

No. 1-09-1525

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                      | ) | Circuit Court of  |
| Plaintiff-Appellee,                  | ) | Cook County.      |
|                                      | ) |                   |
| v.                                   | ) | No. 04 CR 26488   |
|                                      | ) |                   |
| THARINE PARTEE,                      | ) | The Honorable     |
|                                      | ) | Marcus R. Salone, |
| Defendant-Appellant.                 | ) | Judge Presiding.  |

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PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Evidence supported the trial court's finding that defendant's mental state shifted from an unreasonable belief that self-defense was warranted, leading to his convictions for the second-degree murder of two individuals, to a requisite intent to kill without lawful justification, as required to sustain his conviction for attempted first-degree murder. The trial court correctly found that the shootings did not transpire within a single course of conduct and therefore defendant's aggregate sentence was well within the statutory limits.

¶ 2 Following a bench trial, defendant Tharine Partee was found guilty of two counts of second-degree murder and one count of attempted first-degree murder. Defendant received

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consecutive sentences of 25 years in prison for each count of second-degree murder and 30 years in prison for attempted first-degree murder, for an aggregate sentence of 80 years. On appeal, defendant asserts the evidence was insufficient to sustain his conviction for attempted first-degree murder because the trial court's finding that he believed he was legally justified in using self-defense precludes a finding that he intended to kill without legal justification. Defendant also asserts the aggregate sentence of 80 years in prison must be reduced because the convictions occurred in a single course of conduct and thus, the sentence exceeds the maximum terms authorized under section 5-8-2 of the Code of Corrections (the Code) (730 ILCS 5/5-8-2 (West 2004)). The parties agree that the mittimus should be amended to reflect 1125 days served in presentence custody. We affirm the judgment but order that the mittimus be corrected.

¶ 3

### BACKGROUND

¶ 4 On August 31, 2004, defendant shot and killed 15-year-old Joshua Dent and 16-year-old Antonio Washington. Additionally, he shot and gravely injured 20-year-old Jamaal Durham. This tragedy began when Shontell Littlejohn (Shontell) had a brief altercation with defendant, prompting her to call her brother, Charles Littlejohn (Charles), and his friend, Ivan Day (also known as Mario Brown),<sup>1</sup> apparently telling them that defendant was bothering her about some derogatory statements that she had allegedly made. Following those telephone conversations, Charles contacted his friends, including Washington and Dent, and they went to confront defendant. It is undisputed that Dent and Washington engaged in a physical altercation with defendant. It is also undisputed that defendant later shot Dent, Washington and Durham.

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<sup>1</sup>For consistency, we refer to this witness solely as Day throughout.

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Defendant maintained at trial that he acted in self-defense in all three instances.

¶ 5 At trial, Durham testified that on the day of the incident, he was at Daley College when his friend, Charles, received a telephone call from his sister, Shontell. Charles then asked Durham to take him home to 57th and Union. At approximately 5 p.m. Charles went to 56th and Union with a number of friends. When Durham joined the group shortly thereafter, it looked like a fight had ensued and defendant appeared to be "roughed up." Durham did not observe any weapons. Charles and his group of friends, including Washington, Dent and Durham, then proceeded back to Charles' house and Charles went upstairs, while the rest of the group loitered outside of the house. Defendant walked up to the group and asked for Charles. When the group told defendant that Charles did not want to talk to him, Durham observed defendant pull a gun out of his back pocket and shoot Washington. Durham then fled up the stairs to Charles' house and felt a bullet go through his left arm and a second bullet go through his back. Durham recalled possibly hearing 10 to 12 shots being fired.

¶ 6 Raymond DuPlasser, a 60-year-old ex-marine, testified that he was sitting on his neighbor's front porch across the street from the Littlejohn residence when he observed someone hand Charles a gun as a group of approximately six youths headed toward 56th Street. They returned roughly 20 minutes later and stood along the fence in front of Charles' house. DuPlasser then heard defendant yell, "Little Charles," followed by approximately seven gunshots from what sounded like one firearm. DuPlasser observed defendant in the act of shooting. DuPlasser then saw one of the young men who had been shot brace himself on DuPlasser's truck that was parked in the street and saw a second man laying in the vacant lot adjacent to his home. When asked on

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direct examination whether the shooting appeared to be deliberate or done in a random manner, DuPlasser replied, "[h]e shot right into the crowd." DuPlasser could not tell whether defendant was aiming at anyone and that he observed that everyone was running away from defendant.

¶ 7 L.C. Norman testified that he witnessed the brief altercation between defendant, Washington and Dent on the day of the shooting. He observed Washington get out of a car and swing at defendant. Dent joined in. Norman also observed defendant swing back. Following the altercation, Norman drove to Charles' house. Norman essentially corroborated Durham's testimony, but added that Norman did not see anyone approach defendant or see anyone besides defendant with a gun.

¶ 8 Ivan Day testified that before the altercation between Washington, Dent and defendant, Shontell called him and said, "this boy down there putting his hands on me and such," which is why Day went to join Charles. After the altercation, Day heard one of defendant's friends say, "let's get the guns." Day, who testified that he was also known as Mario Brown, essentially corroborated both Durham and Norman's testimony, but in contrast to Norman's testimony, Day testified that he observed another gun, a High Point .45-caliber semiautomatic handgun, in Washington's car. Day suggested the handgun was transferred to a Cutlass parked on Charles' street. Furthermore, the testimony of Jeremy Cozart, who was present at both the altercation and shooting, corroborated Day's testimony.

¶ 9 Detective Thomas Kelly testified that when he arrived at the scene, he questioned a number of witnesses and they told him to look for "T-Bone" or "Tone Bone." He searched an unlocked 1993 Oldsmobile registered to Denise Washington, Washington's mother, and found a

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High Point .45-caliber semiautomatic handgun secreted under the front passenger seat. Detective Kelly also testified that Day identified defendant as the shooter from a photo array, which led to the issuance of an arrest investigation alert. Detective Kelly later questioned Durham in the hospital, where he identified defendant as the shooter from a photo array.

¶ 10 Detective Brian McKendry testified that on October 7, 2012, he apprehended defendant in the area of California and 26th Street. Following the arrest, Durham, along with Norman, Day and Cozart, identified defendant as the shooter from a lineup.

¶ 11 Forensic Investigator William Moore identified a photograph of a fired .40-caliber cartridge case recovered at the scene along with nine .40-shell casings. He also identified the gun found in Washington's car. In addition, the parties stipulated that the High Point .45-caliber semiautomatic handgun was inoperable due to a missing firing pin and that the casings found could not have been fired from that particular gun.

¶ 12 Defendant testified that at approximately 4:30 p.m. on the day of the incident, he picked up his son at 56th and Emerald. He stopped to speak with some friends at 55th and Union when Shontell walked by. Defendant objected to her gossiping about him to his girlfriend by shouting, "keep my name out of your mouth." She started crying and was separated from defendant by his friend Eric Carson. Shortly thereafter, Charles and his friends walked down the street.

Defendant observed Day with a machine gun and Charles with a handgun. A car pulled up with three more people and defendant told Charles that defendant did not touch Shontell. Immediately thereafter, Washington punched defendant and as the two men were wrestling, Dent hit defendant over the head from behind with a gun. Charles pointed his gun at defendant's friends to stop

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them from intervening. After the altercation, defendant observed Day give his gun to Dent, who placed it in Dent's car.

¶ 13 Defendant testified that he went to look for his son when his son's mother, Dorian Williams, drove up to see if defendant was alright. Defendant told her he was going to "go down to where Little Charles was and squash everything." When he approached Charles' house, he observed Washington, Charles' girlfriend and Dent leaning on a car. Durham and Norman were on the sidewalk. Dent was walking with his hand under his shirt toward him which prompted defendant to pull-up his shirt and say, "I wasn't on that and I came down here to talk to Little Charles." Defendant testified to having no weapons on his person, but observed Day sitting on the first step of the porch with the previously seen machine gun in his lap. When Charles' girlfriend went inside, Day placed the machine gun on the bottom step concealing it with a t-shirt and joined Durham on the sidewalk.

¶ 14 At this time, Washington walked towards defendant "swinging" and saying "Little Charles does not want to talk to you." Defendant blocked Washington's punch and they started wrestling, while defendant heard Durham say, "shoot him." Washington pulled an automatic handgun from his waistband and tussled for it with defendant. Defendant heard a click and heard Dent tell Washington to move back. Washington eventually let go of the gun but it fired as defendant stumbled back. Defendant testified that he did not intentionally fire the first shot. When he looked up, Dent was coming toward him with a gun and defendant shot three or four times in Dent's direction, to which Washington was running. People started running toward the street, but Durham ran back toward the house. Defendant then saw Durham pick up the machine

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gun and point it at defendant, who was afraid and started shooting at Durham. Defendant ran toward 57th Street and tossed the gun into someone's backyard. Defendant was arrested approximately six weeks later.

¶ 15 Defendant's testimony was corroborated by Eric Carson and Lashelle Hill, although neither was present at the shooting itself. Carson corroborated defendant's testimony concerning his exchange with Shontell. After the altercation, Carson observed that Charles had a handgun and saw Dent place a gun in a vehicle. In addition, Hill testified that she witnessed the altercation from her friend's porch. She identified Dent from a photo array as the individual who pointed a gun at defendant's friends. She also observed that Charles and another individual both had guns.

¶ 16 Latoya Cauley and Thomas Cauley both testified that they observed Williams speeding down the street and followed her. They then saw defendant arguing with a young man in front of Charles' house. As Latoya and Thomas approached, defendant and Washington started wrestling and fell out of view. A few seconds later, Latoya and Thomas heard gunshots and went back in the opposite direction. They did not observe the actual shooting, know how the altercation occurred or see anyone with a gun.

¶ 17 Williams testified that she was on her way to the video store with her cousin Jimmy Bobo when her son ran out of the alley on 56th Street yelling, "them [sic] going to kill his daddy." She went to check on defendant and found him with torn clothes and blood on his mouth, but saw no weapon on his person. She then went to 57th and Union and saw defendant arguing with Washington. Washington tried to strike defendant, who blocked the punch and pushed

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Washington off. Washington pulled out a gun and wrestled for it with defendant. Williams observed Dent go to a black car and return with a gun. She also heard him say, "look out G." Williams backed her car down the street and heard gun shots. Williams testimony was substantially corroborated by Jimmy Bobo.

¶ 18 After closing arguments, the trial court found that DuPlasser's testimony was key because "both sides seem to agree that Mr. DuPlasser is the most objective witness. He is the only one without a horse in the race." The trial court found defendant guilty of the second-degree murder of Washington and the second-degree murder of Dent, based on an unreasonable belief in the need to use self-defense, as well as the attempted first-degree murder of Durham based on his intention to kill Durham without legal justification. The trial court subsequently denied defendant's motion for a new trial and sentenced him to consecutive terms of 25 years in prison for each count of second-degree murder and 30 years in prison for attempted first-degree murder, for an aggregate sentence of 80 years.

¶ 19

#### ANALYSIS

¶ 20 On appeal, defendant asserts the evidence is insufficient to sustain his conviction for attempted first-degree murder because the trial court's finding that defendant substantively believed that he needed to use self-defense as to Washington and Dent precludes a finding that defendant intended to kill Durham without legal justification. Where, as here, a 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 were

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proven beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In addition, the trier of fact determines the witnesses' credibility, the weight given to their testimony and draws reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). We will not substitute our judgment for that of the trier of fact on these matters. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Furthermore, to sustain a conviction for attempted first-degree murder, a defendant must have the specific intent to kill unlawfully. 720 ILCS 5/5-8-4(a) (West 2004); 720 ILCS 5/9-1 (West 2004); *People v. Lopez*, 166 Ill. 2d 441, 445 (1995).

¶ 21 Contrary to defendant's assertion, the evidence was more than sufficient to sustain his conviction. Defendant contends that the intent associated with a subjective belief that use of force was justified negates the intent to kill without lawful justification. When read in its entirety, however, the record shows that the trial court found defendant guilty of attempted first-degree murder because he acted with the requisite intent to kill without lawful justification when he shot Durham in the back as he attempted to flee to safety, in contrast to his mental state when he shot Washington and Dent.

¶ 22 At trial, the State and defendant provided the court with conflicting evidence. The trial court determined that "the truth lies somewhere in the middle" of the State's version and defendant's version of events. In addition, the trial court noted at the motion for a new trial that "the defendant's reliance upon the notion of self-defense was unreasonable," but the court also

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stated that it "attempted to re-create the environment, the mental state of the defendant," suggesting that defendant's belief, albeit erroneous, was genuine. The trial court found it persuasive that Washington and Dent were the same two individuals who engaged in a physical altercation prior to the shooting with defendant. Accordingly, the trial court convicted defendant of second-degree murder as to Washington and Dent. Nonetheless, the court found it could not "transfer the unreasonable reliance of self-defense to the shooting of Mr. Durham" because Durham was shot in the back when fleeing defendant. It appears that the trial court did not find defendant's testimony entirely credible. In addition, defendant was the only witness to suggest Durham was in possession of a machine gun. We find nothing in the record to give us pause to dispute the trial court's finding and will not substitute our judgment for that of the trier of fact.

¶ 23 In reaching this determination, we are unpersuaded by defendant's reliance on *People v. Reagan*, 99 Ill. 2d 238 (1983), and *Lopez*, 166 Ill. 2d at 445. In *Reagan*, the supreme court held that it was impossible to commit attempted voluntary manslaughter because one cannot intend to kill without lawful justification while at the same time unreasonably believe that one was justified in using force. *Reagan*, 99 Ill. 2d at 240. Subsequently in *Lopez*, the supreme court held that attempted second-degree murder did not exist in this state because it was impossible to intend the presence of the mitigating factor of imperfect self-defense. *Lopez*, 166 Ill. 2d at 449. In the case at bar, however, the trial court determined defendant was not acting in self-defense when he shot Durham and therefore, *Reagan* and *Lopez* do not apply to defendant's situation. The trial court found that the defendant's reliance on self-defense dissipated after he shot both Washington and Dent, apparently finding that these were the only victims that possessed

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weapons. The court found it improbable that defendant had even an unreasonable belief of self-defense once Durham ran up the stairs to flee. Based on the foregoing, we conclude the evidence was sufficient for the trier of fact to find defendant guilty beyond a reasonable doubt.

¶ 24 Defendant next contends that the trial court erred by sentencing him to an aggregate sentence of more than 60 years in prison in violation of section 5-8-4(c)(2) of the Code. This section provides, in pertinent part, as follows:

"[T]he aggregate of consecutive sentences for offenses that were committed as part of *a single course of conduct* during which there was no substantial change in the nature of the criminal objective shall not exceed the sum of the maximum term authorized under Section 5-8-2 for the 2 most serious felonies involved, but no such limitation shall apply for offenses that were not committed *as part of single course of conduct* during which there was no substantial change in the nature of the criminal objective."

730 ILCS 5/5-8-4(c)(2) (West 2004).

¶ 25 Defendant contends that his three convictions occurred during a single course of conduct because the shooting of several individuals in rapid succession over approximately one minute or less does not involve a substantial change in the nature of one's criminal objective. Contrary to defendant's suggestion, the decision in *People v. Miller*, 193 Ill. App. 3d 918 (1990), does not set forth that principle. In *Miller*, the reviewing court determined that the defendant's shooting of the two decedents was part of a single course of conduct, however, it based its finding on the facts of the case not because the shooting occurred in rapid succession as defendant suggests. *Id.* at 928-930. The *Miller* court concluded the defendant unreasonably believed he was protecting himself

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from the decedents' attack and therefore, there was no change in the motivation between the two shootings. *Id* at 929.

¶ 26 In contrast to *Miller*, the trial court here properly found defendant's shooting of Durham produced a substantial change in the nature of his criminal objective. Defendant is correct that the shootings of Washington and Dent are analogous to *Miller* in that defendant unreasonably believed he was acting in self-defense, but the evidence supported the trial court's finding that the defendant intended to kill Durham without lawful justification. The court noted during the hearing on defendant's motion for a new trial that "how you can transfer the unreasonable reliance to the shooting of M. Durham, maybe the appellate court can answer it." Based on the record before us, we accept the trial court's determination that there was a substantial change in the nature of defendant's criminal objective, and thus, defendant's sentences were not subject to section 5-8-4(1)(2). We need not calculate the maximum aggregate sentence permitted under that section.

¶ 27 Lastly, the parties agree that the mittimus should be corrected to reflect the 1125 days of credit for the time defendant served in presentence custody, as opposed to the 1102 days currently reflected on the mittimus. 730 ILCS 5/5-8-7(b)(c) (West 2004); *People v. Robinson*, 172 Ill. 2d 452 (1996). We agree. Accordingly, we order the clerk of the circuit court to correct the mittimus in a manner consistent with this order.

¶ 28 CONCLUSION

¶ 29 Based on the foregoing, we affirm the judgment of the circuit court and order that the mittimus be corrected.

¶ 30 Affirmed; mittimus modified.