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FIRST DIVISION
June 19, 2017

No. 1-15-3496
2017 IL App (1st) 153496-U

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. MC1 223755
	)	
ANTHONY SANTANA,	)	Honorable
	)	William B. Raines,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Judgment affirmed where defendant did not establish prejudice based on the alleged errors in the charging instrument; evidence was sufficient to sustain his conviction for aggravated assault with a deadly weapon.

¶ 2 Following a bench trial, defendant Anthony Santana was found guilty of aggravated assault with a deadly weapon and sentenced to 364 days in the Cook County Department of Corrections. On appeal, defendant contends that the charging instrument was not sufficiently specific to allow him to prepare a defense to the offense of aggravated assault with a deadly weapon and that he suffered prejudice as a result. Defendant also maintains that the evidence was

insufficient to prove him guilty of aggravated assault with a deadly weapon beyond a reasonable doubt where the victim, Richard Ramirez, testified that he did not see a gun and no gun or shell casings were recovered. For the following reasons, we affirm the judgment of the trial court.

¶ 3 The charging instrument is titled "misdemeanor complaint" and states that at 3534 West Belmont Avenue on or about August 29, 2015, defendant committed the offense of "Agg[.] Assault in that [he] knowingly and without legal justification fired an unknown handgun towards [Ramirez] placing him in fear of receiving great bodily harm[] in violation of 720 Illinois Complied Statutes 5.0/12-2-C-1." At his arraignment on August 30, 2015, the trial court indicated to defendant that he was "charged with aggravated assault with a deadly weapon." Prior to trial, the State declined the opportunity to amend the complaint.

¶ 4 At trial, Ramirez testified that he was employed as a mover on the day in question. At about 8:30 that morning, he and three other workers were in an alley north of Belmont and Drake, which was where they parked their truck. As Ramirez passed a man whom he later identified as defendant in the alley, defendant asked him for money. Ramirez looked back and did not feel comfortable so he started walking faster without responding to defendant. When defendant asked for money a second time, Ramirez "took off running" because it was 8:30 in the morning and defendant looked suspicious to him.

¶ 5 "Right before [Ramirez] ran out of the alley, [he] turned back" and observed defendant standing with both hands "together pointed directly in front of his chest." Defendant was approximately 200 feet away when Ramirez "saw him in a position pointing a gun, and [he] heard a shot fired." Ramirez knew it was a gunshot because he had heard guns before, but he did not see the gun in defendant's hands because he "was at the end of the alley almost running for [his] life." After he heard the gunshot, Ramirez ran out of the alley, where he told some women

with children to go the other way because a person was in the alley with a gun. He then called the police. Approximately 15 or 20 minutes later, the police brought Ramirez to defendant. Ramirez recognized defendant because he "took a look at him" and thought "he looked suspicious" when he walked past defendant earlier.

¶ 6 On cross-examination, Ramirez testified that as he headed towards the truck with his coworkers, he had seen defendant "standing there like he was sleeping" and told him good morning. Although Ramirez had asked for the day off from work, his boss was initially unable to find another worker to cover his shift. At the last minute, Ramirez's boss informed him that he had found a substitute worker so Ramirez started walking home as his coworkers exited the alley in the truck. It was at that point, after he passed defendant on his way home, that defendant first asked Ramirez for money. Ramirez testified that when he saw defendant with the police, he was wearing a different shirt, "[b]lue shirt, shorts, darker shorts. He changed."

¶ 7 Chicago police officer W.W. Hartz testified that at about 8:30 on the morning in question, he heard a simulcast that a robbery had just taken place in the vicinity of Central Park and Belmont. Officer Hartz responded to a "flash" describing a subject as a Hispanic male, 5 feet 9 inches, who weighed about 160 to 185 pounds, and was wearing a blue T-shirt and blue and red shorts. As Officer Hartz patrolled the area for the subject, he heard a second simulcast that there was a man with a knife at Kedzie and Belmont. When he reached that location, several individuals pointed out defendant. After Officer Hartz placed defendant in handcuffs, he realized defendant fit the description from the simulcast of "this incident" and brought defendant back for a "showup with the victim." The victim positively identified defendant.

¶ 8 On cross-examination, Officer Hartz testified that he could not recall specifically what the clothing description was in the first call. After Officer Hartz found defendant at Belmont and

Kedzie, he did not run from the officer or have a knife on his person. Officer Hartz did not recover a gun or conduct gunshot residue testing on defendant. Ramirez was about 20 feet away from defendant during the "showup" interview.

¶ 9 After the State rested, defendant moved for a directed finding without argument, which the court denied.

¶ 10 Following closing argument, the State asked "for a finding of guilty in terms of aggravated assault using a deadly weapon."

¶ 11 In closing, defense counsel first argued:

> "Beginning briefly with the actual face of the complaint, Judge, this is charged under subsection C1 which requires a use of a deadly weapon other than by discharging an actual firearm. So the statute citation that it is charged under requires that the gun is not actually fired but some other weapon that is substantially similar to a gun.
>
> However, the language, the element of the offense in the complaint, that the State is required to prove, indicates that [defendant] fired an unknown handgun. The citation of the complaint does not match the language, and frankly it is unclear as to which the State is even attempting to prove here. But I think more to the point, Judge —
>
> * * *
>
> [T]he State is trying to prove that [defendant] fired a gun under the statute citation that requires some other weapon is used. And really, Judge, it just goes to consistency in what the State is required to prove."

¶ 12 Defense counsel then turned to the sufficiency of the evidence and focused the majority of his argument on the fact that Ramirez never testified that he was in fear of a battery. In conclusion, counsel stated:

> "So, in summary, Judge, I think that the fact that Mr. Ramirez never testified that he was in fear, that he never even saw a gun. It cannot be said beyond a reasonable doubt that [defendant] had a gun or fired a gun based upon both the officers' [*sic*] testimony and Mr. Ramirez's testimony."

¶ 13 The trial court found Ramirez and Officer Hartz "to be highly credible" and entered a finding of "guilty as to aggravated assault with a deadly weapon."

¶ 14 Defendant filed a motion for a new trial arguing, in relevant part, that the State failed to prove him guilty beyond a reasonable doubt of the offense charged in the criminal complaint. In support of his argument, defendant noted that the State tried to prove he "committed the offense of aggravated assault by firing an 'unknown handgun' at [Ramirez], yet the subsection of the statute under which [defendant] was charged explicitly requires that some weapon **other than an** [*sic*] **firearm** is used." (Emphasis in original.) The motion further argued, "There was no direct evidence throughout the trial that a firearm was ever used in the commission of the offense." After briefing and argument, the trial court denied defendant's motion, finding that although the language in the complaint was in contrast with the language of the statute cited, the language in the complaint was consistent with the language in the police reports that were tendered in discovery and consistent with the trial testimony. Thus, the court found defendant was on notice of the actual charge and not prejudiced in the preparation of his defense.

¶ 15 Defendant was sentenced to a misdemeanor term of 364 days pursuant to section 12-2(c)(1), (d) of the Criminal Code (Code) (720 ILCS 5/12-2(c)(1), (d) (West 2015)).

¶ 16 On appeal, we first address defendant's challenge to the charging instrument, which we review *de novo* because it involves a question of law. *People v. Rowell*, 229 Ill. 2d 82, 92 (2008). Section 111-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3 (West 2014)) sets forth a defendant's fundamental right to be informed of the nature and cause of criminal accusations made against him. *People v. Nash*, 173 Ill. 2d 423, 428-29 (1996). Where, as here, a defendant does not attack the charging instrument prior to trial, he must show that he was prejudiced in the preparation of his defense. *Rowell*, 229 Ill. 2d at 93. Under the prejudice standard, an indictment is sufficient if: (1) "it apprised the accused of the precise offense charged with sufficient specificity to prepare his defense"; and (2) the accused could "plead a resulting conviction as a bar to future prosecutions arising from the same conduct." *Id.* (citing *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976)).

¶ 17 The statutory provisions relevant to this appeal provide:

> "(c) Offense based on use of firearm, device, or motor vehicle. A person commits aggravated assault when, in committing an assault, he or she does any of the following:
>
> > (1) Uses a deadly weapon, an air rifle as defined in Section 24.8-0.1 of this Act, or any device manufactured and designed to be substantially similar in appearance to a firearm, other than by discharging a firearm.
> >
> > (2) Discharges a firearm, other than from a motor vehicle." 720 ILCS 5/12-2(c)(1), (c)(2) (West 2015).

¶ 18 While subdivision (c)(1) of section 12-2 is a Class A misdemeanor punishable with a determinate sentence of less than one year (730 ILCS 5/5-4.5-55(a) (West 2014)), subdivision

(c)(2) is a Class 4 felony, which carries a one-to three-year sentencing range (730 ILCS 5/5-4.5-45(a) (West 2014)). 720 ILCS 5/12-2(c)(1), (c)(2), (d) (West 2015).

¶ 19 Defendant concedes that he did not file a pretrial motion attacking the indictment but nevertheless maintains that the imprecise language in the indictment prejudiced him in the preparation of his defense. To establish he was not placed on sufficient notice of the charge against him, defendant argues that it is "not clear whether [defendant] was charged with firing a handgun or using a lookalike deadly weapon without discharging the weapon." We disagree, noting that defendant appears to conflate the terms "unknown handgun," which appears in the charging instrument, and "firearm," which appears in the statute.

¶ 20 The Firearm Owners Identification Card Act defines a "firearm" as any device which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas. 430 ILCS 65/1.1 (West 2014). The definition of "firearm" includes exceptions for items such as BB guns, spring guns, paint ball guns, antique firearms, and any device used exclusively for the firing of stud cartridges. 430 ILCS 65/1.1 (West 2014).

¶ 21 Here, the charging instrument cited the correct statutory provision, subdivision (c)(1) of section 12-2(c). 720 ILCS 5/12-2(c)(1) (West 2015). The cited offense was the Class A misdemeanor version of aggravated assault, which requires the State to prove that a defendant "use[d] a deadly weapon, *** other than by discharging a firearm." 720 ILCS 5/12-2(c)(1) (West 2015). The language in the misdemeanor complaint alleged that defendant "fired an unknown handgun toward [Ramirez]." Neither the statutory citation nor the language in the misdemeanor complaint charged that defendant committed the Class 4 felony version of aggravated assault enumerated in subdivision (c)(2), which requires that a defendant "discharges a firearm." 720 ILCS 5/12-2(c)(2) (West 2015). In light of the correct statutory citation in the charging

instrument, which was a misdemeanor complaint, we find that defendant was placed on sufficient notice that he was charged with the Class A misdemeanor enumerated in section 12-2(c)(1) of the Code. Accordingly, we do not find that the language "fired an unknown handgun" prejudiced defendant in the preparation of a defense and we are not persuaded by defendant's argument.

¶ 22 Defendant next challenges the sufficiency of the evidence to prove him guilty of aggravated assault using a deadly weapon beyond a reasonable doubt. Where, as here, a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). A reviewing court may not overturn a conviction based on insufficient evidence unless the proof is so unreasonable, improbable or unsatisfactory that a reasonable doubt exists. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 23 To sustain defendant's conviction in this case, the State was required to prove: (1) defendant, without lawful authority, engaged in conduct that placed another in reasonable apprehension of receiving a battery; and (2) in committing the assault, defendant used a deadly weapon. 720 ILCS 5/12-2(c)(1) (West 2015); *In re Gino W.*, 354 Ill. App. 3d 775, 777 (2005). The trier of fact determines whether the defendant's conduct placed the victim in reasonable apprehension of receiving a battery. *In re Gino W.*, 354 Ill. App. 3d at 777-78. In assessing reasonable apprehension, the trier of fact considers the evidence at trial, including the conduct of the victim and the defendant. *Id.* at 778. A victim's apprehension must be of an immediate or imminent battery, not of future harm. *People v. Kettler*, 121 Ill. App. 3d 1, 6 (1984).

¶ 24 Here, Ramirez testified that he did not feel comfortable and started walking faster after the first time defendant asked him for money in the alley. When defendant again asked Ramirez for money, he "took off running" because it was 8:30 in the morning and defendant looked suspicious to him. "Right before [Ramirez] ran out of the alley, [he] turned back" and observed defendant standing with both hands "together pointed directly in front of his chest." Defendant was approximately 200 feet away when Ramirez "saw him in a position pointing a gun, and [he] heard a shot fired." When he heard what he thought was a gunshot, Ramirez kept running out of the alley, told individuals on the street to go the other way because a person was in the alley with a gun, and then called the police. Ramirez identified defendant as the man in the alley to the police shortly after the incident, and at trial. Although defendant points to various factual inconsistencies in Ramirez's testimony and highlights the auspicious nature of the "showup" identification as well as the fact that no gun was recovered, the trial court found that Ramirez was "highly credible." A reviewing court may not substitute its judgment for that of the trial court upon matters of fact such as credibility determinations and "the testimony of a single witness, if positive and credible, is sufficient to convict." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 25 Drawing all reasonable inferences in a light most favorable to the State, we find that any reasonable trier of fact could have found defendant guilty of aggravated assault beyond a reasonable doubt. See *People v. Preis*, 27 Ill. 2d 315, 318-19 (1963) ("one who points a loaded revolver at another, within shooting distance, in a threatening manner, is guilty of an assault").

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.