

No. 1-13-2670

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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. 09 CR 11925
)	
JOVANNY MARTINEZ,)	Honorable
)	Maura Slattery Boyle,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Evidence sufficient to prove that defendant personally discharged weapon that killed victim, supporting 25-year enhancement to sentence. Remanded for resentencing because amendment to statute automatically transferring defendant to adult court applied retroactively.

¶ 2 Following a bench trial, defendant Jovanny Martinez was convicted of two counts of first degree murder in the death of Alex Arellano. Defendant’s 75-year prison sentence included a 25-year mandatory sentencing enhancement for proximately causing the death with a firearm.

Defendant, who was 15 years old at the time of the offense, was tried and sentenced as an adult

pursuant to the automatic transfer provision of the Juvenile Court Act of 1987 (the Act) (705 ILCS 405/5-130 *et seq.* (West 2010)). On appeal, defendant contends that the 25-year sentence enhancement imposed as part of his prison term should be vacated because the State failed to prove beyond a reasonable doubt that he personally discharged the firearm that killed Arellano. Defendant also raises several challenges to his sentence, including that Public Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805 (West 2014)) applies retroactively to his case on appeal. Specifically, he contends that the amendment exempts him from the provision of the Act requiring him to be automatically transferred to adult court.

¶ 3 We disagree with defendant's claim regarding the sufficiency of the State's evidence but agree that the amendment to the Act applies to him. We affirm defendant's conviction but vacate his sentence and remand.

¶ 4 Defendant was charged with multiple counts of murder, aggravated kidnapping, aggravated unlawful restraint and concealment of a homicidal death. Because defendant was 15 years old at the time of the offense, and he had been charged with first-degree murder, he was automatically transferred to adult criminal court. 705 ILCS 405/5-130(1)(a) (West 2008). Portions of defendant's 2013 bench trial were held simultaneously with that of co-defendant Erick Ortiz.

¶ 5 At defendant's trial, Sabrina Arce testified that, between 6 and 7 p.m. on May 1, 2009, she and Arellano, who was her boyfriend, were walking back to Suarez's house on 53rd Street in Chicago after attending a party. Leslie Suarez and another woman were also present.

¶ 6 Arce and Suarez testified that, at 53rd Street and Albany Avenue, two Hispanic male teenagers approached on bikes and asked Arellano about his "shag" haircut, which represented a

gang affiliation. Arce testified that the teens were members of the Latin Kings street gang and asked Arellano what gang he was in, but Arellano did not respond. Arce testified that Arellano also did not respond when the teens asked him to display the Latin Kings gang sign; however, Suarez testified Arellano made the gang sign. Arellano lifted his shirt in response to the teens' request to see his tattoos, though Arellano had none, and the teens left after telling the group to "be careful."

¶ 7 Arce and Suarez said that, a short time later, a car containing five people drove up and four occupants got out. Arce testified that the passenger riding in the front seat, "one of the main Latin Kings," asked Arellano what gang he was in. Arellano did not reply. That person returned to the car, retrieved a baseball bat, and struck Arellano in the head with it. Arellano ran, and the group chased him. Suarez identified defendant as one of the group that got out of the car.

¶ 8 Arce testified that as Arellano ran, he was struck by the car. Arellano rolled onto the hood, fell to the ground, and then got up and continued running. The group chased Arellano out of Arce's sight. The person who hit Arellano with the bat told Arce that she should run away or else she would get hurt.

¶ 9 Daniel Villeda testified that at about 6 p.m. on the night in question, he was in the yard of his house at 3004 West 54th Place, near Albany Avenue. Villeda saw a group of Hispanic teens swinging baseball bats at the ground. Villeda testified that he "didn't see what but they were hitting the [floor] with bats." Other teens were making kicking and punching motions. Villeda called 911 to report the incident. After the attack, three or four of the teens in the group walked past Villeda. Villeda identified defendant in a police photo array and a lineup as one of the individuals in that group.

¶ 10 Edgar Silva testified he was the driver of the car and was a Latin King. Silva pleaded guilty to second-degree murder charges in this case in exchange for a 20-year sentence. As part of Silva's testimony relating to Ortiz, Silva was asked on cross-examination if he saw defendant taking part in the attack on Arellano. Silva responded that defendant "was nowhere in sight."

¶ 11 Chicago police officers Lisa Svihula and Robert Caulfield testified that, around 7 p.m. on the night in question, they received a call of a battery in progress at 54th Place and Albany. As they responded to the call, Svihula and Caulfield saw defendant running toward them and holding his left side near his waist. Defendant, upon seeing the officers, reversed course and ran east on 54th Street.

¶ 12 The officers followed defendant in their car, and Officer Caulfield then pursued defendant on foot. Officer Caulfield testified that he was about 15 feet behind defendant when defendant pulled a firearm from the left side of his waistband and tossed it over a fence. The officer arrested defendant and then recovered the weapon. On cross-examination, Officer Caulfield stated he did not see defendant shoot the gun and he did not know if the gun had been fired. Officer Svihula testified that defendant was wearing blue jeans and a white and blue shirt that night, and she identified those items as having been placed in inventory by police.

¶ 13 Dr. Stephen Cina, the Cook County chief medical examiner, testified as to the post-mortem examination of Arellano by another doctor. Arellano's body displayed "100 percent full thickness burns and body charring." Arellano had a bullet entrance wound on the top of his head. He also had several lacerations on his head due to a "blunt force impact" and his skin was split in each location to expose his skull, though the heat of the fire could have caused the tissues to contract, making the lacerations appear to have split wider. Arellano died of a gunshot wound

to the head and the manner of his death was homicide. A fired bullet was removed from Arellano's head.

¶ 14 The parties stipulated that a fired cartridge case was recovered near Arellano's body. Justin Barr, an Illinois State Police (ISP) expert in firearms identification, testified that he received the weapon recovered in this case, as well as the fired cartridge case and the fired bullet, in a sealed condition. Barr's testing revealed that the bullet recovered from Arellano had been fired by the weapon retrieved by Officer Caulfield.

¶ 15 Scott Rochowicz, an ISP expert in gunshot residue identification, testified that he received defendant's jeans in a sealed condition. His testing revealed that the "left pocket in the exterior of the waistband" was positive for the presence of gunshot residue, meaning the fabric had either contacted an item containing gunshot residue or was in close proximity to a firearm when it was discharged.

¶ 16 The parties stipulated that Arellano's body was burned beyond recognition but could be identified using a DNA comparison analysis with Arellano's mother. The parties further stipulated that Arellano's blood was found on defendant's jeans and shirt.

¶ 17 The defense elected to present no evidence.

¶ 18 The trial court found defendant guilty of first degree murder and also found that defendant personally discharged a firearm proximately causing Arellano's death. The trial court sentenced defendant to 50 years for the murder and an additional 25 years for personally discharging the weapon that caused the victim's death.

¶ 19 On appeal, defendant first contends that the 25-year sentence enhancement should be vacated, because the State failed to prove beyond a reasonable doubt that he personally

discharged the firearm that caused Arellano's death. He argues that the attack on the victim involved several people, and that he was not identified as the shooter by any eyewitness.

¶ 20 When a defendant challenges the sufficiency of the evidence, the relevant inquiry is whether, after viewing all of 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. Bradford*, 2016 IL 118674, ¶ 12. It is the purview of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id.* Accordingly, a reviewing court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence. *Id.* On appeal from a criminal conviction, this court will not reverse the trial court's judgment unless the evidence is so unreasonable, improbable or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id.* The reasonable doubt standard applies in all criminal cases, whether the evidence is direct or circumstantial. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47.

¶ 21 A trial court must impose a sentence enhancement of 25 years to natural life imprisonment if the court finds that, during the commission of the offense, the defendant personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement or death to another person. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). A defendant's criminal acts are the proximate cause of another's death when they contribute to that person's death, and the death is not caused by an intervening event unrelated to the defendant's acts. *People v. Kaszuba*, 375 Ill. App. 3d 262, 268 (2007). This enhancement may be added only if the underlying facts are proved by the State beyond a reasonable doubt. *People v.*

Trzeciak, 2014 IL App (1st) 100259-B, ¶ 57; see also *Kaszuba*, 375 Ill. App. 3d at 267 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

¶ 22 Here, the State presented sufficient circumstantial evidence to support the sentence enhancement. Several witnesses testified that defendant was among a group of individuals that attacked Arellano. Defendant also was seen walking away after being among a group that kicked and struck Arellano. Officer Caulfield recovered a weapon that he saw defendant throw away during the foot chase immediately following the beating. Ballistics testing established that the bullet recovered from Arellano was fired from that weapon. Gunshot residue testing of defendant's clothing revealed that the area of defendant's left waistband, which he had been holding during the chase, tested positive for gunshot residue, meaning the fabric had contact with an item containing gunshot residue or had contact with a discharged firearm. Thus, the State presented evidence that defendant had possession of the weapon used to kill Arellano. Moreover, Arellano's blood was found on defendant's clothing. Given that evidence, a reasonable trier of fact could find that defendant personally discharged the weapon that killed Arellano.

¶ 23 Defendant posits that he could have been present when someone else shot Arellano and was merely holding the weapon later, as directed by a gang leader. He also points out that no gunshot residue was found on his hands. It is not the task of this court of review to retry the defendant. *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). It was the purview of the trier of fact to consider the facts presented and the reasonable inferences to be drawn therefrom. *Bradford*, 2016 IL 118674, ¶ 12. Even if defendant's hypothesis had been presented at trial, the trier of fact was not 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). Viewing the evidence on this point in the light most favorable to the State, the trial court could have rationally found that defendant personally discharged the weapon that proximately caused Arellano's death. Accordingly, we affirm the trial court's imposition of the 25-year sentence enhancement.

¶ 24 Defendant raises several other challenges to his sentence: (1) that the amendments to the automatic-transfer provision of the Juvenile Court Act of 1987 (Act) contained in Public Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a)) apply retroactively to his case; (2) that Public Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5-4.5-105), which added additional factors a trial court must consider when sentencing a defendant under 18, apply retroactively to his case; (3) that his 75-year sentence was unconstitutional and excessive; and (4) that the automatic-transfer provision is unconstitutional. We agree with defendant's first argument regarding the retroactivity of the amendments to section 5-130 of the Act (705 ILCS 405/5-130).

¶ 25 At the time of defendant's prosecution, section 5-130 required that all juveniles 15 years old and up be automatically transferred to adult court when they were charged with certain offenses, including first-degree murder. 705 ILCS 405/5-130(1)(a) (West 2008). In Public Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a)), the General Assembly raised the age of automatic transfer from 15 years old to 16 years old. Defendant was 15 at the time of his offense, meaning that the amendment would place him outside the reach of the automatic-transfer provision if it applies to him. The question, then, is whether the legislature intended the amendment to apply retroactively to individuals like defendant.

¶ 26 The Illinois Supreme Court recently resolved the retroactivity of Public Act 99-258's amendment to section 5-130 in *People ex rel. Alvarez v. Howard*, 2016 IL 120729. In *Howard*, the defendant was charged with a murder he allegedly committed when he was 15 years old. *Id.* ¶¶ 3-4. At the time the defendant was charged, section 5-130 required all juveniles 15 and older to be automatically transferred to adult court when they were charged with first-degree murder. *Id.* ¶ 4. While the charges against the defendant were pending, the legislature passed Public Act 99-258, which amended section 5-130 to raise the age of automatic transfer from 15 to 16. *Id.* ¶ 5. The defendant filed a motion to hold a hearing on whether he should be transferred, and the trial court granted that motion. *Id.* ¶¶ 5, 7. The State then sought leave to file an action for a writ of *mandamus* in the Illinois Supreme Court, asking for a writ compelling the trial court to keep the case in adult court. *Id.* ¶ 10.

¶ 27 The Illinois Supreme Court denied the State's request for the writ because the court determined that the amendments to section 5-130 found in Public Act 99-258 applied retroactively. *Id.* ¶¶ 28, 35. The court noted that it had adopted the United States Supreme Court's test from *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), when addressing the retroactivity of legislation. *Howard*, 2016 IL 120729, ¶ 19. When applying the *Landgraf* test, a court should first look to whether the legislature clearly indicated the temporal reach of the amended statute. *Id.* If it did, then the legislature's expression of its intent controls, absent some constitutional problem. *Id.* If the legislature did not signal its intent, then the court looks to whether application of the statute "would have a retroactive impact." *Id.*

¶ 28 But, the supreme court noted, "an Illinois court will never need to go beyond step one of the *Landgraf* test because the legislature has clearly set forth the temporal reach of every

amended statute.” *Id.* ¶ 20. That is because section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2014)) constitutes a “general savings clause” that has been interpreted “as meaning that procedural changes to statutes will be applied retroactively, while substantive changes are prospective only.” *Howard*, 2016 IL 120729, ¶ 20. In other words, if the statutory amendment itself does not indicate its temporal reach, “it is provided by default in section 4.” *Id.*

¶ 29 The supreme court then applied that version of the test to the amendments to section 5-130. *Id.* ¶¶ 21, 28. The court found “nothing in the text of the amendment itself that indicates the statute’s temporal reach,” noting that the amendment to section 5-130 did not contain a savings clause even though other portions of Public Act 99-258 did. *Id.* ¶ 21. The court then found that the amendments to section 5-130 were procedural, relying on precedent establishing that the decision to try a defendant in juvenile or adult court is a procedural one. *Id.* ¶ 28 (citing *People v. Patterson*, 2014 IL 115102, ¶ 104). Because the amendments were procedural, the default legislative intent in section 4 of the Statute on Statutes applied and the amendments were retroactive. *Howard*, 2016 IL 120729, ¶ 28.

¶ 30 *Howard* resolves the question of retroactivity presented in this case. Just like the defendant in *Howard*, in this case, defendant was 15 years old when he committed the offense. Thus, *Howard* is directly on point.

¶ 31 We acknowledge that the procedural posture of this case differs slightly from the procedural posture before the court in *Howard*. Specifically, the case in *Howard* was pending before the trial court when Public Act 99-258 was passed, whereas this case was pending on direct appeal when the amendment was enacted. But under either circumstance, we would apply the same test. See, e.g., *People v. Glisson*, 202 Ill. 2d 499, 503-04 (2002) (applying section 4 of

Statute on Statutes to question of retroactivity of statutory amendment passed while case pending on direct appeal); *People v. Digirolamo*, 179 Ill. 2d 24, 49-50 (1997) (deciding retroactivity of statutory amendment passed while case pending on direct appeal); *People v. Scott*, 2016 IL App (1st) 141456, ¶ 46 (applying amendment to section 5-130 in Public Act 99-258 to defendant whose case was pending on appeal when public act was passed). Thus, the fact that defendant's case was pending on direct appeal when the legislature passed Public Act 99-258 does not change the controlling effect of *Howard*.

¶ 32 The State contends that Public Act 99-258 should be applied prospectively because it had a delayed effective date, noting that it was passed on May 19, 2015 but did not come into effect until January 1, 2016. The State refers to the default rule, found in the Effective Date of Laws Act (5 ILCS 75/0.01 *et seq.* (West 2014)), that any laws passed before June 1 in any year become effective on January 1 of the following year. 5 ILCS 75/1(a) (West 2014). The State claims that, because the legislature passed Public Act 99-258 knowing that, under the Effective Date of Laws Act, it would not go into effect until the following year, it signaled its intent to delay the effective date of the law. See *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 187 (2011) (“[T]he delayed implementation date of [an] amendment indicates a clear legislative intent for the prospective application of the provision.”).

¶ 33 But the supreme court rejected an identical argument in *Howard*, 2016 IL 120729, ¶¶ 22-27. We are bound to follow the supreme court's decision that the Effective Date of Laws Act does not signal the legislature's intent to give amendments a prospective effect.

¶ 34 Having found that the amendment to section 5-130 applies retroactively to defendant, we vacate defendant's sentence and remand for resentencing in the juvenile court. On remand, the

State should have the opportunity to petition for a discretionary transfer of defendant's case to adult criminal court.

¶ 35 Because we have found that the amendments to section 5-130 apply retroactively, we decline to reach defendant's other claims regarding his sentence. Defendant argues that Public Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5-4.5-105), which added additional considerations that a court must consider when sentencing a defendant under 18, apply retroactively. But that new provision only applies to minors being sentenced as adults. We cannot be certain that the State will even petition for adult sentencing on remand, let alone that the juvenile court will grant that request. Similarly, defendant's arguments concerning the length of his sentence are moot, since we have vacated his adult sentence. And we need not address defendant's constitutional challenge to the automatic-transfer provision, since that provision no longer applies to him.

¶ 36 Defendant's remaining two contentions on appeal involve the mittimus and are conceded by the State. First, defendant asserts, and the State correctly agrees, that his convictions on two counts of first-degree murder violate the one-act, one-crime doctrine because he was only charged with killing one person. Under that rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). The mittimus reflects that defendant was convicted of two counts of first degree murder. Accordingly, defendant's conviction on one of those counts should be vacated.

¶ 37 When there is a one-act, one-crime violation, the less serious count should be vacated and sentence should be entered on the more serious count. *In re Samantha V.*, 234 Ill. 2d 359, 379 (2009). When determining which of two offenses is more serious, we look to the possible

punishments for the two offenses and which offense has the more culpable mental state. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Here, the parties agree that Count 18 is the more serious count because that count includes the allegation that defendant personally discharged the firearm that caused Arellano's death. We agree, since that allegation means that Count 18 carries a greater possible punishment than Count 1. We direct the court, on resentencing, to sentence defendant only on Count 18.

¶ 38 Defendant further argues that the mittimus should be corrected to reflect the accurate count number on which he was sentenced. We see no need to reach this issue since a new sentencing order will be entered on remand.

¶ 39 Finally, defendant contends, and the State correctly agrees, that the mittimus in this case should be corrected to reflect 1,518 days of credit for time spent in custody prior to sentencing, instead of the 1,125 days listed. Defendant was arrested on May 1, 2009, and he was sentenced, and his mittimus issued, on June 27, 2013; thus, he should receive 1,518 days of presentence incarceration credit. On remand, we direct the court to afford defendant the appropriate amount of credit for his presentence detention.

¶ 40 In conclusion, for the reasons set out above, we affirm defendant's conviction and vacate his sentence. We remand for resentencing in the juvenile court and direct the court to give the State an opportunity to petition for a discretionary transfer of defendant's case to adult criminal court. We vacate defendant's conviction under Count 1 and direct the court to enter sentence, on remand, on Count 18 alone.

¶ 41 Affirmed in part and vacated in part. Remanded for resentencing with directions.