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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 13-CF-202
)	
JEREMY M. RUSH,)	Honorable
)	Robert G. Kleeman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The State proved defendant guilty beyond a reasonable doubt, specifically his identity as the person who fired the gun on the night in question: the trial court was entitled to credit a witness's in-court identification of defendant, especially in light of the other evidence, including another witness's out-of-court identification of defendant; (2) we modified the judgment to reflect the proper class of defendant's convictions.

¶ 2 On the evening of August 18, 2011, defendant, Jeremy M. Rush, fired a gun into a crowd of people gathered outside an apartment complex in Addison. At a subsequent bench trial, three State witnesses provided identification testimony, but only one of the witnesses clearly identified defendant as the shooter. The trial court found defendant guilty of two counts of unlawful use of

a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) and two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)). Following a sentencing hearing, defendant was sentenced to concurrent terms of 4 years' imprisonment for each count of unlawful use of a weapon by a felon and 12 years' imprisonment for each count of aggravated discharge of a firearm. At a hearing on defendant's motion to reconsider his sentence, defendant and the State alerted the court to the fact that the sentencing order incorrectly indicated that defendant's convictions of aggravated discharge of a firearm were Class X felonies. Because the portion of the sentencing order listing the offenses, classes, and sentences could not be altered, the parties added language to the order on a subsequent page indicating that defendant's convictions of aggravated discharge of a firearm were in fact Class 1 felonies. The Department of Corrections ignored this language and listed defendant's convictions of aggravated discharge of a firearm as Class X felonies. On appeal, defendant argues that (1) he was not proved guilty beyond a reasonable doubt, as the evidence did not establish that he was the shooter and (2) his convictions of aggravated discharge of a firearm should be corrected to indicate that they are Class 1 felonies. For the reasons that follow, we affirm as modified.

¶ 3 At around 9 p.m. on August 18, 2011, Vincent Zapata, Daybi Ramirez, and Jose Jasso were at or near the parking area of some Addison apartment buildings. This parking area, which was in an area known to be Latin Counts territory, was between Michael and Elizabeth Lanes and ran parallel with Valerie Lane. Shots were fired, and Officer Doug Kucik, an evidence technician, was called to the scene at 9:39 p.m. After talking with people there, he recovered seven nine-millimeter shell casings. Pictures taken of the scene revealed that lights outside of all of the apartment buildings illuminated the area.

¶ 4 Zapata testified that he was at a convenience store near the apartment buildings that night with a friend. While there, he noticed a person wearing black. Zapata and his friend left the store and were headed toward his friend's house on Michael Lane when they heard gunshots coming from Valerie Lane. Zapata ran to his friend's house. After acknowledging that he talked with a police officer that night, gave the officer a written statement, and told the truth in that written statement, Zapata testified that he saw a person in black pull out a gun and start shooting. However, Zapata could not identify defendant as the shooter. In fact, Zapata testified that he had "no idea who shot [*sic*] that evening."

¶ 5 Ramirez, who used to be a member of the Insane Dragons and had prior convictions of unlawful possession of a controlled substance and domestic battery, testified that two days before the shooting his brother had an altercation with defendant and seven other Latin Kings. During that altercation, defendant "got it the worst, the beating, you know."

¶ 6 On the night of the shooting, Ramirez was drinking with Zapata and at least 15 other people in an alley on Michael Lane. Although it was dark out at that time, Ramirez indicated that lights outside the apartment buildings were on. Ramirez stated that a friend of his saw defendant get out of a van. While Ramirez was talking to a girl, the girl looked to her left and asked Ramirez who the person there was. Ramirez glanced to his right and saw a shadow. Ramirez testified that he did not really pay that much attention to this shadow, as he was trying to talk to the girl about one of her friends. Ramirez stated that he then heard gunshots being fired toward them, everyone ducked, Ramirez threw his beer at the shooter, and then everyone chased the shooter until the shooter got into a van waiting at the end of the street. As Ramirez was chasing the shooter, all he could see was the shooter's back.

¶ 7 When asked for more information about the shooter's identity, Ramirez asserted that he did not see the shooter's face or the gun the shooter used. Rather, Ramirez stated that he "[j]ust saw all black, you know, suit on." Ramirez indicated that, although he could not positively identify defendant as the shooter, defendant looked like the shooter. That is, defendant's shape and build were similar to the shooter's. Moreover, Ramirez asserted that "in all the Latin Kings in Addison, [defendant is] the only one that looks like that."

¶ 8 Ramirez also testified that he spoke with Officer Jose Gonzalez of the Addison police department on January 1, 2012, while Ramirez was in the Du Page County jail. Gonzalez, who asked for Ramirez's cooperation in the shooting investigation and whom Ramirez wanted to help, spoke to Ramirez about the shooting and showed Ramirez a six-person photo lineup. Without any improper suggestion, Ramirez identified defendant as the shooter.

¶ 9 Jasso, who used to be a member of the Latin Kings and had a prior conviction of aggravated battery,¹ testified that, on the day of the shooting, he noticed someone get out of a car in the area between Michael and Elizabeth Lanes. Jasso identified defendant, who went by the nickname Slim, as this person. Jasso saw defendant get back into the car and drive away.

¶ 10 Later that night, Jasso was at a cookout in front of one of the apartment buildings. Across the way and three apartment buildings, or two blocks, down from the cookout was another get-together. Although Jasso observed only five or six people at that get-together, he saw various men and women coming and going throughout the evening. The people at the get-together gathered in various groups. Among the people he saw at the get-together were Zapata

¹ This conviction was for battery to a senior citizen in Cook County, and the case number for that case is 11-CR-52830. Jasso was released from custody in that case at some point before March 2012.

and Ramirez. Although Jasso initially stated that he knew both men, he later clarified that he was only familiar with them. Jasso testified that he was aware of the people at the get-together because he was concerned for his own safety.

¶ 11 At around 9 p.m., Jasso saw a car drive up, and defendant got out. Jasso observed defendant approach the get-together, pull out a gun, aim it at the people there, and fire the gun four or five times. Jasso saw defendant and the people at the get-together run away while he “kept on going with [his] evening.” Later, Jasso admitted that he was not paying much attention to the get-together until he heard the gunshots.

¶ 12 When the police responded to the scene, Jasso did not talk to them. Rather, approximately seven months later, he bumped into Gonzalez, who was sitting in his car with some other officers outside of the convenience store. Gonzalez asked Jasso if he heard anything about the shooting. Jasso told him that he saw the shooting and knew who the shooter was. Gonzalez told Jasso that he saw Jasso at the scene. A few days later, Gonzalez showed Jasso a photo lineup, and Jasso identified defendant as the shooter. Although Jasso testified that he picked defendant because defendant was the only person in the lineup he knew, he later clarified that he picked defendant without any improper prompting from Gonzalez, because defendant was the person he saw fire the gun that night.

¶ 13 Gonzalez, who, as a gang investigator, worked undercover as a gang member who purchased drugs, was declared an expert in gang-related activity in Addison. Gonzalez stated that the Latin Kings, whose colors are black and gold, and the Latin Counts are rivals and that the Insane Dragons do not get along with either gang. Defendant was a member of the Latin Kings, Ramirez was a member of the Latin Counts and used to belong to the Insane Dragons,

and the parties stipulated that Zapata was associated with the Latin Counts when the shooting occurred.

¶ 14 On the night of the shooting, Gonzalez was on vacation. He received a phone call from another officer advising him about the shooting. That officer told Gonzalez that the shooter was male, dark-skinned, and about 6 feet tall. The officer also advised Gonzalez that the shooter had a thin build, had short black hair, and was wearing a black shirt with a long-sleeved yellow shirt underneath it. The officer told Gonzalez that the shooter yelled “what up Count” before firing the gun. All of this led Gonzalez to believe that the shooter was defendant, as defendant was the only Latin King member in the area who fit that description.²

¶ 15 When Gonzalez returned to work, he was assigned the case and eventually spoke to Zapata. In January 2012, Gonzalez spoke to Ramirez, who was in the Du Page County jail. Ramirez told Gonzalez he knew who the shooter was. Ramirez identified defendant as the shooter in a photo lineup. Gonzalez clarified that Ramirez did not merely give him a description of the shooter. Rather, he specifically told Gonzalez that he got a good look at the shooter and that “it was Slim.” Gonzalez did not promise Ramirez anything in exchange for his cooperation, and no one identified defendant as the shooter before Ramirez did.

¶ 16 In the afternoon of March 20 or 21, 2012, Gonzalez was on patrol for a gang-related case when he saw Jasso. Gonzalez asked Jasso “for any additional information in reference to criminal activity in Addison.” At that point, Jasso told Gonzalez that he had witnessed a shooting. Because Gonzalez was involved in another matter, Jasso gave Gonzalez his phone number so that Gonzalez could contact Jasso to set up a time to meet and discuss the shooting

² This evidence was elicited to establish only the reason why Gonzalez included defendant’s picture in the photo lineups shown to Ramirez and Jasso.

further. Gonzalez did not make a report detailing this encounter, which lasted only a few minutes.

¶ 17 On March 23, 2012, Gonzalez met with Jasso close to Jasso's home. Jasso told Gonzalez that he was a witness to the shooting. He said that Slim, a Latin King member, was the shooter. Gonzalez handed Jasso a photo lineup, and Jasso, without any improper suggestion, identified defendant as the shooter.

¶ 18 The court found defendant guilty of both counts of unlawful possession of a weapon by a felon and aggravated discharge of a firearm, noting that the only real issue before it was whether defendant was the shooter. In finding defendant guilty, the court noted that Zapata, when asked to take the oath, had a look on his face like he was going to be ill. Under these circumstances, the court concluded that it could not believe Zapata's testimony. The court determined that Zapata "knew exactly who we were talking about and he didn't want to tell us, which [the court was not] surprised about."³ Nevertheless, the court stated, erroneously, that it "heard [Zapata's] prior testimony, which is admitted as substantive evidence, where he identified this defendant as the shooter." In commenting on Ramirez's testimony, the court noted that his testimony about throwing a beer at the shooter and chasing him was "nothing less than absurd." However, the court found credible Ramirez's prior identification of defendant as the shooter. With regard to Jasso's testimony, the court found him credible, even though he had been convicted of battering a senior citizen, an "awful crime." However, the court was troubled a bit by the circumstances surrounding Jasso's initial encounter with Gonzalez, noting that it would have "preferred" that the circumstances of that initial encounter were documented. Nevertheless, the court found

³ In denying defendant's motion for a new trial, the court acknowledged this error and stated that it "did not influence [the court's] ruling."

“striking” the fact that “Josso [*sic*], a former Latin King, identifi[ed] Slim, identifi[ed] the photographs [*sic*] in the lineup, the same person that was identified in the lineup by Ramirez and Zapata.” The fact that none of the three men were connected further strengthened the court’s conclusion that defendant was the shooter. Elaborating more on the three witnesses’ testimony, the court observed:

“If it was just Josso [*sic*]—and I thought about this and I don’t know if I needed to—would I have said that that’s proof beyond a reasonable doubt? You know, I don’t know. But it’s [*sic*] Josso [*sic*] combined with Zapata’s out-of-court statement combined with Ramirez’s out-of-court statement, and I’m left with the conclusion that the defendant was the shooter.”

¶ 19 Thereafter, defendant was sentenced, he moved the court to reconsider his sentence, and the court denied the motion. At the conclusion of the case, the following exchange was had:

“MR. JACOBS [defense attorney]: Judge, a couple of issues. Number one. I spoke with the State’s Attorney. The sentencing orders [*sic*] indicated that this was a Class X felony, though it’s a Class 1. So I believe that [the assistant State’s Attorney] did a revised sentencing order specifically setting out the language that this was a Class 1 felony.

THE COURT: Yeah, I looked at the sentencing orders [*sic*], and actually candidly did not see that ***. ***

MS. LINDT [assistant State’s Attorney]: That was an error, your Honor. I actually vacated—I had orders prepared this morning to vacate everything that was issued on the 21st to clarify and reissue new orders just to get everything straight. I couldn’t

change the Class Xs, as Mr. Jacobs indicated, because it's automatically generated. I do have additional language to change that. ***

* * *

THE COURT: All right. *** [I]f you agree [to add language to clarify that defendant's convictions of aggravated discharge of a firearm should be listed as Class 1 felonies], I don't have any problem. Obviously we need to correct the order, but I just want both sides to take a look at it. If you think the order that [is] proposed is accurate, I would appreciate it. If I see it come across, I'm going to assume you looked at it and you agree it's accurate ***."

¶ 20 The sentencing order, which is two pages long, conspicuously indicates on the first page that both counts of aggravated discharge of a firearm are Class X felonies. On the second page, amid various paragraphs detailing the terms of the sentence, it states:

"Count [I] merges into count [VI], a Class 1 felony not a Class X felony as indicated & shall be corrected as such. Count [II] merges into count [VII], a Class 1 felony. ***

This order is entered *nunc pro tunc* to [the date of sentencing]."

¶ 21 This timely appeal followed.

¶ 22 At issue in this appeal is whether (1) the State proved beyond a reasonable doubt that defendant was the shooter and (2) the sentencing order must be corrected to reflect that defendant's convictions of aggravated discharge of a firearm are Class 1 felonies, not Class X felonies. We consider each issue in turn.

¶ 23 The first issue we address is whether the State proved beyond a reasonable doubt that defendant was the shooter. The trier of fact must determine whether a defendant is guilty. *People v. Frieberg*, 147 Ill. 2d 326, 359 (1992). When a defendant challenges on appeal the trier

of fact's assessment of the evidence in determining guilt, we must consider 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 crime proved beyond a reasonable doubt. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). We will reverse a defendant's conviction only if the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Maggette*, 195 Ill. 2d 336, 353 (2001).

¶ 24 The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). "A single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *Id.* On the other hand, an identification will be insufficient to support a conviction if it is vague and doubtful. *Id.* The reliability of a witness's identification of a defendant as the perpetrator is a question for the trier of fact to resolve. *People v. Cox*, 377 Ill. App. 3d 690, 697 (2007). The trier of fact must also assess the credibility of the witnesses, assign what weight to give to the witnesses' testimony, determine what inferences to draw from the evidence, and resolve any conflicts or inconsistencies in the evidence. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002).

¶ 25 Circumstances to consider in evaluating the reliability of a witness's identification include: (1) the opportunity the witness had to view the accused at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the accused; (4) the level of certainty the witness demonstrated when he identified the accused as the perpetrator; and (5) the length of time between the crime and the witness's identification of the accused as the perpetrator. *Slim*, 127 Ill. 2d at 307-08.

¶ 26 With these principles in mind, we find that the State proved beyond a reasonable doubt that defendant was the shooter. The evidence revealed that the shooting occurred in an area known to belong to the Latin Counts. Jasso, a former member of a rival gang who indicated that for his own safety he keeps track of who is around him, testified that he saw defendant in the area approximately three hours before the shooting. Defendant left, and Jasso stated that he saw defendant return at around 9 p.m. Although it was dark outside at this point, the evidence revealed that lights outside of the apartment buildings were on. Courts have found that an identification made at night in an area illuminated only by artificial light can establish the defendant's identity as the perpetrator beyond a reasonable doubt. *People v. Barnes*, 364 Ill. App. 3d 888, 895 (2006). Jasso told Gonzalez that defendant, who goes by the nickname Slim, was the shooter, and he identified defendant as the shooter in the photo lineup without any improper suggestion from Gonzalez. Although this out-of-court identification of defendant as the shooter was made a little over seven months after the shooting, the evidence suggested that Jasso was in custody in Cook County after the shooting and was released only shortly before he told Gonzalez that defendant was the shooter. Aside from the fact that the evidence suggested that there was a reason for Jasso's delay in identifying defendant as the shooter, we note that courts have found that delays much longer than seven months after a crime was committed did not render the identification testimony incredible. See, e.g., *People v. Rodgers*, 53 Ill. 2d 207, 213-14 (1972) (identification made more than two years after crime occurred); *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (identification made 16 months after crime was committed). In court, Jasso again unequivocally identified defendant, with whom he was acquainted, as the shooter. Jasso's familiarity with defendant's appearance strengthened Jasso's identification of defendant as the shooter. *Barnes*, 364 Ill. App. 3d at 895; see also *People v. Petermon*, 2014 IL

App (1st) 113536, ¶ 32 (witness familiar with codefendant strengthened identification). This positive identification from Jasso was alone sufficient to establish beyond a reasonable doubt that defendant was the shooter. *Slim*, 127 Ill. 2d at 307. The fact that the trial court *questioned* whether it would have been is of no consequence, as the court never asserted that Jasso's identification was insufficient, and we must consider the evidence in the light most favorable to the State.

¶ 27 Defendant argues that Jasso's identification testimony should be viewed as incredible. Supporting this position, defendant suggests that Jasso was in cahoots with Gonzalez to identify defendant as the shooter. Defendant questions that Jasso ran into Gonzalez a few days before Gonzalez showed Jasso the photo lineup, noting that Gonzalez never made a report detailing this first encounter. However, the fact that Gonzalez did not make a report indicating what he and Jasso discussed at the first meeting does not detract from the credibility of Jasso's identification testimony. Gonzalez testified that he spoke with Jasso for only a few minutes, as he was in the middle of another gang-related case. Because of his involvement in this other case, which may have been more pressing, he could not question Jasso in depth about a shooting that occurred several months earlier.

¶ 28 Other evidence, when considered in light of Jasso's identification, further supports the conclusion that defendant was the shooter. Specifically, a few days before the shooting, defendant, a Latin King member, was involved in an altercation with the brother of Ramirez, a current or former member of a rival gang. During this altercation, defendant was allegedly beaten up pretty badly. This incident certainly gave defendant a motive to attack rival gang members. On the night of the shooting, in the middle of August, a person dressed pretty warmly in Latin King colors was seen in Latin Count territory. This attire might well have drawn the

attention of people in the area. In fact, both Zapata and Ramirez noticed it. Although Zapata might not have been able to describe for police anything other than what the shooter was wearing, Zapata's description of the shooter's attire was consistent with Ramirez's. Ramirez also provided a physical description of the shooter that was consistent with defendant's physical characteristics. According to the evidence, of all the Latin Kings in the area, defendant was the only one who fit that physical description. More significantly, Ramirez did identify defendant out-of-court as the shooter.

¶ 29 Defendant argues that this evidence should not be considered, because the three men all knew each other and together might have decided to wrongly accuse defendant. The evidence presented at trial does not bear this out. Only Jasso testified that he knew both Zapata and Ramirez, and he later clarified that he was merely familiar with both men. Nothing presented at trial even hints that this familiarity would somehow lead to the men colluding to falsely identify defendant as the shooter.

¶ 30 The next issue we consider is whether defendant's convictions of aggravated discharge of a firearm should be corrected on the sentencing order to clearly reflect that they are Class 1 felonies, not Class X felonies. Because this issue is purely one of law, our review is *de novo*. *People v. Breedlove*, 213 Ill. 2d 509, 512 (2004).

¶ 31 Defendant "asks that this cause be remanded with directions for the trial court to remove the Class X felony language from the sentencing orders [*sic*] and replace it with the proper Class 1 felony designation." The State claims that "[i]f the defendant wants to advise the Department of Corrections that it is improperly stating the class of his felonies on its website, he or his counsel need only provide the Department of Corrections with a copy of the complete sentencing

order.” Accordingly, the State asserts that “[a] remand to the circuit court in this circumstance is unnecessary and would be an inefficient use of judicial resources.”

¶ 32 The record is clear that the court orally ruled that defendant’s convictions of aggravated discharge of a firearm should be Class 1 felonies, not Class X felonies. The written sentencing order, while expressing this in one part, elsewhere indicates that the convictions of aggravated discharge of a firearm are Class X felonies. The law is well settled that, when the written order and the oral pronouncement of the trial court conflict, the oral pronouncement becomes the judgment of the court, and the written order must be corrected to reflect the oral ruling. See *People v. Maxey*, 2015 IL App (1st) 140036, ¶ 46. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we modify the judgment to reflect that defendant’s convictions of aggravated discharge of a firearm are Class 1 felonies.

¶ 33 In doing so, we note that, although neither the parties nor this court found any published opinions addressing this type of problem, we did find two unpublished cases where the courts did. See *People v. Collier*, 2014 IL App (1st) 122922-U, ¶ 32; *People v. Banks*, 2011 IL App (1st) 100382-U, ¶ 24. In both of those cases, the State conceded error. *Collier*, 2014 IL App (1st) 122922-U, ¶ 32; *Banks*, 2011 IL App (1st) 100382-U, ¶ 24. If the State, as it says, is truly concerned about not wasting judicial resources, we encourage it to follow *Collier* and *Banks* and concede errors as clear as this one in the future.

¶ 34 For the reasons stated, we modify the judgment of the circuit court of Du Page County to reflect that defendant’s convictions of aggravated discharge of a firearm are Class 1 felonies, and we affirm the judgment in all other respects. As part of our judgment, we grant the State’s request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 35 Affirmed as modified.