

No. 1-12-2749

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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. 11 CR 16890
)	
MARCUS LLOYD,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 **Held:** We affirm, concluding the State proved defendant guilty beyond a reasonable doubt of two counts of aggravated battery with a firearm where one witness identified defendant at trial, two other witnesses identified defendant in pretrial statements they later recanted, and the trial court stated it did not believe defendant's version of events.

¶ 2 After a bench trial, defendant, Marcus Lloyd, was convicted of two counts of aggravated battery with a firearm and sentenced to concurrent six-year prison terms. He appeals, asserting the State failed to prove him guilty beyond a reasonable doubt because it presented unreliable

evidence and he provided corroborated testimony that he was not the initial aggressor and that the gun's discharge was accidental. For the following reasons, we affirm.

¶ 3 At trial, Robyn Gregory testified that she went shopping with her brother, Demetrius Smith, at Mozart Foods on 63rd and Mozart at around 5 p.m. on June 22, 2011. When Gregory entered the store, defendant, who was standing near the cashier, "judged" her hairstyle by stating he did not "like seeing bitches with guy haircuts." Gregory responded by telling defendant, "you don't know me, why are you assaulting me?" Defendant then stated, "bitch, I ain't talking to you, I'm not talking about you, mind your business." Gregory said something to defendant like, "why are you still assaulting me, you don't know me, I don't know you, what is the problem?"

¶ 4 Smith entered the store and asked Gregory with whom she was arguing, and Gregory identified defendant. Defendant then said he would throw some of his nachos on Gregory if she said anything else. Smith cautioned defendant against touching his sister, and defendant told Smith to "tell [his] sister to watch her mouth." Thereafter, defendant and Smith "exchange[d] words" outside while Gregory remained inside the store. From her spot about an inch away from the door, Gregory could see defendant hit Smith in the head with a gun. He then placed Smith in a headlock. After she saw defendant strike Smith, Gregory went into the store to make sure the store employees were calling the police. While inside the store, she heard shots. She could not see the shots but said they came from defendant. She then got a juice bottle to try to "get [defendant] off" her brother. When she went back outside, she saw defendant holding her brother in a bear hug or a headlock with a gun in his hands. She also observed blood coming from Smith's head and under his arm and waist.

¶ 5 According to Gregory, she started pulling on defendant's shirt and tried to toss the juice bottle at him. Defendant said, "bitch, let me go," and turned around and shot Gregory in the right

breast from half an inch away. Gregory fell to the ground, where her brother had also fallen, as defendant fled south on Mozart to his car. An ambulance arrived and transported Gregory to the hospital, where she remained for eight days and underwent surgery on her stomach and chest. Gregory denied being pregnant when she was shot but acknowledged her mother told an assistant State's Attorney in her presence that she was pregnant at the time of the shooting. She did not correct her mother when her mother said she was pregnant. Gregory identified defendant from a photo array on June 27, 2011, and from a physical lineup on September 20, 2011.

¶ 6 A surveillance video admitted into evidence showed Gregory and defendant start to argue near the cash register. As defendant moved to exit the store, Smith entered, pulled at his pants, and began verbally fighting with defendant as he slapped a fist into his palm. He then followed defendant out of the store, pulling on his pants again. Gregory followed, then re-entered the store and started explaining what happened to other people in the store. She then went back to the cashier and suddenly, with a bottle in her hand, hurried outside. Gregory explained she heard a noise while standing at the register that she believed to be a shot. After Gregory went outside, three gunshots can be heard being fired.

¶ 7 On cross-examination, Gregory acknowledged the surveillance video depicted her cursing during her exchange with defendant. She stated that her brother left the store before defendant. According to Gregory, defendant did not have her brother in a bear hug; rather, he had him in a headlock and her brother was trying to take the gun from defendant. She saw defendant retrieve the gun from his car after he left the store.

¶ 8 Demetrius Smith, Gregory's brother and the other shooting victim, testified that at the time of trial he was in custody for violating his probation on a charge of possession of a controlled substance. He acknowledged missing a prior court date. He testified he did not know

or remember whether he was with his sister at around 5 or 6 p.m. on June 22. He thought he remembered telling an assistant State's Attorney and a detective that on that date, he accompanied his sister to Mozart Foods. He then stated he went to Mozart Foods on June 22, but did not go inside. While he was out front, his sister got into an argument inside the store. When asked whether he saw in court the person with whom his sister argued, Smith stated, "[p]ossibly," then, "[y]eah, but I really don't remember." He could not identify defendant, explaining when Officer Burns showed him "the list," he was not sure at the time.

¶ 9 Smith testified he got into an altercation with someone at Mozart Foods, and that person pulled out a pistol from about 10 feet away. Smith then "walked up on" the individual and hit him. The person pulled out "something shiny" and Smith, believing it was a gun, swung a fist at the man. Smith said the next thing he remembered was lying on the floor and waking up in the hospital. However, he then testified that after he got hit with the gun, he struggled to try to get the gun and was shot twice in the side. When asked whether he saw who hit him with the gun, Smith responded, "I think I was looking at him with the gun." The State then asked whether the person who shot him was the same person who hit him, to which defendant first said, "[u]h-huh" but then said it was a different person. After being shot, Smith tried to run but was shot again before falling down. He did "not really" see his sister exit the store and, when asked whether he saw his sister get shot, he responded, "I heard more gunshots." Smith remained in the hospital for about a week. The parties stipulated that he was shot and sustained "multiple internal injuries as a result of the gunshot wound."

¶ 10 Smith testified Detective Burns showed him a photo array on June 27, 2011. Defendant signed and dated one of the photographs and identified the individual in the picture as the person who shot him. Defendant was the person Smith identified. However, Smith testified he "was

medicated" when he met with Detective Burns. He specified that his medication was marijuana.

On September 20, 2011, Smith went to the police station and an officer indicated he was going to show Smith a physical lineup. Smith acknowledged signing a lineup photo spread advisory form.

When asked whether he viewed a physical lineup, however, Smith testified, "I don't think so."

He denied that the State's exhibit depicted the physical lineup he saw on September 20, stating,

"No. It was a Mexican guy, too." He also said he identified two people from the photo array as the person who shot him.

¶ 11 Smith stated he could not remember whether he met with an assistant State's Attorney on July 26, 2011. He also denied making a statement to the assistant State's Attorney, stating that although his signature appeared multiple places on a statement, that statement "was already written down" and police asked him to sign his name "if it sounded right" and "matched up to" his sister's statement.

¶ 12 The parties stipulated that Assistant State's Attorney Bob Groebner would testify he met with Smith on July 26, 2011, at which time Smith made a handwritten statement. Groebner would also testify Smith identified defendant in a photograph.

¶ 13 In his signed, handwritten statement, Smith stated he and his sister, Robin Gregory, decided to go to a grocery store at Mozart and 63rd Street. While he stood outside, Smith heard Gregory arguing with someone inside the store. When he entered the store, he observed his sister with the person he identified in exhibit No. 1, defendant. Defendant and Smith went outside and defendant pulled out a silver handgun, walked up to Smith, and started to hit him over his left eye with the handgun. Smith tried to hit defendant, but defendant pointed the gun at him and shot him at least three times. Gregory came outside and jumped on defendant's back, at which time

defendant shot her in the chest. Defendant then got into a silver car and departed. The next thing Smith remembered was an ambulance transporting him to the hospital.

¶ 14 Rosio Rubio testified she was working as a cashier at Mozart Foods on June 22. She recalled Gregory and defendant arguing inside the store. At some point, the arguing stopped, and Rubio heard what "sounded like fire crackers" outside. She called the police. Rubio did not remember whether she looked out the window after hearing the shots. She also did not remember what she told an assistant State's Attorney, explaining she "was pregnant and scared." She acknowledged her signature on a statement and a photo lineup but said the person she identified in the lineup was a person she recognized "as the customer." She said she could not see the shooting because posters obstructed her view. She did not see defendant shoot anybody outside the store that day.

¶ 15 The parties stipulated that Assistant State's Attorney Sam Larabee would testify he took Rubio's typewritten statement, in which she indicated Smith and the man depicted in exhibit No. 2, defendant, went outside the store and she heard a couple of loud noises outside the window. She saw defendant hitting Smith on the head with a silver revolver while Smith tried to defend himself by covering his head with his hands. She then saw defendant shoot the gun at Smith's head and put the gun to Smith's side and shoot him again. The parties also stipulated that Rubio identified defendant to Detective Burns as the person who did the shooting in front of Mozart Foods.

¶ 16 Derek Curry, the former manager of Mozart Food Mart, testified that defendant was in the store buying nachos on June 22. Another man entered the store, "[b]elligerent and hitting his hands together like he had just got through arguing with somebody in front of the store." As he started talking to defendant, the man grabbed his waist like he had a gun. The two then went

outside, and from his position near the door, Curry could see the man hit defendant, causing defendant to drop his nachos. A woman who had purchased "some kind of juice" threw her juice bottle and hit defendant in the head. After that, Curry heard approximately two gunshots but he did not know where they came from. Curry did not hear defendant yelling at the woman or recall him calling her names. He also did not see defendant with a gun at any point.

¶ 17 Defendant, a high school graduate who was working at Fed Ex at the time of his arrest, testified that he went to the Mozart Food Mart to buy some nachos on June 22. He did not have a gun. While defendant was at the cashier buying the nachos, Gregory entered. Defendant complimented her mohawk and tried to talk to her, but she "went off on" him, saying she did not like light-skinned boys. As defendant completed his purchase, Gregory continued talking, and defendant "might have said something else to her as far as like you ain't that bad anyway." After he received his nachos, defendant started to walk outside. When defendant stopped at the door, Smith and another man entered and Smith asked defendant who he was talking to. Gregory and Smith both started "going crazy," and Smith tried to "walk up on" defendant. Defendant tried to get away, and Smith started lifting up his shirt and grabbing at his waist. Defendant left the store, explaining Smith was a "big guy" and he was "going crazy."

¶ 18 As defendant walked out the door, Smith came out behind him. Defendant did not "want to be caught off guard," so he stopped and turned around, at which point Smith hit him in his face. Smith then started pacing back and forth, walking to the store's doorway and then coming back out and talking about what he would do to defendant while "grabbing on his shirt." Defendant figured he had a gun, so he stood still and tried to explain to the other man to keep Smith back. However, Smith continued to pace in and out of the store, talking about what he was going to do. After Smith hit defendant outside of the store, defendant saw Smith "going for his

waist," and defendant tried to wrestle with him to keep him from retrieving whatever he had on his waist. However, Smith was able to retrieve the item, which defendant saw was a gun.

¶ 19 The men wrestled over the gun, with defendant holding the gun toward Smith's stomach in an effort to prevent Smith from pointing the gun at him. After about five seconds, Gregory hit defendant in the head with a bottle, but the two men continued "tussling." At some point, the gun started "going off," discharging multiple times. At that point, defendant saw Smith was no longer trying to point the gun at defendant, so defendant ran home. He did not have a car, nor did he depart from the store in a car. When he reached home, defendant did not call 9-1-1 or go to the police station, explaining "[t]here was a lot of stuff going on in the neighborhood," he was scared, and he assumed somebody in the store called the police.

¶ 20 On this evidence, the trial court found defendant guilty of two counts of aggravated battery with a firearm. In doing so, the court stated as follows:

"I observed [Gregory] on the witness stand. She is an abrasive, difficult woman. She's got a personality that is, I can understand, very exasperating. I think she got everybody agitated. I'm not sure what it was [defendant] had said to her, but she reacted in a fashion that was her own fashion, and I saw her personality come through on the witness stand as well. But outside things got heated verbally and outside, right after the parties left, this happened. And I heard and I listened carefully to all of the evidence. I cannot imagine that somehow Mr. Smith shot himself, shot Ms. Gregory while he was jostling with [defendant.] That's not what happened. [Defendant]

had a gun. He used the gun. You can't bring a gun to a fist fight or a verbal fight."

¶ 21 Defendant filed a motion for new trial and arrest of judgment. At a hearing on the motion, defense counsel questioned the State's witnesses' credibility, characterizing their testimony as "a fabric of lies." The trial court denied defendant's motion, stating it found defendant's version of the events "to be a preposterous story." However, the court added that it would make a finding of no severe injuries so that defendant would not be subject to mandatory consecutive sentences. After the parties argued as to the appropriate sentence and defendant's mother made a statement, the court offered to review the trial transcript again because counsel was "arguing pretty strongly." At a subsequent hearing, the court indicated it had reviewed the transcripts of the trial testimony and it was "persuaded as much, if not more, that [its] findings were accurate." The court thus denied defendant's motion for posttrial relief and imposed the minimum sentence of concurrent six-year prison terms. This appeal followed.

¶ 22 On appeal, defendant argues the State failed to prove him guilty beyond a reasonable doubt because the State's evidence was unreliable and implausible, particularly in light of defendant's own corroborated account of the shooting. Specifically, he asserts Gregory was biased, in that she wanted to exculpate her brother in a shooting that arose due to her "quarrelsome nature." He also contends Gregory provided an unlikely version of events, testifying she could see defendant retrieve a gun from his car and shoot Smith even though Gregory was inside the store, posters obstructed her view, and she said she could only hear but not see the initial shots. Defendant also challenges the reliability of Rubio and Smith, pointing out they disavowed their prior identifications of defendant, with Rubio asserting she could not see what happened and Smith saying he was on "medication" when he made earlier statements.

He also notes Smith, who was in custody at the time of trial for violating his probation, testified he did not (1) remember going into Mozart Foods, (2) see the shooter get the gun from a car, (3) see his sister leave the store and join the fight, (4) remember providing a pretrial statement, or (5) "think" he viewed a physical lineup. On the other hand, defendant contends, he provided clear and plausible testimony that the gun accidentally discharged. Moreover, defendant posits, his claim that Smith was the initial aggressor was corroborated by Curry, who described Smith as gesturing with his fists and grabbing at his waist as if he had a gun, and the surveillance video, which depicted Smith tugging at his hip to indicate he was armed.

¶ 23 In resolving a challenge to the sufficiency of the evidence, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Our function is not to retry the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Rather, in a bench trial, it is for the trial court to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any evidentiary conflicts. *Id.* We will reverse a defendant's conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 24 Defendant was convicted of aggravated battery with a firearm. Relevant to this appeal, a person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm causes any injury to another person. 720 ILCS 5/12-4.2(a)(1) (West 2010). An individual commits battery when he intentionally or

knowingly, without legal justification, causes bodily harm to an individual or makes physical contact of an insulting or provoking nature. 720 ILCS 5/12-3(a) (West 2010).

¶ 25 Based on the evidence presented, a rational trier of fact could have found defendant guilty of aggravated battery with a firearm against Gregory. Gregory testified that defendant shot her in the chest as she attempted to intervene in defendant and Smith's fight. Gregory subsequently identified defendant as her shooter in a photo array and in a physical lineup. In addition, Gregory's testimony was corroborated in part by Smith. Although Smith first testified he did not know whether he was with his sister on June 22, he later testified he accompanied her to Mozart Foods. While Smith waited out front, Gregory got into an argument. At trial, Smith did not identify the person with whom Gregory was arguing; however, in his signed, handwritten statement made prior to trial, Smith identified the individual as defendant and also stated that defendant shot Gregory after she jumped on defendant's back.

¶ 26 The evidence was also sufficient to sustain defendant's conviction for aggravated battery with a firearm against Smith. Smith testified that he became involved in an altercation at Mozart Foods with a man who pulled out a pistol and hit Smith with it. Smith was then shot as he struggled to get the gun. At trial, Smith did not identify his shooter and he provided mixed testimony as to whether the person that hit him was the same person that shot him. However, in his pretrial statement, Smith identified defendant as the person who both hit and shot him, and he identified defendant as his shooter from a photo array. Gregory saw defendant holding a gun and hit Smith with it before the shootings. Gregory also identified defendant as Smith's shooter both prior to and during trial. Finally, Rubio identified defendant in a photo array and made a pretrial statement in which she described seeing defendant hit Smith on the head with a silver revolver and shoot at his head and side.

¶ 27 Although defendant challenges Gregory's testimony as implausible and asserts she was biased, the trial court's guilty findings make clear that it found Gregory to be a credible witness even though the court acknowledged she was "abrasive" and "difficult." The trier of fact is best equipped to judge the credibility of witnesses, and its findings concerning credibility are entitled to great weight. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). In addition, although Smith and Rubio recanted their pretrial statements and identifications of defendant, it is well settled that recantation testimony is generally regarded as unreliable, and it is for the trier of fact to determine the credibility of such testimony. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). In this case, the court observed Smith and Rubio testify and evidently believed their pretrial statements more than their trial testimony. We will not substitute our judgment for that of the trial court. See *People v. Logan*, 352 Ill. App. 3d 73, 77, 80 (2004) (refusing to substitute its judgment for the jury's finding that a witness's pretrial statement and grand jury testimony, which she claimed at trial were coerced, were more credible than her trial testimony).

¶ 28 We also find unpersuasive defendant's contention that his conviction cannot be sustained in light of the evidence he presented that he either shot Smith by accident or because he was acting in self-defense. Although Curry testified that Smith acted aggressively inside the store and lifted up his shirt to indicate he was armed, Curry did not see who fired the gun outside. Similarly, the surveillance video contained footage only of the events inside the store. It shows Smith punching his fists together and pulling at his hip, although it is unclear whether Smith is flashing a gun, as defendant contends, or merely pulling up his pants. As to the events that transpired outside, the sole individual to testify that Smith pointed a gun at defendant and the gun accidentally discharged while defendant attempted to protect himself was defendant. However, the court rejected defendant's testimony, expressly stating at a hearing on his motion for new trial

that it found defendant's version of events "to be a preposterous story." The trier of fact is not required to believe a defendant's testimony. See *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001).

Moreover, it was for the trial court to determine the witnesses' credibility. *Siguenza-Brito*, 235 Ill. 2d at 224-25.

¶ 29 In sum, viewing the evidence, in the light of most favorable to the prosecution, a rational trier of fact could have found defendant guilty of both counts of aggravated battery with a firearm.

¶ 30 For the reasons stated, we affirm the trial court's judgment.

¶ 31 Affirmed.