2018 IL App (2d) 160755-U
No. 2-16-0755
Order filed October 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ARMANDO DELGADO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-1729 Honorable Linda Abrahamson, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of attempted murder: as to identity, although defendant questioned the eyewitness identifications, the evidence as a whole, including the cartridge casing in his pocket and the gunshot residue on his clothes, was sufficient; as to intent, the evidence was sufficient in that it showed that he aimed the gun at both victims.

¶ 2 Defendant, Armando Delgado, appeals from his conviction on a single count of attempted murder with an enhancement for personal discharge of a firearm (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)). The charge resulting in defendant's conviction alleged that defendant intended to kill both Omar Contreras and Alonso Rodriguez. Defendant asserts that the State failed to

supply adequate evidence that he was the shooter or, alternatively, that he intended to kill either Contreras or Rodriguez. Defendant's argument concerning identity does not properly address the evidence and is thus inadequate; his argument concerning intent, although adequate, is ultimately unpersuasive. We thus affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with two counts of attempted murder with an enhancement for personal discharge of a firearm. The first count alleged that defendant, "with the intent to kill Omar Contrearas [*sic*] and Alonso Rodriguez," shot a firearm at them. The second alleged that defendant, "with the intent to kill Orlando Crespo," shot a firearm at him. That is, although the State alleged that defendant had three intended victims, it charged him with only two counts of attempted murder. The State dismissed other counts before defendant's trial, and those counts are not at issue in this appeal. Defendant had a bench trial in June 2016. Defense counsel neither filed any motions *in limine* nor moved to suppress any evidence.

¶ 5 At trial, the State put on evidence by which it intended to prove that, on the night of September 13, 2013, defendant, accompanied by another person, shot at three men: first Contreras and Rodriguez, then Crespo.

¶ 6 A. The First Shooting Incident: Contreras and Rodriguez

¶ 7 At around 9:15 p.m. on September 13, 2013, Contreras was driving west on Bluff Street in Aurora, approaching the intersection with Broadway. His friend Rodriguez was in the front passenger seat. Traffic on Bluff stops at a sign at the intersection; traffic on Broadway does not stop. Contreras had to wait at the intersection for the relatively heavy traffic on Broadway to clear.

¶ 8 As they approached the stop sign, both Contreras and Rodriguez noticed two Hispanic males approaching their vehicle. At trial, Contreras and Rodriguez both had difficulty remembering details of the incident; the State offered a recording and transcript of Rodriguez's statement to the police as substantive evidence on the points that he had completely forgotten.

¶ 9 Rodriguez testified that two men approached them at a run as they approached the stop sign. He turned and saw one of the two run toward his window, "pointing a pistol at [them] out of nowhere." According to the transcript of his statement, both were "throwing the peace sign [(a sign associated with the Deuces)] going down." The person with the pistol was making gang-related comments:

> "He says 'what's up nigga what are you?' *** 'What are you nigga?' 'What's up nigga throw it up nigga?' 'What's up nigga? Deuce killer nigga.' "

Contreras testified that he responded to the gunman's gang slurs by putting his hands in the air and saying that he "was nothing"—had no gang affiliation.

¶ 10 The gunman approached the partially open passenger window and put his gun through it so that the end of the barrel was at or near Rodriguez's temple. Both Rodriguez and Contreras heard several clicking sounds: Rodriguez interpreted the sound as the gunman trying to release the gun's safety; Contreras interpreted it as the sound of the trigger being pulled when the gun was jammed. When Contreras realized that the gunman was trying to shoot, he drove forward, and, as he did so, he heard several gunshots. He paused briefly, but, as he heard another shot, he drove full speed across the intersection, despite the traffic. Afterward, Contreras found signs that several shots hit his car: "There was bullet holes on my car on the quarter panel and two on the door"; "[t]here was one *** in my seat, *** [the] driver's seat, and then there was one actually inside the stereo and lodged in the radio."

¶ 11 B. The Second Shooting Incident: Crespo

¶ 12 (The court found defendant not guilty of the charge stemming from the shots fired at Crespo. The evidence relating to this incident nevertheless bears on the other charge.) Crespo had been a member of the Latin Kings in Chicago, but, after his brother died in gang violence, he left the gang and had been out for three or four years before he moved to Aurora. He had moved into a house on North Street several months before the incident and was alone in the house that evening. At about 11:15 p.m., he decided to sit out on the front porch with a beer. A white Cadillac with two Hispanic males in it parked across the street. The street was very narrow, and the car was so close that he could see that the two occupants were sharing a bottle of José Cuervo tequila. He recognized one of them as someone he had seen in the neighborhood. He watched them getting in and out of the car and heard them joking to each other, and he could tell that they could see him too. After about 10 or 15 minutes, he started to feel that the situation was potentially dangerous, so he decided to get into his car and leave the house. He pulled out, thus passing the two as they walked down the street. He saw them flash a gang sign and utter "some slur" that he thought included the word "killer." He pulled up by them and told them that he was just a person who lived in the neighborhood and was " 'nothing about that' "—not a gang member. The man Crespo did not know started saying, " '[S]hoot him' "; the one he did know stuck the gun in the window and said, " '[Y]ou don't want none of this 9mm.' " When Crespo saw the gun, he hit the gas. He did not realize that the gun was real until he heard four or five shots as he pulled away. He drove around the block and pulled into a parking lot to check his car for damage. None of the shots had struck it.

¶ 13 C. Identification Evidence

¶ 14 All three victims spoke to the police within minutes of the respective shootings. Contreras and Rodriguez were stopped by a patrol car as they fled from the gunman. Crespo saw a police car passing as he was checking his car for damage and flagged it down. All gave roughly consistent descriptions of the two men. All described the gunman as a Hispanic male with long hair in a ponytail, wearing a white shirt and black shorts. The other man was wearing a gold shirt.

¶ 15 A gang-unit officer heard Crespo's description of the car he had seen before the shooting and suspected that it belonged to someone named Andrew Bueno. He and two other officers went looking for it first in Bueno's neighborhood, but then in defendant's neighborhood. They spotted it as Bueno drove it through defendant's neighborhood. Two of the passengers were of interest to the police as possible suspects. Defendant, who had his long hair in a ponytail and was wearing a white shirt and black shorts, was one. He was seated in the back seat. The other suspect was not wearing the gold shirt that the victims described, but the officers believed that he was likely the other man involved. Defendant tried to strike the officer getting him out of the car. When he was searched, he had a 9-milimeter cartridge casing in a pocket of his shorts. The other suspect was also uncooperative.

¶ 16 The police arranged to have the three victims view the two suspects at show-ups; these took place on September 14, 2013, in the early morning hours after the incident. All the victims recognized defendant as the shooter. Rodriguez was unsure whether the second suspect was involved: he believed that the suspect's face was the same but the color of the suspect's shirt was different. In every instance, the victims saw the suspects wearing handcuffs. Several officers testified that having suspects in handcuffs was too suggestive to be preferred procedure for a show-up, but that it was done in this instance because the suspects were uncooperative. As an

officer was taking Crespo to view the suspects, Crespo noticed a white Cadillac parked nearby and identified it as the car that had been parked in front of his house.

¶ 17 The police found three 9-millimeter cartridge casings near Crespo's North Avenue house and two more near the intersection of Bluff and Broadway. At about 5 p.m. on September 14, 2013, an officer was at Bueno's house for other reasons and noticed two more 9-millmeter cartridge casings outside the house. All the cartridge casings recovered, including the one from defendant's pocket, had the same manufacturer's marks. Moreover, a firearms examiner opined that all had been ejected by the same gun.

¶ 18 Samples from defendant's shirt and shorts and the other suspect's jeans tested positive for gunshot residue. Samples from defendant's hands tested negative for gunshot residue, but a pair of work gloves found in the back of Bueno's Cadillac tested positive for gunshot residue.

¶ 19 Officer Robert Myint of the Aurora police interviewed defendant after his arrest. Defendant was Mirandized and agreed to make a statement. After Myint collected the samples for gunshot-residue testing from defendant's hands, defendant volunteered that he believed that he was in trouble because of the clothing he was wearing and the cartridge casing in his pocket. Defendant then told Myint that he had been riding his bicycle around his neighborhood and encountered his friend Juan. He told Juan that he had been wearing the same pants for two days and asked Juan for a change of pants. Juan left and then returned with some black shorts for defendant to wear. Defendant did not know Juan's last name or his address.

¶ 20 D. The Court's Rulings and the Posttrial Motion

¶ 21 The court, which delayed its ruling so that it could review the evidence, found "that the State ha[d] shown beyond a reasonable doubt that it was, in fact, [defendant who] was the person

holding the gun at the passenger window of both cars on September 13th, 2013," and that defendant fired all the shots.

¶ 22 On the issue of intent to kill, it concluded, based on the multiple bullet strikes to Contreras's car, that defendant had fired with the intent to kill both Rodriguez and Contreras. However, it found that, because the incident with Crespo had produced no evidence of the direction in which defendant fired, reasonable doubt existed as to defendant's intent in that incident.

¶ 23 Defendant filed a posttrial motion in which he asserted that the evidence was insufficient to show that he intended to kill either Contreras or Rodriguez. He also asserted that the "court erred in finding that the suggestive show-ups were sufficient to prove Defendant guilty." After the court sentenced defendant, he filed a timely appeal.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant asserts that the evidence was insufficient to show that he intended to kill either Contreras or Rodriguez. He also argues that the evidence was insufficient to show that he was the gunman. He does not address the sufficiency of the identification evidence as a whole, but points to defects only in the evidence relating to the show-ups.

¶ 26 We hold that the evidence of intent was sufficient. We further hold that defendant has effectively forfeited his argument concerning the sufficiency of the identity evidence: to the extent that defendant challenges the admissibility of the evidence from the show-ups, he forfeited the argument by failing to raise it at trial and in his posttrial motion; to the extent that he intends to claim that the identity evidence was insufficient, his argument is fatally incomplete because it fails to address the weight of the identity evidence as a whole. As neither of defendant's arguments sets out a basis for reversal, we affirm.

¶ 27 We review the sufficiency of the evidence under the familiar standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), as adopted by *People v. Collins*, 106 Ill. 2d 237 (1985): when a reviewing court decides a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson*, 443 U.S. at 319). "[W]here the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt," but, "[i]n conducting this inquiry, the reviewing court must not retry the defendant." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280.

> "Under this standard, the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. [Citation.] But merely because the trier of fact accepted certain testimony or made certain inferences based on the evidence does not guarantee the reasonableness of its decision. A conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt." *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 28 For a conviction of attempted murder to be sustainable, the evidence must establish beyond a reasonable doubt, first, that the defendant performed an act constituting a substantial

step toward the commission of a murder, and, second, that the defendant possessed the *specific* intent to kill the victim. *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 52.

> "[M]urder[is] defined in terms of [an] act[] causing a particular result plus some mental state which need not be an intent to bring about that result. Thus, if *A*, *B*, *C* and *D* have each taken the life of another, *A* acting with intent to kill, *B* with an intent to do serious bodily injury, *C* with a reckless disregard of human life, and *D* in the course of a dangerous felony, all three are guilty of murder because the crime of murder is defined in such a way that any one of these mental states will suffice. However, if the victims do not die from their injuries, then only *A* is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm, that he acted in reckless disregard for human life, or that he was committing a dangerous felony. Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (*i.e.*, the death of another)." 2 Wayne R. LaFave, Substantive Criminal Law § 11.3(a), at 212-13 (2d ed. 2003).

Specific intent to kill is usually inferred from the circumstances, "such as the character of the assault on the victim and the use of a deadly weapon." *People v. Jones*, 184 Ill. App. 3d 412, 429 (1989). In the usual case, when a defendant is charged with the attempted murder of more than one victim, the evidence must establish beyond a reasonable doubt that the defendant performed an act constituting a substantial step toward the killing of each victim, and the evidence must further show specific intent to kill each victim. *Viramontes*, 2017 IL App (1st) 142085, ¶ 53.

¶ 29 We start with defendant's challenge to the sufficiency of the identity evidence. Defendant—in effect—has forfeited that claim. The State argues that defendant failed to preserve *the admissibility* of the identifications by failing to specifically object to their admission at trial and to raise that specific matter again in a posttrial motion (*e.g.*, *People v. Woods*, 214 Ill. 2d 455, 470 (2005)). The State is correct that defendant failed to preserve the admissibility issue, but that is not the end of the analysis, as the requirement that a defendant preserve an issue does not apply to arguments attacking the sufficiency of the evidence (*e.g.*, *People v. Enoch*, 122 Ill. 2d 176, 190 (1988)). Defendant's discussion of the identification evidence, although it mostly reads as an admissibility argument, does have features of a true sufficiency-of-the-evidence argument. For instance, defendant argues that Rodriguez failed to make an in-court identification of defendant, thus implying that Rodriguez never had a good sense of the gunman's appearance. However, to the extent that we can treat defendant's argument as one attacking the sufficiency of the identity evidence *as such*, the argument does only half the necessary work to make a case for reversal. While it discusses the weaknesses in the eyewitness identifications, it never explains why *all* the identification evidence was therefore "so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt" that defendant was the gunman (*Ross*, 229 Ill. 2d at 272). The State presented several lines of circumstantial evidence tending to prove defendant's identity. Those included that defendant had a 9-millimeter cartridge casing in his shorts pocket when the gang-unit officers arrested him, that his clothing tested positive for gunshot residue, that he vigorously resisted arrest, and that he volunteered an entirely implausible explanation for the cartridge casing in his pocket. Defendant never addresses this and thus leaves that part of his sufficiency argument fatally incomplete.

¶ 30 Defendant next asserts that the State failed to prove that he intended to kill *both* Contreras and Rodriguez. He seems to assume that, because the count that resulted in his conviction charged him with intending to kill both, the State had to prove his specific intent to kill both. To prove attempted murder in a general sense, the State needed to prove only that defendant intended to kill one person, so the State's failure to prove that defendant intended to kill both victims would merely be a variance between the proof at trial and the indictment. But even a "fatal variance" between the indictment and the proofs is an error that is subject to forfeiture (*People v. Puleo*, 96 Ill. App. 3d 457, 463 (1981)), and defendant did not raise a claim of such a variance below. In any event, the evidence was sufficient for us to sustain a conviction based on his intent to kill both.

¶ 31 Defendant contends that, if he had been intent on killing Rodriguez, he would not have approached him with his gun's safety engaged. This is unpersuasive, to say the least. First, the evidence was not clear that the reason that the gun failed to fire was that defendant had failed to release the safety. Rodriguez thought that the safety was on, but Contreras thought that the gun had jammed, and nothing in the evidence suggested which was correct. Moreover, even if defendant did not fire at Rodriguez's head because he could not get the safety off, that suggests more that he was unfamiliar with his weapon than that he came to the window not intending to fire. If "poor marksmanship is not a defense to attempted first degree murder" (*People v. Johnson*, 331 Ill. App. 3d 239, 251 (2002)), neither is lack of familiarity with the weapon. Further, we agree with a New York appellate court's holding that, where a defendant "made a triggering motion, but the gun never fired," his "intent to shoot [the person at whom it was aimed] could clearly be inferred from his conduct." *People v. Jenkins*, 585 N.Y.S. 73, 74 (N.Y.

1992). In any event, defendant here did shoot at Rodriguez. Indeed, he shot Rodriguez's window out.

¶ 32 Defendant also argues that the State failed to show that he had the specific intent to kill Contreras. He contends that the shots were all directed at the passenger side of the car and that his questions—" 'What are you nigga?' " and so on—were all directed at Rodriguez. This is a closer matter, but we disagree on this point too. The evidence showed that defendant approached Rodriguez's window and, less clearly, spoke only to Rodriguez. But that could have been because Rodriguez's window was open or because defendant wanted to be on the curb side of the car. Further, despite the evidence establishing that defendant fired all his shots from the driver's right as the car drove away, Contreras testified that he found bullet holes in the driver's seat and the stereo. We cannot say that that was an insufficient basis for a reasonable trier of fact to infer that defendant fired shots specifically at Contreras with the intent to kill him.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm defendant's conviction. 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 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 35 Affirmed.