factual matter, the appellate court erred in concluding that the trial judge found Rodriguez's testimony irrelevant. *Compare* R. CC-68-69, *with McLaurin*, 2018 IL App (1st) 170258, ¶¶ 22, 26. *Wright* and *Washington* certainly would have *permitted* the trial court to infer that defendant possessed a real firearm based on the testimony of a single credible eyewitness (Fraction), *see Wright*, 2017 IL 119561, ¶¶ 76-77; *Washington*,

2012 IL 107993, ¶¶ 35-37; but the verdict reveals that the trial court, in fact, relied on testimony from both witnesses in convicting defendant. *E.g.*, R. CC-68-69 ("[T]he weapon was fully loaded and had to be unloaded by the officer . . . ."); R. CC-69 (emphasis added) ("In the absence of a recovered firearm, the *witnesses*[] unequivocal testimony that *they* observed the defendant carrying a firearm is sufficient."); *see generally* R. CC-67-70.

Given the testimony of the two experienced police officers in this case, there was nothing unreasonable, improbable, or unsatisfactory about the trial court's conclusion. The evidence was therefore sufficient to find defendant guilty of AHC, UUW, and AUUW, and the convictions on Counts 1, 2-7, 9, and 11 should be affirmed.

II. *People v. Wright* Established that Eyewitness Testimony Suffices to Prove a "Firearm" as Defined in the FOID Act, and There Is No Basis for a Differing Rule for Possessory Firearm Offenses.

A. *Wright*'s holding that eyewitness testimony suffices to prove a "firearm, as defined in the FOID Act," was not limited to certain categories of criminal offenses.

As explained above, defendant's convictions should be affirmed based on a straightforward application of this Court's precedents holding that an eyewitness's testimony that a defendant possessed what appeared to be a real firearm is legally sufficient to prove criminal offenses containing "firearm" or "dangerous weapon" elements. *Wright*, 2017 IL 119561; *Washington*, 2012 IL 107993.

In *Washington*, this Court concluded that a jury may "reasonably infer[]" a defendant's possession of a "real gun" from a single eyewitness's "unequivocal testimony and the circumstances under which he was able to view the gun." 2012 IL 107993, ¶¶ 36-37. The gun need not be admitted, or even recovered, to prove that it was real. *See id.* ¶¶ 10-12, 35-37 (rejecting argument that failure to recover gun precluded jury from "know[ing] for sure whether the gun was real or a toy," and holding that victim's testimony that he was abducted at gunpoint and "for several minutes . . . had an unobstructed view" of the gun sufficed to prove defendant was "armed with a dangerous weapon"); *see also People v. Harrison*, 359 Ill. 295, 299-300 (1935) (Although "[t]he only witness to relate circumstances which would lead one to believe that a gun was used," "did not see the gun, but [] felt a cold, metallic object placed against his neck when he was prone on the ground," the "evidence in this respect stands uncontradicted, and was sufficient to convince the jury, beyond a reasonable doubt, that the robbers used a gun to intimidate and force [the witness] to submit to their larcenous desires.").

Five years after *Washington*, *Wright* held that eyewitness testimony also suffices to prove the possession of "a firearm, as defined in the FOID Act," so long as "a rational trier of fact could infer from the testimony that the defendant possessed a 'real gun.'" 2017 IL 119561, ¶ 76 ("Our disposition is controlled by the same rationale here [as in *Washington*]."). There, as here, the statutory elements of the charged offense — armed robbery with a

firearm — included that the "firearm" meet the FOID Act's definition: a "'device . . . designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas.'" *Id.* ¶ 71 (citing 720 ILCS 5/18-1(a) (2010), 720 ILCS 5/18-2(a)(2) (2010), and 720 ILCS 5/2-7.5 (2010), and quoting 430 ILCS 65/1.1 (2010)). Yet, no such testimony or device was required to sustain a conviction. Rather, this Court found that lay testimony from three eyewitnesses — a restaurant manager who had fired guns before and saw "what 'looked like a black [semi]automatic [] gun;'" a waitress who said she "saw the handle of a gun in the waistband of [codefendant's] pants;" and a waiter who said he "had seen guns before and believed codefendant's gun was a '9 millimeter pistol'" — was not so unreasonable, improbable, or unsatisfactory when viewed in the light most favorable to the State that no rational trier of fact could have found the codefendant to have been "armed with a firearm" during the commission of an armed robbery with the defendant. *Id.* ¶¶ 76-77; *see also id.* ¶¶ 9-12.

Wright is dispositive here, for the charged possessory offenses include the *exact same* statutory "firearm" element. *See* 720 ILCS 5/2-7.5 (2014); 720 ILCS 5/2-7.1 (2014); 430 ILCS 65/1.1 (2014); 720 ILCS 5/24-1.7(a)(2) (2014); 720 ILCS 5/24-1.1(a) (2014); 720 ILCS 5/24-1.6(a)(1)-(2), (a)(3)(C) (2014); C21-33. Indeed, Article 2 of the Criminal Code incorporates by reference the FOID Act's statutory definition for "firearm" with equal force and application to every section of the Criminal Code referencing a "firearm" unless otherwise

specified. *See* 720 ILCS 5/2-0.5 (2014) ("For the purposes of this Code, the words and phrases described in this Article have the meanings designated in this Article, except when a particular context clearly requires a different meaning."); 720 ILCS 5/2-7.5 (2014) ("'[F]irearm' has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act."); 720 ILCS 5/2-7.1 (2014) (same, for "firearm" and "firearm ammunition"); 430 ILCS 65/1.1 (2014) ("'Firearm' 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[.]"); *see also* 430 ILCS 65/1.1 (2014) ("'Firearm ammunition' means any self-contained cartridge or shotgun shell . . . which is designed to be used . . . in a firearm.").

Neither *Wright* nor the Criminal Code exempts or distinguishes possessory firearm offenses. It stands to reason that if (1) a statutory element is the same, and (2) the burden of proof — beyond a reasonable doubt — is the same, then the evidence required to prove that element and sustain a criminal conviction is also the same — regardless of the offense. *Cf. People v. Hardman*, 2017 IL 121453, ¶ 31 (quotation omitted) (Court does not read into statutes "exceptions, limitations, or conditions" that are not there); *People v. Maya*, 105 Ill. 2d 281, 286 (1985) ("[I]t is presumed that statutes which relate to one subject are governed by one spirit and a single policy, and that the legislature intended the enactments to be consistent and harmonious."). This Court should therefore clarify that *Wright* controls all

cases where the State must prove possession of a "firearm, as defined in the FOID Act," including possessory firearm offenses.

B. Illinois law does not preclude proving possessory firearm offenses with circumstantial evidence.

The appellate court justified its decision not to apply *Wright* by distinguishing possessory offenses, "where the item possessed cannot be inferred from circumstantial evidence," from so-called "more serious offense[s]," where circumstantial evidence may create an inference of the use of a firearm. *McLaurin*, 2018 IL App (1st) 170258, ¶ 24. But the viability of circumstantial proof does not depend on the type of criminal offense charged. Rather, circumstantial evidence "is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged." *People v. Hall*, 194 Ill. 2d 305, 330 (2000); *People v. Campbell*, 146 Ill. 2d 363, 380 (1992) (quotation omitted) ("It is not necessary . . . that the jury be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. It is sufficient if all the evidence taken together satisfies the jury beyond a reasonable doubt of the accused's guilt."); *see also* Ill. Pattern Jury Instr.–Criminal 3.02. Indeed, a "conviction may be based solely on circumstantial evidence." *People v. Patterson*, 217 Ill. 2d 407, 435 (2005).

Moreover, this Court trusts the trier of fact to determine whether a commonly understood object "is what it purports to be" based on "reasonable inferences that flow from the facts presented and [the] appl[ication of] his or

her common knowledge." *Newton*, 2018 IL 122958, ¶ 20. *Newton* held that the State was not required to offer particularized evidence that a church was, in fact, a church for purposes of a sentencing enhancement under the Controlled Substances Act. *Id.* ¶¶ 20, 25-29. A police officer's testimony that he knew the church to be a church based on his "professional and personal experience" in the neighborhood was sufficient "probative evidence from which a trier of fact could discern there was a church at that location." *Id.* ¶ 25. As the Court emphasized, it is the trier of fact's role to "consider the evidence in light of his or her own knowledge and observations in the affairs of life." *Id.* ¶ 28; *see also Hardman*, 2017 IL 121453, ¶¶ 36-45 (State not required to offer particularized evidence that a school was a school; police officers' testimony of familiarity with neighborhood and school in question was sufficient).

Like *Newton* and *Hardman*, *Wright* entrusts the trier of fact to consider the evidence and determine whether a reasonable inference can be drawn from the eyewitness testimony that the object observed (an apparent firearm) was, in fact, the object required to be proved to sustain a conviction (a firearm, as defined under section 1.1 of the FOID Act, *see* 720 ILCS 5/2-7.5) — regardless of whether a qualifying firearm was recovered, or particularized evidence presented, to verify that the object was a device "designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 2017 IL 119561, ¶¶ 9-12, 71-77 (quotation omitted). A

categorical rule that "the item possessed cannot be inferred from circumstantial evidence" for possessory firearm offenses, *McLaurin*, 2018 IL App (1st) 170258, ¶ 24, usurps the trier of fact's role as the final arbiter of the evidence for an entire class of criminal offenses. *See Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (*Jackson* affords "broad discretion" to decide "what inferences to draw from the evidence presented").

A consideration of its practical implications makes clear that the appellate court's rule is untenable. Prosecutors commonly charge defendants with UUW, AUUW, and/or AHC, for example, in addition to armed robbery with a firearm. *See, e.g.*, *People v. Fields*, 2017 IL App (1st) 110311-B, ¶¶ 34-37 (defendant charged with armed robbery with a firearm and AHC); *People v. Pike*, 2016 IL App (1st) 122626, ¶ 4 (defendant charged with armed robbery with a firearm, AHC, two counts of UUW, two counts of possession/use of a firearm by a felon, and four counts of AUUW). Yet under the appellate court's rule, an eyewitness could testify that a defendant (1) demanded money and valuables, (2) pointed what appeared to be a real firearm for several minutes, and (3) exclaimed, "I will shoot you with this real firearm," and if the firearm is not recovered, this testimony would suffice to prove the armed robbery charge but not the UUW, AUUW, or AHC charges even though the same statutory "firearm" element appears in each charge, and the same circumstantial evidence supports each charge. *Compare McLaurin*, 2018 IL App (1st) 170258, ¶ 24, *with Fields*, 2017 IL App (1st) 110311-B,

¶¶ 34-37 (same body of circumstantial evidence supported "firearm" element of both armed robbery conviction and AHC conviction).

These illogical results are not limited to multiple-charge cases. A jury could undoubtedly infer, for example, from a single police officer's testimony that he recognized a convicted felon in a gun shop inquiring about and handling various firearms that the devices were real. Yet the appellate court's reasoning would require the jury to ignore its "knowledge and observations in the affairs of life," *Newton*, 2018 IL 122958, ¶ 28 — namely, that the events occurred in a place where real firearms are bought and sold — and acquit on a possessory firearm charge unless an expert tested and verified that each gun that the defendant handled in the gun shop was a device "designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," 430 ILCS 65/1.1. Such an outcome is not only inefficient, it contradicts the fundamental principle that circumstantial evidence is sufficient to prove a criminal offense so long as "all the evidence taken together satisfies the jury beyond a reasonable doubt of the accused's guilt" as to each element of the offense, regardless of whether every "link in the chain of circumstances" has been proved beyond a reasonable doubt. *Campbell*, 146 Ill. 2d at 380 (quotation omitted); *Hall*, 194 Ill. 2d at 330.

This Court should therefore reject the appellate court's newly-minted, categorical rule that an "item possessed cannot be inferred from

circumstantial evidence" for possessory firearm offenses. *McLaurin*, 2018 IL App (1st) 170258, ¶ 24.

C. The State was not required to disprove or rule out all possible factual scenarios.

Relying on *People v. Crowder*, 323 Ill. App. 3d 710 (2d Dist. 2001), the appellate court opined that possessory firearm offenses (but not other criminal offenses containing the same firearm element or sentencing enhancement) require the State to prove "by inspection or analysis or by other verifiable means" that the item possessed was "a device which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," lest there be "no basis to determine whether the item is a firearm, [or instead] an *exempted* antique, B-B gun[,] 'a toy, a nonfunctioning replica, or a piece of wood or soap.'" *McLaurin*, 2018 IL App (1st) 170258, ¶ 25 (quoting *Crowder*; emphasis in original). Setting aside that *Crowder* pre-dates *Washington* and *Wright* by over a decade, the case is inapposite, as it concerned sanctions for the spoliation of firearm evidence following the defendant's request to inspect it. *See People v. Clark*, 2015 IL App (3d) 140036, ¶ 29 (finding *Crowder* inapplicable to sufficiency claim); *see also Fields*, 2017 IL App (1st) 110311-B, ¶ 37 (same); *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 19 (same).

Moreover, the appellate court's conclusion runs afoul of the longstanding principle that "[t]he State need not disprove or rule out all possible factual scenarios." *Newton*, 2018 IL 122958, ¶ 27 (citing *Hardman*,

2017 IL 121453, ¶ 37); *see also Jackson*, 232 Ill. 2d at 281; *Campbell*, 146 Ill. 2d at 380. Indeed, merely because the scenario of a toy or replica gun is "*possible* does not mean that a jury cannot rely on the reasonable inferences that flow from the unrebutted evidence[:]" that the gun was real. *Newton*, 2018 IL 122958, ¶ 27 (emphasis added). Nor is the trier of fact "required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). Such a requirement would be tantamount to resurrecting the long-abandoned "reasonable hypothesis of innocence test." *See People v. Pintos*, 133 Ill. 2d 286, 291 (1989) (collecting cases) ("[T]he reasonable doubt test . . . should be applied in reviewing the sufficiency of evidence in all criminal cases, whether the evidence is direct or circumstantial.").

Although there may be instances where certain evidence "*preclude*[*s*]" the "inference that the 'gun' the defendant possessed" meets the legal criteria for the charged offense, the law does not require the State to affirmatively disprove that the firearm in question might have been some other object or exempted device by way of direct evidence of each component of section 1.1 of the FOID Act. *Wright*, 2017 IL 119561, ¶¶ 74-75 (distinguishing *People v. Ross*, 229 Ill. 2d 255 (2008), where evidence was insufficient because police testimony conclusively showed weapon in question to have been a "small BB gun"); *cf. Hardman*, 2017 IL 121453, ¶ 29 (emphasis added) ("The decisive

factor in [*People v.*] *Young*[, 2011 IL 111886,] was that the term 'school' did *not* encompass the *type* of school at issue therein. . . . This court did not base its holding upon whether the State had presented enough particularized evidence as to whether the preschool was active or operational on the day of the offense."). Accordingly, this Court should reject a heightened standard for proving a "firearm" element specific to possessory firearm offenses and affirm *Wright*'s applicability wherever the Criminal Code requires proof of a "firearm, as defined in the FOID Act." 2017 IL 119561, ¶ 76.

CONCLUSION

This Court should reverse the appellate court's judgment and affirm defendant's convictions.

July 30, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is twenty-seven pages.

/s/ *Evan B. Elsner*
EVAN B. ELSNER

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2018 IL App (1st) 170258

Appellate Court of Illinois, First District,
First Division.

The PEOPLE of the State of
Illinois, Plaintiff-Appellee,
v.
Jasper MCLAURIN, Defendant-Appellant.

No. 1-17-0258
|
December 11, 2018

Synopsis

Background: Following bench trial, defendant was convicted in the Circuit Court, Cook County, Thaddeus L. Wilson, J., of being an armed habitual criminal. Defendant appealed.

The Appellate Court, Walker, J., held that evidence was insufficient to find that defendant possessed a device designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas, as an element of being an armed habitual criminal.

Reversed.

Mikva J., filed opinion, specially concurring in part.

Appeal from the Circuit Court of Cook County. No. 14 CR 10466, Honorable Thaddeus L. Wilson, Judge, presiding.

OPINION

JUSTICE WALKER delivered the judgment of the court, with opinion.

***1** ¶ 1 Following a bench trial, defendant Jasper McLaurin was convicted of being an armed habitual criminal and sentenced to seven years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because it failed to present sufficient evidence that he possessed a firearm as defined by the Illinois Criminal Code (Code) (720 ILCS 5/2-7.5 (West 2014); 430 ILCS 65/1.1 (West 2014)). We agree and reverse defendant's conviction.

¶ 2 BACKGROUND

¶ 3 Defendant was tried on one count of being an armed habitual criminal, six counts of unlawful use or possession of a weapon by a felon (UUWF), and four counts of aggravated unlawful use of a weapon (AUUW). At trial, Chicago Police Sergeant Nicheloe Fraction (Fraction) testified that about 10:30 a.m. on May 25, 2014, she was sitting alone in an unmarked police vehicle conducting surveillance of an apartment building on South Kildare Avenue. Fraction was parked across the street from the building, on the intersecting street. She observed defendant exit the apartment building "carrying a silver handgun." Fraction was about 50 feet away from defendant and nothing was obstructing her view. Defendant walked parallel to the passenger side of Fraction's vehicle, from the rear to the front. He crossed Kildare and entered the rear of a white conversion van, which drove away.

¶ 4 Fraction followed the van. Over her police radio, Fraction gave a description of the van, its license plate number, and a description of the man whom she saw "get into the van with the handgun." Fraction never lost sight of the van. Marked police vehicles arrived and stopped the van. Fraction stopped her vehicle on the driver's side of the van. The occupants of the van exited the passenger's side of the vehicle, and thus, Fraction did not observe them as they exited. At the scene, Fraction identified defendant as "the gentleman I saw carrying the handgun into the rear passenger side of the van."

¶ 5 Shortly thereafter, Chicago Police Officer Jesse Rodriguez (Rodriguez) asked Fraction to identify a handgun. Fraction described that gun in court as "the same color size of the handgun I saw the gentleman enter the van with." Fraction testified that she did not make any other observations about the handgun. Fraction further testified that during her 12 years of experience as a police officer, she had worked with handguns, was familiar with

them, and carried one herself. Despite this familiarity, Fraction could not give any description other than it was chrome, *and could not state* whether the handgun was a revolver or semi-automatic due to the manner in which the gun was being carried.

¶ 6 On cross-examination, Fraction testified that defendant held the gun by gripping the middle of it, with the barrel of the gun visible on one side of his hand and the handle of the gun on the other side. Fraction acknowledged that she did not tell defendant to drop the gun, nor did she attempt to stop the van. She further acknowledged that she did not observe any of the van's doors opening or any windows being rolled down. She never saw anyone remove an object from the van. Police removed three men from the van. About 20 minutes after the van was stopped, Fraction was asked to identify the gun found at the scene. Fraction did not identify the gun as being the item carried by the defendant, but she did opine that the item was the same color and size as the item she saw defendant carry into the van. Fraction did not submit the gun for fingerprint analysis, and was unaware if such testing had been done.

***2** ¶ 7 Rodriguez testified that he assisted with the stop of the van. Similar to Fraction, Rodriguez stopped his vehicle on the driver's side of the van. Rodriguez exited his vehicle, approached the van, and had a conversation with the driver. The police asked the three men inside the van to exit the vehicle. Defendant was removed from the back part of the van through the double doors that opened in the middle of the van on the passenger side. Fraction confirmed that the officers had stopped the correct vehicle and that defendant was the person she saw with a chrome gun. The officers patted down the three men and searched the vehicle, but did not find a weapon. While standing on the driver's side of the van, Rodriguez looked underneath the vehicle and saw a 9-millimeter chrome handgun on the ground. The gun was located near the rear passenger's side, almost in the middle of the van. Rodriguez crawled underneath the van, reached out his arm, and recovered the weapon. The gun was loaded with a bullet in the chamber. Defendant was arrested.

¶ 8 On cross-examination, Rodriguez testified that the middle side doors of the van opened outward rather than sliding open. Rodriguez acknowledged that he did not see those doors open prior to the time that defendant and the two other men were ordered out of the vehicle. He noted, however, that from his location on the driver's side of the van, he could not see those doors. The driver exited the driver's side of the van, and defendant and the front-seat passenger exited on the passenger's side. Rodriguez acknowledged that he never saw any of those men place or throw anything underneath the vehicle. In addition to Rodriguez and his partner, five other officers responded to the scene. One police vehicle blocked the front of the van and another blocked the rear to prevent it from moving. Rodriguez recovered the gun less than five minutes after the van was stopped. Rodriguez called for an evidence technician to the scene to retrieve the gun, but none were available. He acknowledged that he did not request the gun be tested for fingerprints.

¶ 9 The State presented stipulations that defendant was on parole at the time of this offense, and that he had never been issued a firearm owner's identification (FOID) card. The State also presented a stipulation that defendant had a 2011 prior conviction for UUW, and a 2006 conviction for aggravated battery with a firearm.

¶ 10 Defendant moved for a directed finding arguing that no officer saw any of the doors of the van open, nor did any officer see anyone throw anything underneath the van. Defendant further argued that the gun should have been analyzed for fingerprints. Defendant also pointed out that Fraction could only provide the color and size of the gun, and no further details about the weapon, such as its caliber. The State responded that Fraction was familiar with guns and credibly testified she saw defendant carrying a gun. The State further argued that Rodriguez testified that the gun was recovered from underneath the van in approximately the same location where defendant exited from the vehicle. In addition, the State argued that both the supreme court and the appellate court previously held that it was not necessary for the gun to be recovered to prove it was an actual gun.

¶ 11 The trial court stated that there were many possibilities as to how the gun ended up underneath the van, including a hatch in the middle or back of the van, or someone immediately kicked it there. The court observed that while "recovering a gun would ...assist in terms of more credibility with respect to the evidence and the eye-witness testimony," found, however, that it was not what was found under the van but Fraction's observations that were important stating "[the] bottom line is it's based on what the officer saw at the time that she saw the defendant

pass by her, and she say...she saw the defendant with a gun." The court noted that recovering a gun would lend more credibility to the evidence and the eyewitness's testimony. The trial court granted defendant's motion as to the two counts of AUUW that were based on his lack of a concealed carry license, and denied the motion as to all of the other counts.

***3** ¶ 12 In closing arguments, both parties repeated their arguments above. Defendant further pointed out that there were other police officers in front and back of the van, but no one testified that they saw a door open, or saw someone throw a gun underneath the van. The State further argued that the trial court could rely on the circumstantial evidence to make a reasonable inference that defendant placed the gun underneath the van. The State also pointed out that in prior armed robbery cases, both the supreme and appellate courts held that a civilian's testimony regarding a handgun was sufficient to establish that an object was a handgun. Therefore, the testimony from Fraction, a police officer who had experience with handguns, that she observed defendant with a handgun was sufficient to find him guilty.

¶ 13 The trial court found that Fraction's testimony regarding the manner in which defendant held the middle of the firearm was consistent with her being unable to identify exactly what type of firearm he possessed. The court pointed out that Fraction was familiar with firearms based on her work and training. The court found that Fraction testified "clearly and plainly and without impeachment that she saw a firearm, and that the defendant was the person holding that firearm." The court further found that neither Fraction nor Rodriguez would have been able to see anyone open the van door or throw an object out of the van due to their vantage points. It noted that Rodriguez observed the weapon underneath the van close to the door area where defendant, and only defendant, exited from, and that the weapon matched the color and size description given by Fraction.

¶ 14 The trial court also pointed out that this court recently held that a witness's unequivocal testimony that a defendant possessed a firearm was sufficient to show that he was armed or possessed a firearm within the meaning of the law. In addition, such testimony combined with circumstances under which the witness was able to view the weapon was sufficient to allow a reasonable inference that the weapon was actually a firearm. Consequently, the court found that the State need not present a firearm in order for the trier of fact to find that the defendant possessed one specifically finding that "[I]n the absence of a recovered firearm, the witnesses' unequivocal testimony that they observed the defendant carrying a firearm is sufficient." The court concluded that Fraction provided "unequivocal testimony" that she observed defendant carrying a firearm on the street, and found him guilty of all of the remaining counts. At sentencing, the court merged all of the counts into the armed habitual criminal offense, and sentenced defendant to seven years' imprisonment.

¶ 15 ANALYSIS

¶ 16 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because it failed to present sufficient evidence that he possessed a firearm as defined by the Illinois Criminal Code (720 ILCS 5/2-7.5 (West 2014); 430 ILCS 65/1.1 (West 2014)). Defendant maintains that Fraction's testimony was not sufficient proof to sustain his conviction because she was unable to describe the firearm with any detail beyond its silver color. He also asserts that her testimony did not address the statutory requirement that the gun be a firearm as defined by statute. Defendant further claims that the weapon recovered from underneath the van was irrelevant based on the trial court's comment that its guilty finding was based on Fraction's observations when defendant passed by her. He argues, however, that there was no evidence that he, or anyone else, tossed the gun under the van.

¶ 17 The State responds that Fraction's unequivocal testimony that she observed defendant holding a firearm was, alone, sufficient to prove he possessed a firearm. The State further argues that Fraction's testimony was supported by additional evidence, including her identification of the recovered gun as having the same color and size as the firearm she saw defendant holding, and Rodriguez's testimony that he recovered a chrome gun from the area underneath the van that was closest to the area where defendant exited that vehicle. The State asserts that it was reasonable for the trial court to infer that defendant placed the gun under the van as he exited.

***4** ¶ 18 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether, after viewing the evidence in the light

most favorable to the State, any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48, 377 Ill.Dec. 1, 1 N.E.3d 888 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 328 Ill.Dec. 1, 903 N.E.2d 388 (2009). Under this standard, all reasonable inferences from the evidence must be viewed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42, 369 Ill.Dec. 759, 987 N.E.2d 386.

¶ 19 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228, 336 Ill.Dec. 223, 920 N.E.2d 233 (2009). However, merely because the trier of fact accepted certain testimony or made inferences based on the evidence does not guarantee the reasonableness of those decisions. *People v. Ross*, 229 Ill. 2d 255, 272, 322 Ill.Dec. 574, 891 N.E.2d 865 (2008). A conviction will be reversed where the evidence is so unsatisfactory, improbable, or unreasonable that there exists a reasonable doubt of the defendant's guilt. *Id.*

¶ 20 To prove defendant guilty of being an armed habitual criminal in this case, the State was required to show that he knowingly or intentionally possessed a firearm, after having been previously convicted of UUWF in case number 10 CR 12841, and aggravated battery with a firearm in case number 05 CR 2372. 720 ILCS 5/24-1.7(a) (West 2014). To prove defendant guilty of the UUWF charges, that State had to prove that he knowingly possessed a firearm or ammunition on his person, after having been previously convicted of either of the above felony offenses. 720 ILCS 5/24-1.1(a) (West 2014). To prove defendant guilty of the AUUW charges, the State had to show that he knowingly carried a handgun, pistol or revolver on his person while he was on a public street, was not on his own land or in his own abode, and he did not have a valid FOID card. 720 ILCS 5/24-1.6(a)(1)/(3)(c), (a)(2)/(3)(c) (West 2014).

¶ 21 The legislature has defined what a "firearm" is. Section 2-7.5 of the Code adopted the definition of "firearm" provided in section 1.1 of the FOID Act. See 720 ILCS 5/2-7.5 (West 2014); 430 ILCS 65/1.1 (West 2014). A "firearm"

> "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; excluding, however:
>
> (1) any 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;
>
> (1.1) any pneumatic gun, spring gun, paint ball gun, or B-B gun which expels breakable paint balls containing washable marking colors;
>
> (2) any device used exclusively for signaling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission;
>
> (3) any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition; and
>
> (4) an antique firearm (other than a machine-gun) which, although designed as a weapon, the Department of State Police finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon." 430 ILCS 65/1.1 (West 2014).

***5** ¶ 22 The plain language of the statute clearly states that only a device, regardless of what it is called, that is designed to expel a projectile(s) by the action of an explosion or the expansion of gas or the escape of gas is a "firearm," and that other "guns" are not "firearms," the possession of which are prohibited under the statutory provisions at issue in this case. In this case, the trial court specifically stated that its finding was based on the observation of defendant by Sergeant Fraction as defendant walked down the street. The gun that Rodriguez recovered from underneath the van was not introduced at trial. At least six police officers were on the scene at the time that defendant and the other two men were removed from the van. However, there was no testimony that anyone observed defendant or one of the men discard the gun under the van. It is unknown how the gun came to be located there. Consequently, the trial court found that Rodriguez's testimony regarding the recovered

gun was not relevant to its finding that defendant illegally possessed a firearm. The court expressly found that the possessory offense was based solely on Fraction's observations of defendant when he walked past her vehicle, and that her testimony alone that she observed him in possession of a gun at that time was sufficient to find defendant guilty.

¶ 23 We acknowledge that in several armed robbery cases, when determining whether an actual "firearm," as defined by the statute, was used during the offense, this court has held that "[u]nder this broad definition, unequivocal testimony that the defendant held a firearm constitutes circumstantial evidence sufficient to show the defendant was armed within the meaning of the statute." *People v. Jackson*, 2016 IL App (1st) 141448, ¶ 15, 407 Ill.Dec. 674, 64 N.E.3d 52. See also *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 36, 412 Ill.Dec. 523, 75 N.E.3d 503. In *Jackson*, we pointed out that "courts have consistently held that eyewitness testimony that the offender possessed a firearm, combined with circumstances under which the witness was able to view the weapon, is sufficient to allow a reasonable inference that the weapon was actually a firearm." *Jackson*, 2016 IL App (1st) 141448, ¶ 15, 407 Ill.Dec. 674, 64 N.E.3d 52 (and cases cited therein). Consequently, our supreme court has held that in cases involving offenses such as armed robbery and aggravated vehicular hijacking, the State is not required to present a firearm in order for the trier of fact to find that the defendant possessed one. See *People v. Washington*, 2012 IL 107993, ¶ 36, 360 Ill.Dec. 539, 969 N.E.2d 349 (holding that the jury could reasonably infer the defendant possessed a real gun based on the victim's unequivocal testimony and the circumstances under which he was able to view the gun); *People v. Wright*, 2017 IL 119561, ¶¶ 76-77, 418 Ill.Dec. 866, 91 N.E.3d 826 (applying the rationale from *Washington* to reach the same disposition).

¶ 24 We find these armed robbery cases distinguishable from the case at bar, which involves only an act of mere possession. In armed robbery cases, the underlying offense is robbery, the forcible taking of another's property. To prove robbery, there is no requirement to prove that a firearm was used in the taking. *People v. Lampton*, 385 Ill. App. 3d 507, 511-12, 325 Ill.Dec. 633, 898 N.E.2d 680 (2008). Use of a firearm during the course of a robbery is an aggravating factor that if proven, increases the severity of the crime and elevates the penalty. *Lampton*, 385 Ill. App. 3d at 512, 325 Ill.Dec. 633, 898 N.E.2d 680. As such, circumstantial evidence may be used to create an inference that a firearm was used in the course of the robbery sufficient to establish the aggravating factor to support the more serious offense of robbery while armed with a firearm. *Lampton*, 385 Ill. App. 3d at 512, 325 Ill.Dec. 633, 898 N.E.2d 680. That is not the case with possessory firearm offenses where the item possessed cannot be inferred from circumstantial evidence but must be proven beyond a reasonable doubt to be a firearm as defined by the statute. *People v. Crowder*, 323 Ill. App. 3d 710, 712, 257 Ill.Dec. 539, 753 N.E.2d 1165 (2001). Armed robbery cases usually involve the offender pointing a gun, and ordering the victim to relinquish money and valuables. There is a threat that if the victim does not comply, the defendant will shoot the victim. For example, in *Washington*, the defendant pointed a gun at the victim's head and forced his way into the victim's delivery truck with an accomplice. *Washington*, 2012 IL 107993, ¶ 10, 360 Ill.Dec. 539, 969 N.E.2d 349. The defendant kept the gun pointed at the victim's head, ordered him to sit on a safe between the seats and not to move as the accomplice drove the van, *and took* the victim with them. *Id.* Similarly, in *Wright*, the codefendant entered a restaurant, revealed a black semiautomatic gun tucked into the waistband of his pants, stated that it was a robbery, and ordered the manager to take him to the office. *Wright*, 2017 IL 119561, ¶ 9, 418 Ill.Dec. 866, 91 N.E.3d 826. While walking, the manager felt something sharp against his back that he believed was a gun. *Id.* ¶ 10. In the office, the codefendant ordered the manager to open the safe and give him the money inside. *Id.* In both cases, although no gun was recovered, our supreme court found that given the unequivocal testimony of the victims, and the circumstances under which they viewed the gun, the juries could reasonably infer the defendants possessed real guns. *Washington*, 2012 IL 107993, ¶ 36, 360 Ill.Dec. 539, 969 N.E.2d 349; *Wright*, 2017 IL 119561, ¶¶ 76-77, 418 Ill.Dec. 866, 91 N.E.3d 826.

***6** ¶ 25 In *Crowder*, 323 Ill. App. 3d at 712, 257 Ill.Dec. 539, 753 N.E.2d 1165, we affirmed the dismissal of an indictment for unlawful possession of a firearm where the state destroyed the firearm before the defendant had an opportunity to examine it. The State argued that the trial court was in error when it dismissed the indictment because the State could not prove the firearm was operable. We found that "[e]ven if the State did not have to prove the firearm was operable, it still had to prove that it was a *firearm.* As defendant points out, for all we

know, the 'gun' seized from defendant could have been a toy, a nonfunctioning replica, or a 'piece of wood or soap.' " Without being able to inspect the weapon and examine it and its outward appearance, defendant would not be able to refute in any meaningful way the State's contention that it was a firearm." (Emphasis in original). Absent proof, either by inspection or analysis or by other verifiable means, that the item possessed is a device which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas, there is no basis to determine whether the item is a firearm, an *exempted* antique, B-B gun "a toy, a nonfunctioning replica, or a piece of wood or soap."

¶ 26 The trial court was clear that defendant's conviction is based solely on Fraction's testimony that from fifty feet away she observed him walking on the street holding what appeared to be a gun in his hand. She testified that defendant held the gun by gripping the middle of it, with the barrel visible on one side of his hand and the handle on the other side. Consequently, Fraction was unable to provide any details about the gun other than its color. Fraction provided no testimony that would remotely establish beyond a reasonable doubt that the object she observed in defendant's hand met the statutory definition of a "firearm." There was no evidence that what she observed was, in fact, a device "designed to expel a projectile" or that the item in his hand was an item specifically exempted under the statute, like a B-B gun or an antique. 430 ILCS 65/1.1 (West 2014). Therefore, reasonable doubt existed as to whether the object she observed was an item specifically excluded from the definition of a "firearm," such as a BB gun or pneumatic gun. *Id.*

¶ 27 We hold that the state failed to meet its burden to prove beyod a reasonable doubt possessory firearm offenses where there was no evidence that the item observed in the defendant's possession was a device "designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," as defined by the statute. 430 ILCS 65/1.1 (West 2014).

¶ 28 Here, we find that Fraction's testimony that she observed defendant in possession of an item that she believed was a firearm, standing alone, was not sufficient to sustain defendant's conviction. There was no evidence that the item she observed met the statutory definition of a firearm. Accordingly, we find that the State failed to prove defendant guilty of being an armed habitual criminal, UUWF, and AUUW, and reverse his conviction.

¶ 29 When a conviction is reversed based upon insufficient evidence, the double jeopardy clause prohibits the State from retrying the defendant, and the only remedy that is appropriate is a judgment of acquittal. *People v. Williams*, 239 Ill. 2d 119, 133, 346 Ill.Dec. 50, 940 N.E.2d 50 (2010).

¶ 30 CONCLUSION

¶ 31 For these reasons, we reverse the judgment of the circuit court of Cook County and enter a judgment of acquittal.

¶ 32 Reversed.

Justice Pierce concurred in the judgment and opinion.

Presiding Justice Mikva specially concurred, with opinion.

¶ 33 MIKVA, J., specially concurring, in part.
¶ 34 I join in all aspects of this opinion, other than the court's suggestion, supra ¶¶ ——– ——, that the evidence needed to prove the illegal possession of a firearm is somehow different than the evidence needed to prove that a defendant possessed a firearm during a robbery. In both situations the State is required to prove beyond a reasonable doubt that what the defendant possessed was a firearm, as defined by the statute. See supra ¶ ——. And in both situations circumstantial evidence, if strong enough, may be relied upon to prove this necessary fact. Our supreme court has repeatedly emphasized that "a criminal conviction may be based solely on circumstantial evidence" (People v. Brown, 2013 IL 114196, ¶ 49, 377 Ill.Dec. 1, 1 N.E.3d 888 (citing People v. Wheeler, 226 Ill. 2d 92, 120, 313 Ill.Dec. 1, 871 N.E.2d 728 (2007); People v. Hall, 194 Ill. 2d 305, 330, 252 Ill.Dec. 653, 743 N.E.2d 521 (2000)) and that "the same standard of review applies whether the evidence is direct or circumstantial" Id. (citing People v. Cooper, 194 Ill. 2d 419, 431, 252 Ill.Dec. 458, 743 N.E.2d 32 (2000)).

*7 ¶ 35 I concur totally in the court's conclusion that, in this case, Sergeant Fraction's testimony did not "remotely establish beyond a reasonable doubt that the object she observed in defendant's hand met the statutory definition

of a 'firearm.' " Supra ¶ ——. And I share the court's concern that defendants could be found guilty of serious felonies based on conclusory testimony that a "firearm" was involved, with no evidence to prove that the object observed met the statutory definition of a "firearm."

¶ 36 This concern applies equally where a defendant is subject to a firearm enhancement that increases the penalty for a crime by fifteen years or more. People v. Jackson, 2016 IL App (1st) 141448 ¶ 1, 407 Ill.Dec. 674, 64 N.E.3d 52, People v. Fields, 2017 Il app (1st) 110311-B, ¶ 51, 412 Ill.Dec. 523, 75 N.E.3d 503. As we noted in Fields, "contrary to [the defendant's] assertion that the State must prove the gun is a firearm by direct or physical evidence, unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed during a robbery." Id. at ¶ 36. What distinguishes this case from Fields and Jackson is not the type of crime charged but the quality of the evidence. For all of the reasons laid out convincingly by the court, the evidence relied on by the State in Mr. McLaurin's case is simply insufficient to prove that the object Sergeant Fraction testified that she saw him holding met the statutory definition of a "firearm," i.e., that it was a weapon "designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," not falling within any statutory exclusion.

All Citations

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there.

MS. MIEHLICH: Pardon?

THE COURT: But I don't know who put the snow there.

MS. MIEHLICH: Okay. Fair enough. What we do know is, you have the credible testimony of Sergeant Fraction who saw the defendant with a gun and she identified the gun that was recovered that Officer Rodriguez recovered from underneath that same vehicle as the gun that she saw the defendant with.

We do believe we have met our burden, we ask you to find the defendant guilty.

THE COURT: All right. Chicago police officer, who's on surveillance on a matter unrelated to the defendant, sees the defendant in plain daylight come out of a building, walk near her vehicle holding a firearm. The officer testifies to the way that the defendant is holding the firearm, which is consistent with not being able to say exactly what type of firearm because of the way the defendant's hand was in the middle of the firearm. She's an officer familiar with firearms, works with firearms, trained with firearms, and testifies clearly and plainly and without impeachment that she saw a firearm, and that the

defendant was the person holding that firearm.

She calls in for the vehicle to be stopped. She follows the vehicle. While she doesn't see anyone open the vehicle, throw anything out, she takes up a position, a vantage point that is such that she wouldn't have been able to see.

The n officer who testifies says that he didn't see anybody open the door or throw out anything out because his vantage point would have been such that he wouldn't have been able to see that. After the officers have some assurance with respect to the stop regarding the proper vehicle, they searched the vehicle and the individuals and do not find a weapon. The officer looks under the vehicle as close to the door area where the defendant exited out of, and only the defendant, he sees a weapon that matches the description of size and color given by Officer Fraction. The defendant is arrested and charged.

The defendant having previously been convicted of unlawful use or possession of a weapon by a felon and aggravated battery with a firearm, and the defendant did not have a valid firearms owners identification card. And that the weapon was fully loaded and had to be unloaded by the officer when it

was recovered.

We know, as indicated by the Supreme Court and the Illinois Appellate Court including an opinion in which I was just affirmed by the Appellate Court only a few weeks ago that the unequivocal testimony of a witness that the defendant held possessed a firearm constitutes substantial evidence sufficient to show the defendant was armed or possessed a firearm within the meaning of the law.

In this case, in most robbery cases, we have a civilian, in this case we have a trained police officer. Some of these courts have consistently held that eye-witness testimony that a defendant possessed a firearm combined with circumstances under which the witness was able to view the weapon is sufficient to allow a reasonable inference that the weapon was actually a firearm. Consequently the State need not present a firearm in order for the trier of fact to find the defendant possessed one.

In the absence of a recovered firearm, the witnesses unequivocal testimony that they observed the defendant carrying a firearm is sufficient.

The unequivocal testimony in this case is that the defendant was seen on the street carrying a

firearm. And based on his status as to Counts 1 through 7, 9 and 11, there will be a finding of guilty.

MS. MIEHLICH: Judge, we would ask that the defendant's bond be revoked.

THE COURT: Bond will be revoked. It will be no bail, no EM. A P.S.I. order will be entered.

All right. We do post-trial motion and sentencing on Fridays.

(Whereupon there was a short pause in the proceedings)

MR. MILLER: How about the 21st?

THE COURT: If you need time to amend, then we will grant you time to amend, but please timely file it, and if you need to amend, we will grant you leave to amend. By agreement --

MR. MILLER: 21st is fine.

THE COURT: By agreement, October 21 for post-trial motion and sentencing. Defendant is remand had.

(WHICH WERE ALL THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE)

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned deposes and states that on July 30, 2019, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and served upon the following e-mail addresses of record:

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Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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