No. 1-09-2855

FOURTH DIVISION
April 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 13834
	)	
RAMON WHITEHEAD,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred in the judgment.

O R D E R

HELD: Attempted armed robbery conviction affirmed over claim that witness testimony describing gun was insufficient evidence of its character as a firearm or dangerous weapon.

Following a bench trial, defendant Ramon Whitehead was convicted of attempted armed robbery under a theory of accountability and sentenced to 10 years' imprisonment. On

appeal, defendant contends that the State failed to prove beyond a reasonable doubt that the gun used by his companion was a firearm or dangerous weapon, and that his conviction should be reduced to attempted robbery.

The record shows, in relevant part, that about 2:37 a.m., on July 10, 2008, Darrell Townsend, Darryl Jones, and Mario Burke were at 538 West 97th Street in Chicago, when they were approached by defendant and a companion. At that time, Townsend was on the sidewalk in his wheelchair, and Jones and Burke were standing near the curb. The companion pulled a gun out from under his shirt and held it about two feet from Townsend's head, aimed it at his left temple, and one of the two robbers told everyone to empty their pockets.

Defendant took $70 and a red Bic cigarette lighter from Burke, and also took the cigarette out of Burke's mouth to smoke it himself. Meanwhile, his companion took Townsend's state identification card from his pocket, but nothing from Jones, whose pockets were empty. Before leaving, defendant urged his companion to "shoot the motherfuckers" and "[k]ill them," but he did not, and the robbers walked away.

As they did so, Jones and Burke followed them to an alley and saw them enter a dark blue van. Jones and Burke took Burke's car in pursuit of the van while Burke called 911. They flagged down Chicago police officer Charmane Kielbasa near 95th and

Halsted Streets, told her what had happened, and provided a description of the robbers, the van, and where the van was located. She told them to stay where they were and went looking for the vehicle.

As Officer Kielbasa turned onto Union Avenue, she saw a van that matched the description given to her by Jones and Burke and sent out a flash message concerning it. She then approached the side of the van with her gun drawn and waited for backup to arrive. Suddenly, the van door slid open, and defendant's companion ran out and disappeared into nearby gangways. Officer Kielbasa started in his direction, but stopped because she wanted to wait for backup. Once additional officers arrived, they found defendant and two females inside the van, and recovered a red lighter from defendant in the ensuing search. When the three victims arrived at this location, a showup was conducted and each victim identified defendant as one of the robbers.

At trial, each victim testified, to some degree, as to the gun used by defendant's companion. Townsend, who testified that he had seen guns before, described it as a nickel-plated or chrome nine-millimeter with a black handle, about five to six inches long. Jones testified that it was a chrome nine-millimeter pistol with a black handle, about five to six inches long. Burke described the gun as a chrome-plated nine-millimeter, about six inches long.

After the State rested its case-in-chief, defendant moved for a directed finding, arguing specifically that the State failed to prove that he was armed with a firearm or dangerous weapon, citing *People v. Ross*, 229 Ill. 2d 255 (2008). The State conceded that defendant was not armed, but argued that the testimony of its witnesses sufficiently indicated that his accomplice was armed with a weapon. The court denied defendant's motion, and defendant rested without calling any witnesses.

After closing arguments, the court continued proceedings until the next day so that it could review *Ross* before entering its findings. When the proceedings resumed, the court found that the three victims consistently testified that defendant's accomplice was armed with a nine-millimeter handgun and that they were in a good position to see the gun, as it was pointed at Townsend's head. The court also found their testimony further enhanced by defendant's statements urging his accomplice to shoot the victims, which indicated defendant's belief that the gun was an operable, loaded and dangerous firearm. The court ultimately found defendant guilty of two counts of armed robbery and one count of attempted armed robbery under an accountability theory.

At defendant's post-trial motion and sentencing hearing, the court reconsidered its earlier findings, and entered revised findings of guilty on the charge of attempted armed robbery and not guilty on the remaining two charges of armed robbery. In

this appeal from that judgment, defendant contends that the State failed to prove that his companion used a firearm or dangerous weapon during the attempted armed robbery and that his conviction should be reduced to attempted robbery.

Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court 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. *Ross*, 229 Ill. 2d at 272. It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

In this case, defendant was found guilty of attempted armed robbery under an accountability theory in that he intentionally aided and abetted another in the commission of that offense. 720 ILCS 5/5-2(c) (West 2008). The armed robbery statute requires the taking of property from another by use of force or the threat

of imminent use of force (720 ILCS 5/18-1(a) (West 2008)) while armed with a dangerous weapon or firearm (720 ILCS 5/18-2(a)(1), (2) (West 2008)). A defendant is guilty of attempted armed robbery where, with the intent to commit that offense, he does any act which constitutes a substantial step toward its commission. 720 ILCS 5/8-4(a) (West 2008).

In challenging his conviction, defendant focuses solely on the sufficiency of the evidence to establish that his accomplice was armed with a firearm or dangerous weapon. Under the Criminal Code, a "firearm" is defined in Section 1.1 of the Firearm Owners Identification Card Act (720 ILCS 5/2-7.5 (West 2008)), as any device which is designed to expel a projectile by the action of an explosion, or expansion or escape of gas, with various exclusions, such as B-B guns and antique firearms (430 ILCS 65/1.1 (West 2008)). Whether an object qualifies as a dangerous weapon, on the other hand, is generally a question for the trier of fact as to whether it was sufficiently susceptible to use in a manner likely to cause serious injury. *People v. Skelton*, 83 Ill. 2d 58, 66 (1980).

Viewed in the light most favorable to the prosecution, the evidence established beyond a reasonable doubt that defendant's accomplice was armed with a firearm. The three witnesses testified consistently that defendant's accomplice brandished a metallic nine-millimeter handgun about six inches long. Townsend

and Burke also testified that defendant urged his accomplice to shoot the victims, revealing his knowledge that his accomplice was armed with a loaded, operable firearm. The court found the victims' testimony credible in this regard (*Sutherland*, 223 Ill. 2d at 242), and we cannot say that its decision was so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt (*Smith*, 185 Ill. 2d at 542).

The same result was obtained in *People v. Toy*, No. 1-07-2969, slip op. at 32 (Ill. App. Jan. 21, 2011), where the court found sufficient evidence that defendant was armed with a firearm based on the testimony of two witnesses who stated that defendant had a gun and that he threatened to kill them. Similarly, in the instant case, where Townsend, Burke, and Jones testified that defendant's accomplice had a gun, and Townsend and Burke testified that defendant urged his accomplice to shoot them, we likewise conclude that the State presented sufficient evidence to allow the trier of fact to find that defendant's accomplice was armed with a firearm beyond a reasonable doubt. *Toy*, No. 1-07-2969, slip op. at 32.

Defendant, nonetheless, argues that because the gun was never recovered or photographed and only testimonial evidence was offered, the State did not prove that the gun met the definition of firearm beyond a reasonable doubt, citing *Ross*. In *Ross*,

however, the issue, was not, whether the pellet gun was a firearm, but rather, whether it constituted a dangerous weapon, and the court found insufficient evidence that it was because neither the gun, nor photographs of the gun, were presented at trial, there was no evidence it was loaded or brandished as a bludgeon, and there was no evidence of its weight or composition. *Ross*, 229 Ill. 2d at 277.

Under the armed robbery statute, "firearm" and "dangerous weapon" are clearly two different offenses under different subsections. *Toy*, No. 1-07-2969, slip op. at 29-30. Here, we found that evidence proved that defendant's accomplice was armed with a firearm to sustain defendant's conviction of attempted armed robbery, and need not address whether it also qualified as a dangerous weapon under *Ross*.

For the reasons stated, we affirm the judgment of the circuit court of Cook County.

Affirmed.