2016 IL App (2d) 140506
No. 2-14-0506
Order filed July 6, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-245
ARMANDO GALLARDO,	)	Honorable John A. Barsanti,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was convicted beyond a reasonable doubt of attempted first degree murder.

¶ 2 Following a bench trial, the defendant, Armando Gallardo, was convicted of attempted first degree murder (720 ILCS 5/8-4(a) (West 2010)) and he was sentenced to 30 years' imprisonment. On appeal, the defendant argues that he was not convicted beyond a reasonable doubt. We affirm.

¶ 3 BACKGROUND

¶ 4 On February 15, 2013, the defendant was charged by indictment with attempted first degree murder (720 ILCS 5/8-4(a) (West 2010)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2010)), and other weapons offenses. The charges alleged that the defendant attempted to shoot and kill Gabriel Berrios on September 6, 2011 in Aurora.

¶ 5 Between June 28 and November 13, 2013, the trial court conducted a bench trial. Terry Ayala testified that on September 6, 2011, around 3:00 p.m. he heard three or four gunshots, then looked up and saw a dark blue SUV coming off of Third Street onto Woodlawn. He said there was a driver and a person in the back and that the license plate had the letters "A" and "G." Later that day, Aurora police found three spent .40-caliber shell casings and one lead core in the roadway in front of 215 Third Street.

¶ 6 Berrios, the alleged victim, testified that on September 6, 2011, he heard gunshots while standing in front of 215 Third Street. He did not think the shots were fired in his direction. He was not injured. He did not see the shooter. He did not recall seeing a blue SUV.

¶ 7 Aurora police officer David Brian testified that on September 12, 2011, he found a handgun a few feet from the sidewalk on West Park Place. That gun was taken into evidence and was identified as a Ruger P94 semiautomatic pistol.

¶ 8 Aurora police officer Chris McWilliams testified that on September 12, 2011, he was in pursuit of a silver Chrysler. The Chrysler crashed near the intersection of Galena and Anderson. He identified both the defendant and Adam Argo as being present at that scene.

¶ 9 Argo testified that on September 12, 2011, he and the defendant were in the defendant's silver Chrysler HHR. The defendant was driving in the Woodlawn neighborhood. After they noticed that they were being followed by the police, a chase ensued and ended when the defendant crashed the vehicle on Anderson Street. Argo gave statements to the police that the

gun had been thrown from the vehicle during the chase. Argo testified that the defendant instructed him to call Nelson Caceras and tell him to come outside so the gun could be thrown into the yard and retrieved.

¶ 10 Argo further explained that he was charged with attempted first degree murder, aggravated discharge of a firearm, and several more weapons offenses in connection with the events of September 12, 2011. In exchange for his full cooperation with the investigation of the events of September 6 and September 12 and to testify at any related trials, he agreed to plead guilty to unlawful possession of a firearm by a street gang member, a Class 2 felony. He was sentenced to four years in prison to be served at 50%. The dismissed charges would have carried a 30-year sentence.

¶ 11 Argo testified that he was introduced to the Maniac Latin Disciples by the defendant in 2007 or 2008. On September 6, 2011, he picked up the defendant in his mother's blue Dodge Nitro with license plates "ARGO 4." They drove to the area of Third and Woodlawn around 2:30 or 3:30 p.m. as part of a "mission" to find rival gang members and shoot them. After seeing two men using Latin Kings related hand gestures, or "shaking up," the defendant told Argo to circle back around, or "hit the block." While driving around the block, the defendant moved from the front passenger seat to the back passenger bench. The defendant put on gloves. Argo stopped the car on the street in front of 215 Third Street with the passenger side facing the house and made the Maniac Latin Disciples gang sign to Berrios. Berrios made a similar hand gesture back. The defendant told Argo that Berrios was "bullshitting," meaning he did not belong to the gang whose gesture he had used. The defendant then extended his arm and hand out the back window in the direction of Berrios and fired three to four shots. As Argo drove away from the

scene the defendant climbed back into the front passenger seat and said either, "I think I got him" or "I think I hit him because I was aiming." It was at this time that Argo saw the black gun.

¶ 12 Detective Robert Hillgoth of the Aurora police department testified that on September 12, 2011, he interviewed the defendant at the Aurora police department. The defendant asked him if the firearm had been recovered. The defendant then asked what the detective could do for him if he gave information about the gun. The defendant described the gun as a P94 Ruger, .40-caliber, black with black grips, and that he believed his fingerprints and DNA would be found on the weapon. The defendant referred to it as a "nation gun," meaning that it belonged to the gang collectively. The defendant admitted to being a member of the Maniac Latin Disciples gang but denied any involvement in the September 6 shooting.

¶ 13 Robert Hunton, a firearms identification specialist from the Illinois State Police Forensic Science Command, testified that the cartridge casings found on September 6, 2011, were fired from the gun collected on September 12, 2011.

¶ 14 Gina Minetti, an expert in fingerprint examination, comparison, and identification, determined that the latent prints lifted from the handgun and its magazine were not suitable for identification.

¶ 15 Aurora police officer Dave Tellner, an expert in street gangs, testified that in September 2011, the Maniac Latin Disciples and Latin Kings were rival street gangs. Berrios was a member of the Latin Kings, the defendant was a member of the Maniac Latin Disciples, and Argo was attempting to become a member of the Maniac Latin Disciples. Officer Tellner described the area of Third and Woodlawn as Latin Kings' turf.

¶ 16 Sonia Ortiz, the defendant's mother, testified for the defense that on September 6, 2011, she arrived home at about 2:30 p.m. She then prepared a big dinner for the whole family,

including the defendant, her daughter Serena, and her husband Bobby. According to Ortiz, the defendant was in his room when she arrived and did not leave the house before dinner which was served around 4:30 p.m.

¶ 17 On rebuttal, the State presented recordings and transcripts of phone calls and visits between the defendant and his mother, the mother of his children, and Bobby Ortiz. The trial court found that this evidence impeached Sonia Ortiz and showed that the defendant solicited a false alibi from her.

¶ 18 At the close of the trial, the trial court found the defendant guilty of attempted first degree murder, aggravated discharge of a firearm, and two counts of unlawful possession of a firearm. The trial court noted Argo's bias and his motive to testify falsely, but found his testimony to be credible, especially in light of the amount of detail Argo presented, and the corroboration of his testimony by the other witnesses and the evidence at trial. The trial court further found that the defendant's statements and his attempt to solicit a false alibi supported a finding of guilt. The trial court merged the other charges into one conviction for attempted first degree murder. Following the denial of his post-trial motion, the trial court sentenced the defendant to 30 years' imprisonment. The defendant thereafter filed a timely notice of appeal.

¶ 19 ANALYSIS

¶ 20 The defendant argues on appeal that he was not convicted beyond a reasonable doubt of attempted first degree murder because the State did not establish that he intended to kill anyone. The defendant insists that Argo's testimony was not credible and, at most, only established that the defendant committed aggravated discharge of a firearm. The defendant further argues that he could not be convicted of attempted first degree murder when the alleged victim was not even aware that he was being shot at. Further the defendant argues that the evidence against him was

insufficient because there were no bullets or bullet holes found near where Berrios was purportedly standing.

¶ 21 It is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is whether, "'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original.) *Id.* at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The sufficiency of the evidence and the relative weight and credibility to be given the testimony of the witnesses are considerations within the exclusive jurisdiction of the fact finder. *People v. Jimerson*, 166 Ill. 2d 211, 214 (1995). The evaluation of the testimony and the resolution of any conflicts or inconsistencies which may appear are also wholly within the province of the finder of fact. *Collins*, 106 Ill. 2d at 261-62. Nonetheless, where the record leaves a reasonable doubt, a reviewing court must reverse the judgment. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). A court of review has a duty to carefully review the evidence and to reverse the conviction of the defendant when the evidence is so unsatisfactory as to raise a serious doubt as to the defendant's guilt. *People v. Estes*, 127 Ill. App. 3d 642, 651 (1984).

¶ 22 To support a conviction for attempted murder, the State must establish beyond a reasonable doubt that: (1) the defendant performed an act constituting a "substantial step" toward the commission of murder (720 ILCS 5/8-4 (West 2010)), and (2) the defendant possessed the specific intent to kill the victim (720 ILCS 5/9-1(a)(1) (West 2010)). *People v. Green*, 339 Ill. App. 3d 443, 451 (2003). Because intent is difficult to establish with direct evidence, specific intent to kill may be, and normally is, inferred from the surrounding circumstances, such as the character of the attack, the use of a deadly weapon, and other matters from which an intent to kill

may be inferred. *Id*. "Such intent may be inferred when it has been demonstrated that the defendant voluntarily and willingly committed an act, the natural tendency of which is to destroy another's life." *Id.* (quoting *People v. Winters*, 151 Ill. App. 3d 402, 405 (1986)). "While the act of firing a gun, without more, is not sufficient to prove the specific intent to kill, circumstances demonstrating that the defendant acted with malice or a complete disregard for human life when he discharged a firearm at another person support the conclusion that the defendant possessed the specific intent to kill." *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39. The fact that the defendant failed to strike anyone "could support an inference that he lacked the intent to kill. However, that fact also supports the alternative inference that [the defendant] was simply unskilled and missed his targets. The decision as to which of competing inferences to draw from the evidence is the responsibility of the trier of fact." *Green*, 339 Ill. App. 3d at 451-52.

¶ 23 Based on the standard set forth in *Green*, we believe that the State has presented sufficient evidence for a reasonable trier of fact to find the defendant guilty of attempted first degree murder beyond a reasonable doubt. The State presented evidence that the defendant extended his arm in the direction of Berrios and fired at least three times. The defendant was a member of the Maniac Latin Disciples who was on a "mission" to shoot rival gang members. The defendant believed that Berrios was a member of the Latin Kings, a rival gang. Prior to shooting at Berrios, the defendant put on gloves and moved to the back seat where he could aim better, fired at least three times and then said, "I think I hit him because I was aiming." The defendant's attempt to solicit an alibi from his mother was further evidence of guilt. *People v. Milka*, 211 Ill. 2d 150, 182 (2004). Based on this evidence, we cannot find that the trial court was unreasonable to infer that the defendant committed a substantial step towards the commission of murder and that he possessed the specific intent to kill.

¶ 24 The defendant argues that the testimony of Argo, the State's only witness to the shooting, was insufficient because he had an obvious motive to lie in order to deflect blame from himself and place it squarely on the defendant. The specific inconsistency the defendant points to is that Argo claimed to have seen the defendant's arm and hand point out the back window in the direction of Berrios yet he did not claim to see the defendant shoot or what the defendant used to fire. The defendant maintains that because Argo was an accomplice to the alleged crime his testimony has inherent weaknesses and it should only be accepted with the utmost caution and suspicion. See *People v. Williams*, 147 Ill. 2d 173, 232-33 (1991). The Illinois Supreme Court has stated that accomplice testimony is "fraught with serious weaknesses such as the promise of leniency or immunity and malice toward the accused" and should therefore be accepted only with the utmost caution and suspicion. *People v. Newell*, 103 Ill. 2d 265, 470 (1984) (quoting *People v. Wilson*, 66 Ill. 2d 346, 349 (1977)). As the trial court recognized:

> "An argument can be made that the substitution of the defendant's name for Argo's name in a great deal of the evidence presented would still be a consistent theory in this case."

¶ 25 In considering Argo's credibility as a witness, the trial court considered the reduction in sentencing that he received in exchange for his testimony, his bias, as well as his motive to testify falsely. Nonetheless, the trial court found that Argo's potential bias was outweighed by the detail presented in his testimony, as well as by his consistency and the corroboration by the other evidence and testimony. The weight and credibility to be given to the testimony of a witness is within the exclusive jurisdiction of the fact finder. *Jimerson*, 166 Ill. 2d at 214. Because the trial court accepted Argo's testimony as credible and persuasive, this court will not re-weigh the evidence or supplant its judgment for that of the fact finder.

¶ 26 We further note that it is not required for a victim of attempted first degree murder to have knowingly witnessed an attempt on his or her life. It is only required for the State to show that the defendant took a substantial step toward the commission of an act, the natural result of which would be to terminate another's life, and that the defendant did so with that intention. See *Green,* 339 Ill. App. 3d at 451. Moreover, the lack of bullets and bullet holes does not contradict Argo's testimony that the defendant aimed at Berrios as Berrios stood in front of the house at 215 Third Street. Even though all of the defendant's shots obviously missed, poor marksmanship is not a defense to attempted murder. *Id.* at 452.

¶ 27 Finally, we find the defendant's reliance on *People v. Wagner*, 189 Ill. App. 3d 1041 (1989), *overruled on other grounds by People v. Mitchell*, 241 Ill. App. 3d 1094 (1993), and *People v. Trinkle*, 40 Ill. App. 3d 730 (1976), *aff'd*, 68 Ill. 2d 198 (1977), to be misplaced. In *Wagner*, the defendant shot a gas station attendant during a robbery. *Wagner,* 189 Ill. App. 3d at 1043-44. Although the trial court found that the defendant did not have the specific intent to kill, it nonetheless convicted him of attempted first degree murder. The reviewing court reversed the defendant's conviction, finding that, absent an intent to kill, he could not be found guilty of attempted murder. *Id*. at 1046. In *Trinkle*, the defendant shot at a tavern from the outside after he was refused service, and the bullet struck a patron inside. *Trinkle*, 68 Ill. 2d at 200. The Illinois Supreme Court ultimately concluded that the defendant could not be found guilty of attempted murder because he did not act with a specific intent to kill when he fired at a building. See *Id.* at 202-03. Here, unlike in *Wagner* and *Trinkle*, there was evidence that the defendant did act with a specific intent to kill. The evidence shows that the defendant aimed a gun at a rival gang member and shot at him. That was enough to establish that he acted with the requisite intent. See *People v. Johnson*, 331 Ill. App. 3d 239, 250 (2002) ("[e]vidence that a defendant discharged

a firearm in the direction of another individual, either with malice or total disregard for human life, is sufficient to support a conviction for attempted first degree murder."); *People v. Sowewimo*, 276 Ill. App. 3d 330, 341 (1995) (firing even one shot at another person is sufficient to constitute intent to kill for attempted first degree murder).

¶ 28 CONCLUSION

¶ 29 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 30 Affirmed.