2017 IL App (1st) 151138-U

No. 1-15-1138

Order filed July 24, 2017

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 6295
	)	
ANTWON LEE,	)	Honorable
	)	Joan Margaret O'Brien,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for reckless discharge of a firearm over his challenge to the sufficiency of the evidence. Under the one-act, one-crime doctrine, we vacate defendant's convictions for unlawful use of possession of a weapon by a felon based on possession of a firearm, aggravated unlawful use of a weapon, and defacing identification marks of a firearm as they are based on the same principal act as his conviction for armed habitual criminal.

¶ 2 Following a bench trial, defendant Antwon Lee was found guilty of and sentenced on one count of armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2012)), one count of

unlawful use or possession of a weapon by a felon (UUWF) based on possession of a firearm (720 ILCS 5/24-1.1(a) (West 2012)), one count of UUWF based on possession of firearm ammunition (720 ILCS 5/24-1.1(a) (West 2012)), two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(2)/(3)(C) (West 2012)), one count of defacing identification marks of a firearm (720 ILCS 5/24-5(b) (West 2012)), and one count of reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2012)). On appeal, defendant contends that, under the one-act, one-crime rule, his convictions for UUWF, AUUW, reckless discharge of a firearm, and defacing identification marks of a firearm must be vacated and that only the AHC conviction should stand. Defendant also contends that the State did not prove beyond a reasonable doubt that he committed the offense of reckless discharge of a firearm. We affirm in part and vacate in part.

¶ 3 At trial, Sergeant Phillip Orlando of the Chicago police department testified that, at about 2:00 a.m., on March 19, 2012, while he was on patrol and driving on Ashland Avenue past 80th Street, in Chicago, he heard a gunshot and saw a muzzle flash to his right. Immediately making a U-turn, he saw defendant, who was wearing a black shirt and black pants, standing on the sidewalk in the area of 1538 West 80th Street pointing a gun, with his arm fully extended, at an individual across the street. Orlando saw three or four people "out in front by the cars." None of these individuals had a firearm. When Orlando was about 30 feet away from defendant, he made eye contact with him. While still holding the gun, defendant immediately ran into a three-flat apartment building located at 1538 80th Street.

¶ 4 Orlando called for assistance. When additional officers arrived, they surrounded the building and then forced entry into it. In the first floor apartment was an "older couple" and

children. The second floor apartment was vacant. When Orlando reached the third floor, defendant was coming out of the apartment on that floor. He had changed clothes, and Orlando saw the black clothes defendant had previously been wearing "tossed on some furniture right inside the apartment." Orlando immediately recognized defendant as the person he had seen on the street with the gun, and placed him into custody.

¶ 5 Chicago police officer Andrew Scudella testified that, at about 2:07 a.m., on March 19, 2012, he responded to a call at 1538 West 80th Street. When he got to that location, he went to the rear of the apartment building. Within about five minutes after he arrived, he recovered a .45 caliber handgun from inside a grill located on the deck of the second floor. The gun was loaded with six live rounds, and the serial number was defaced. Scudella testified that the gun was "still warm to the touch" and "smelled like it had just been fired, or had been recently fired."

¶ 6 Scudella showed Orlando the gun he recovered, and Orlando identified it as the weapon he had previously seen in defendant's hand. Scudella also recovered a .45-caliber spent shell casing near 1538 West 80th Street. The shell casing was the "same brand ammo" that was inside the recovered gun. Scudella inventoried the items following Chicago Police Department inventory procedures. Scudella did not see any individuals come out of the rear of the apartment building.

¶ 7 The State introduced into evidence a certification form from the Illinois State Police showing that defendant was born on June 27, 1976 and that, as of November 30, 2013, he had never been issued a Firearm Owners Identification (FOID) card. The State also introduced into evidence certified copies of defendant's prior convictions, including a narcotics related offense in 2002 and an aggravated battery and great bodily harm offense in 1998.

¶ 8 The trial court found defendant guilty of one count of AHC, two counts of UUWF based on possession of a firearm and possession of firearm ammunition, two counts of AUUW, one count of defacing identification marks of a firearm, and one count of reckless discharge of a firearm. The trial court sentenced defendant to concurrent prison terms of ten years for AHC, seven years for each of the UUWF and AUUW counts, five years for defacing identification marks of a firearm, and three years for reckless discharge of a firearm. The trial court denied defendant's motion to reconsider. This appeal followed.

¶ 9 On appeal, defendant contends that the State did not prove beyond a reasonable doubt that he committed the offense of reckless discharge of a firearm. He argues that the State did not prove that he endangered the bodily safety of another individual, an essential element of the offense.

¶ 10 As an initial matter, defendant argues that we should apply the *de novo* standard of review because there are no credibility determinations at issue and because the question is whether "a settled set of facts" was sufficient to meet the reasonable doubt standard. We disagree, as defendant is clearly challenging Officer Orlando's credibility. In supporting his sufficiency of the evidence argument, defendant contends, *inter alia*, that there was no evidence presented that anyone other than defendant was present when the shot was fired or that the other person was armed or unarmed. However, Orlando testified that, after he heard the shot and turned around, he saw defendant standing on the sidewalk pointing a gun at an individual across the street and also saw three or four people by the cars, and that none of those people had a firearm. Defendant is, therefore, challenging Orlando's credibility and the facts are, therefore, not well settled. It is for the trial court, as fact finder, not this court, to determine the credibility

of the witnesses as it had the " 'opportunity to hear the witnesses and observe their demeanor in court.' " *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 41 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007)). Because defendant is challenging whether the State presented evidence to support an essential element of the offense – whether he endangered the bodily safety of another – he is challenging the sufficiency of the evidence and the trial court's factual findings. *People v. Pryor*, 372 Ill. App. 3d 422, 430 (2007) ("By questioning whether the evidence proved an element of the offense of aggravated vehicular hijacking, defendant is challenging the sufficiency of the evidence at trial and the factual findings of the jury."). Thus, the issue is a question of fact and not of law, and we will not apply the *de novo* standard of review. *Pryor*, 372 Ill. App. 3d at 430.

¶ 11 When we review the sufficiency of the evidence, the 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We "must give the State the benefit of all reasonable inferences." *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 62. It is the fact finder's responsibility to determine the "credibility of the witnesses, to weigh the evidence and draw reasonable inferences from it, and to resolve any conflicts in the evidence." *People v. Johnson*, 2014 IL App (1st) 120701, ¶ 21. As a reviewing court, we will not substitute our judgment for that of the fact finder on questions regarding the weight of the evidence and the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). We will only reverse a conviction if the credibility of the witnesses is so improbable as to raise a reasonable doubt (*Mays*, 81 Ill. App. 3d at 1099), or if the evidence is

"so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt" (*People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 12 To convict defendant of reckless discharge of a firearm, the State was required to prove that (1) defendant discharged a firearm in a reckless manner, and (2) he endangered the bodily safety of an individual. 720 ILCS 5/24-1.5(a) (West 2010); *People v. Grant*, 2017 IL App (1st) 142956, ¶ 10. Recklessness is defined as follows:

> "A person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2012).

Thus, for the first element, the State does not have to prove that defendant "shot a gun knowing that he may injure a particular person to show the defendant's reckless state of mind." *People v. Watkins*, 361 Ill. App. 3d 498, 501 (2005). For the second element, the State must prove that "a defendant's reckless conduct created a dangerous situation—such that an individual was in peril of probable harm or loss." *Collins*, 214 Ill. 2d at 215.

¶ 13 Defendant contends that the State did not prove that he endangered the bodily safety of another, the second element, because there was no evidence that other people were present when he fired the gun, or that it was fired in the direction of anyone. However, in this context, he also asserts that there was no evidence presented about how the gun was fired and that, because no witnesses testified that defendant fired the shot, "it is just as likely that he was pointing the gun because he had been shot, not because he was shooting," which implicates the first element:

whether defendant actually discharged the gun. Defendant does not challenge that the discharge was reckless.

¶ 14 Viewing all the evidence in the light most favorable to the State, we find the evidence is sufficient for any rational trier of fact to find that defendant was the individual who fired the gun and that individuals were in the vicinity of the discharge such that he endangered the bodily safety of an individual. Immediately after Officer Orlando heard the gunshot and saw the muzzle flash, he saw defendant standing on a sidewalk pointing a gun across the street at another individual. Defendant was the only person on the street with the gun. Orlando then saw defendant run into the apartment building, holding a gun. Shortly thereafter, Orlando found defendant in the building where Officer Scudella found a recently fired gun and still warm gun hidden in a grill. The gun looked like the gun Orlando saw defendant holding and the bullets in the gun matched the bullet Scudella recovered outside the building. These facts support the reasonable inference that defendant was the individual who fired the gunshot heard by Orlando, and we need not "search out all possible explanations consistent with innocence." *People v. Hommerson*, 399 Ill. App. 3d 405, 409 (2010) (quoting *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007)).

¶ 15 Further, the evidence supports that other people were in the vicinity of the shooting and that they were endangered by the gunshot. After Orlando heard the shot, he saw defendant standing on the sidewalk pointing the gun at someone across the street and three or four other people out by the cars. By firing a shot from the sidewalk, when other people were across the street or next to cars, thus necessarily in front of the sidewalk, defendant placed them in peril of probable harm. While defendant argues that the State did not present evidence that "the gun was

fired at any specific trajectory or a target," the State was not required to prove the "angle or direction of the discharge." *Collins*, 214 Ill. 2d at 217-18 ("The inherent danger caused by the reckless discharge of a firearm in the air, and the obvious ricochet effect that may occur when bullets fall to the ground, are matters of common sense. In this case, what inevitably came down endangered, placed individuals in peril of probable harm or loss, those in the vicinity of the discharge."). Thus, we conclude that the evidence was sufficient to support the finding that defendant's discharge of the firearm endangered the bodily harm of an individual.

¶ 16 Defendant cites *People v. Moreno*, 2015 IL App (3d) 130119, ¶ 54, where the appellate court reversed the defendant's conviction for reckless discharge of a firearm, to support his position that the State failed to prove him guilty beyond a reasonable doubt. In *Moreno*, the defendant did not fire the gun in the direction of any individuals but fired it into the dirt in the rear deck of a residence and the other "partygoers" present were on the porch behind him, which the court found "reduced their changes of being hit by a potential ricochet to virtually zero." *Moreno*, 2015 IL App (3d) 130119, ¶¶ 9, 44.

¶ 17 Unlike in *Moreno*, the chances of a bystander here being hit by defendant's bullet were not "virtually zero." Not only was defendant on the sidewalk pointing the gun at an individual across the street when he fired the shot, there were three or four other individuals "out in front by the cars," *i.e.*, in the potential line of fire. Defendant's conduct created a dangerous situation in which any of the people on the street was in danger of being hit by the bullet. Thus, the facts in *Moreno* are distinguishable. The conviction for reckless discharge of a firearm is affirmed.

¶ 18 Defendant also contends on appeal that all of his convictions are based on the single act of possession of a firearm and, therefore, under the one-act, one-crime rule, only his AHC

conviction should stand and the remaining convictions should be vacated. The State concedes that his convictions for AHC, UUWF based on possession of a firearm, AUUW, and defacing identification marks of firearms violate the one-act, one-crime rule. However, the State maintains that his convictions for UUWF based on possession of firearm ammunition and reckless discharge of a firearm do not violate the one-act, one-crime doctrine.

¶ 19 Defendant concedes he did not raise his challenge under the one-act, one-crime doctrine in the trial court but urges us to review it under the plain error doctrine. See *People v. Hillier*, 257 Ill. 2d 539, 544 (2010). Even though defendant did not preserve his challenge in the trial court, we may review arguments involving the one-act, one-crime doctrine under the plain error doctrine, "as violation of the one-act, one-crime rule results in a surplus conviction and sentence and affects the integrity of the judicial process, and thus satisfies the second prong of the plain-error rule." *People v. Price*, 2011 IL App (4th) 100311, ¶ 25; *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). We therefore review the merits of defendant's claim.

¶ 20 Under the one-act, one-crime doctrine, multiple convictions are improper if they are "based on precisely the same act." *In re Angel P.*, 2014 IL App (1st) 121749, ¶ 66. However, multiple convictions are proper "where a defendant has committed several acts, despite the interrelationship of those acts." *People v. King*, 66 Ill. 2d 551, 566 (1977). "[A]n 'act' is defined as any overt or outward manifestation that will support a separate conviction." *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 21 When analyzing a one-act, one-crime issue, we first determine "whether a defendant's conduct consisted of separate acts or a single physical act." *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). If a defendant commits several acts then we must determine if any of the offenses

are lesser-included offenses. *Nunez*, 236 Ill. 2d 488, 494 (2010). Multiple convictions are proper if none of the offenses are lesser-included offenses. *Id.* The issue of whether a defendant was improperly convicted of multiple offenses based on the same act is reviewed *de novo*. *Id.* at 493.

¶ 22 First, we must determine whether defendant's convictions were based on a single physical act, and therefore, will review the statutes defining the relevant offenses, as charged in this case. See *People v. Tolentino*, 409 Ill. App. 3d 598, 610 (2011).

¶ 23 AHC is defined as follows: "(a) A person commits the offense of being an armed habitual criminal if he or she*** possesses, *** any firearm" after being convicted of at least two or more qualifying offenses as provided in the statute. 720 ILCS 5/24-1.7(a) (West 2012). The two qualifying offenses applicable to defendant were his convictions for aggravated battery based on great bodily harm in 1998 and possession of a controlled substance with intent to deliver in 2002.

¶ 24 UUWF is defined as follows: "(a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2012). Defendant was found guilty of two counts of UUWF, one for possession of a firearm and the other for possession of firearm ammunition.

¶ 25 AUUW is defined as follows:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:***(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city***except when an invitee thereon or therein, for the purpose of the display of such weapon or the

> lawful commerce in weapons, or except when on his or her own land or in his or her own abode, legal dwelling, or fixed place of business,*** any pistol, revolver, stun gun or taser or other firearm; and***the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card[.]" 720 ILCS 5/24-1.6(a)(2)/(3)(C) (West 2012).

¶ 26 Defacing identification marks of firearms is defined as follows: "A person who possesses any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated commits a Class 3 felony." 720 ILCS 5/24-5(b) (West 2012). Reckless discharge of a firearm is defined as follows: "A person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual." 720 ILCS 5/24-1.5(a) (West 2012).

¶ 27 We agree with the parties that defendant's convictions for UUWF based on his possession of a firearm, defacing identification marks of a firearm, and AUUW violate the one-act, one-crime doctrine because they were based on the single physical act of defendant's possession of a handgun. See *People v. West*, 2017 IL App (1st) 143632, ¶ 25.

¶ 28 Defendant's conviction for UUWF based on his possession of firearm ammunition does not violate the one-act, one-crime doctrine. As explained by our supreme court in *People v. Almond*, 2015 IL 113817, ¶ 48, "the act of possession of a firearm is materially different from the act of possession of firearm ammunition, even if both items are possessed simultaneously." Finding that the defendant "committed two separate acts—possession of a firearm and possession of firearm ammunition"—the court concluded that the defendant's convictions for AHC based on his possession of a firearm and UUWF based on his possession of firearm

ammunition did not violate the one-act, one-crime rule. *Id.* ¶¶ 45, 48. Following *Almond*, we find defendant's conviction for UUWF based on his possession of firearm ammunition and his conviction for AHC based on possession of a firearm do not violate the one-crime, one-act doctrine as they are based on entirely separate acts.

¶ 29 Defendant also argues that his conviction for reckless discharge of a firearm violated the one-act, one-crime doctrine because it was based on the same act of possession of a firearm. We disagree. To convict defendant of reckless discharge of a firearm, as charged in this case, the State had to prove that defendant discharged "a firearm in a reckless manner which endangers the bodily safety of an individual." 720 ILCS 5/24-1.5(a) (West 2012). Necessarily, the offense entails possession of a firearm. However, defendant could not be convicted of this offense based only on the physical act of possession of a firearm. Rather, in addition to the possession of a firearm, the State also had to prove that he committed the separate act of "discharging a firearm," an element not included in AHC or any of the other charged offenses. It also had to prove the discharge endangered the bodily safety of an individual. Accordingly, although defendant's convictions all had possession of a firearm as a common element, his conviction for reckless discharge of a firearm did not violate the one-act, one-crime rule as it also required proof of separate and distinct act in addition to the possession of a firearm. See *Tolentino*, 409 Ill. App. 3d at 610 (where the defendant's convictions all had possession of a firearm as a common element, this court held that his convictions for attempted first degree murder of a peace officer and aggravated discharge of firearm did not violate the one-act, one-crime rule, noting that these convictions also required "proof of separate and distinct acts in addition to the possession of a firearm").

¶ 30 Accordingly, we conclude that defendant's convictions for UUWF based on possession of a firearm, AUUW, and defacing identification marks of a firearm violate the one-act, one-crime rule. However, defendant's convictions for UUWF based on possession of firearm ammunition and reckless discharge of a firearm are proper.

¶ 31 Of defendant's convictions that violate the one-act, one-crime rule, we must determine which offense is the most serious and which offenses should be vacated as the less serious offenses (*People v. Artis*, 232 Ill. 2d 156, 170 (2009)), as "judgment and sentence may be entered only on the most serious offense" (*People v. Smith*, 233 Ill. 2d 1, 20 (2009)). To determine the most serious offense, we compare the relative punishments for each offense, as the legislature would mandate a greater punishment for the most serious offenses. *Artis*, 232 Ill. 2d at 170. If the sentencing classifications are the same, then we consider which conviction has the more culpable mental state. *Id.* at 170-71. Here, the parties do not dispute that AHC is the most serious offense. We agree.

¶ 32 AHC is a Class X felony with a sentencing range of 6 to 30 years. 720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). UUWF based on possession of a firearm is a Class 2 felony with a sentencing range of 3 to 14 years. 720 ILCS 5/24-1.1(e) (West 2012). The two AUUW convictions are also Class 2 felonies with a sentencing range of three to seven years. 720 ILCS 5/24-1.6(d)(1) (West 2012). Defacing identification mark of firearms is a Class 3 felony, with a sentencing range of two to five years. 720 ILCS 5/24-5(b) (West 2012); 730 ILCS 5/5-4.5-40(a) (West 2012). Accordingly, as the punishment for AHC is greater than the punishment for the other offenses, AHC is the most serious offense and will stand. Because defendant's convictions for UUWF based on possession of a firearm, AUUW, and defacing

identification marks of firearms are the less serious offenses, these convictions are vacated under the one-act, one-crime rule. See *People v. Johnson*, 237 Ill. 2d 81, 99 (2010) (vacating the defendant's UUWF conviction because it was less serious than the AUUW offense); See also *People v. Akins*, 2014 IL App (1st) 093418-B, ¶ 26 (vacating one of the defendant's conviction under the one-act, one crime doctrine).

¶ 33 For the reasons explained above, we vacate the convictions for UUWF based on possession of a firearm, both counts of AUUW, and defacing identification of firearms and order the clerk of the circuit court to correct defendant's mittimus accordingly. The judgment is affirmed in all other respects.

¶ 34 Affirmed in part; vacated in part; mittimus corrected.