2019 IL App (1st) 161661-U

No. 1-16-1661

Order filed March 20, 2019

Third 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. 11 CR 14559-01
	)	
CALVIN TRUITT,	)	Honorable
	)	Luciano Panici and
Defendant-Appellant.	)	Tommy Brewer,
	)	Judges, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty of aggravated battery with a firearm and aggravated discharge of a firearm beyond a reasonable doubt. The trial court did not abuse its discretion in admitting a witness's statement over defendant's objection that it was not relevant.

¶ 2 Following a bench trial, defendant Calvin Truitt was found guilty on one count of aggravated battery with a firearm and two counts of aggravated discharge of a firearm. The trial court merged the aggravated discharge of a firearm counts into the aggravated battery with a

firearm count, and sentenced defendant to 10 years' imprisonment. He appeals, arguing that (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt where he testified that he acted in self-defense, and (2) the trial court erred in admitting a witness's irrelevant statement at a lineup that defendant "shot to kill." We affirm.

¶ 3 Following an August 9, 2010 shooting in Calumet Park, Illinois, defendant was charged in a 14-count indictment with multiple counts of attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), and aggravated battery (720 ILCS 5/12-4(a) (West 2010)). Prior to trial, the State dismissed several counts and proceeded on four counts of attempt first degree murder, one count of aggravated battery with a firearm, and two counts of aggravated discharge of a firearm. Count VII alleged that defendant knowingly injured Richard Garcia by discharging a firearm. Counts X and XI alleged, respectively, that defendant knowingly discharged a firearm in the direction of Amanda Keating, and in the direction of a vehicle that he knew or reasonably should have known was occupied by Keating.

¶ 4 Prior to trial, defense counsel filed a motion *in limine* to bar the State from eliciting evidence that Keating stated "he shot to kill" when identifying defendant from a lineup. The State argued that the statement was admissible under the hearsay exceptions as an excited utterance and as a statement made during a lineup identification. After hearing arguments on the motion, the court deferred making a "formal ruling" on the statement's admissibility, but stated that it "will be given the proper weight." Defense counsel inquired, "And just so I am clear,

Judge, you won't be ascribing to that, that [s]he, in fact, knows what is in h[is] mind," to which the court replied, "No. It is a bench trial. I certainly wouldn't be doing that."

¶ 5 At trial, Garcia acknowledged that he was convicted of burglary in 2009. He testified that, just before midnight on August 8, 2010, he was at home with Keating, his girlfriend, when he received a phone call from defendant. He had known defendant, who went by the nickname "Noo-Noo," for a couple of years after meeting him through a mutual tattoo artist. Defendant asked Garcia to pick him up at 125th Street and Winchester Avenue and give him a ride, but did not say where he wanted to go. Garcia, who had given defendant a ride "[o]nce or twice" before, agreed. He drove to 125th and Winchester with Keating, who was in the passenger's seat, but he did not see defendant immediately upon arrival. Garcia drove around the area and called defendant, but he did not answer at first. After three or four minutes, defendant answered the phone and said, "I'm right here."

¶ 6 Garcia spotted defendant in a nearby alley, which was "[p]retty lit up," and drove into the alley until defendant was five or six feet away from his car on the passenger's side. Defendant was standing next to a man Garcia knew as "Skidow,"[1] whom he had met through the same tattoo artist. Defendant opened the rear passenger door, "mumbled" a few words, and pulled a gun from his waistband. He crouched down and fired four shots into the vehicle. The first bullet struck Garcia in the right side of his head, exited near his scalp, and cracked the windshield. Another bullet grazed the back of Garcia's neck, and a third hit him in the right shoulder blade, leaving him "covered in blood." Garcia testified that he did not see Skidow with a gun, and that no bullets came from Skidow's direction. Once Garcia was struck the third time, he ducked

[1] Defendant testified at trial that Christopher Williams goes by the nickname "Skidoo," and that Williams is the person Garcia referred to during his testimony. We will refer to Williams as "Skidow."

down in his seat, grabbed Keating, and drove forward "[a]s fast as [he] could." As they sped away, he heard several more gunshots come from the alley behind them.

¶ 7 Garcia drove to Metro South Hospital, where he was briefly examined by doctors. He was instructed to follow up with his primary care physician, who removed the bullet from his back two days later. Garcia showed the court the scar on his right shoulder from the removal procedure. Garcia also testified that there is still a bullet fragment in his head, which causes migraines on hot days. The trial judge felt the "slight swelling or lump" in Garcia's forehead, but noted that he could not conclude that the lump was a bullet fragment.

¶ 8 On February 4, 2011, Garcia identified defendant from a photo array at the Calumet Park Police Department. He circled the photograph of defendant and wrote "Number 3 is the man that shot me" underneath. On July 23, 2011, Garcia identified Skidow from a photo array, circled his photograph, and wrote "This is the man with [defendant] at the time of [the] shooting." On August 12, 2011, Garcia identified defendant at a physical lineup. He also identified defendant at trial. Each identification was done separately from Keating. Additionally, Garcia identified several photographs showing a bullet hole in the rear "rack top" of his car, and one photograph showing the "spider web" crack in the windshield. He testified that the damage shown in the photographs was a result of defendant's shooting.

¶ 9 On cross-examination, Garcia stated that he did not remember calling defendant approximately 53 times in the hours before the shooting, but acknowledged that they exchanged some calls during that period. Garcia denied that he arranged to buy marijuana from defendant, that Keating handed him a gun, or that he attempted to rob defendant. Garcia did not know what

type of gun defendant had. He added that defendant fired "at least three or four" more shots after Garcia drove away.

¶ 10 Keating testified that she and Garcia were at Garcia's house late on August 8, 2010, when he received a phone call. Garcia asked if she wanted to accompany him to pick up "Noo-Noo," his friend whom she had never met. Keating agreed, and sat in the passenger's seat as Garcia drove to a location less than five minutes away. Garcia spoke to somebody on the phone and then drove into a nearby, illuminated alley. He pulled up next to defendant, whom she identified in court, and another man, such that they were standing near the passenger's side door. She turned around in her seat, and observed defendant open the rear passenger door and make "a motion" toward the front of his pants. Thinking that defendant would take a seat, Keating turned back to face the front of the car. She heard defendant mumble something unintelligible, followed by three or four gunshots from the area where he had opened the back door. The bullets missed her by a few inches. Garcia said, "I'm hit," and accelerated the car. As they drove away, she heard more gunshots, some of which hit the vehicle. Garcia drove to Metro South Hospital, where he was treated for approximately one hour. At the hospital, Keating saw blood coming from Garcia's right temple, neck, and back. She never saw Garcia with a gun during the shooting, and he never fired a gun during the shooting.

¶ 11 Keating identified defendant from a photo array at the Calumet Park Police Station on February 4, 2011. She circled defendant's photograph and, in the space below, wrote "#1 is the one who shot my boyfriend." She identified the other man from a photo array on July 23, 2011. Keating circled his photograph and wrote "this is the man with the shooter at the time of the shooting." On August 12, 2011, she identified defendant in a physical lineup. Each identification

was done separately from Garcia. Upon viewing defendant in the lineup, Keating stated that "he shot to kill."

¶ 12 The parties argued the admissibility of Keating's statement that "he shot to kill" outside the presence of the witness. The court allowed the statement "under the hearsay rule as a statement made during the course" of a lineup identification. The court declared that it would "give [the statement] the proper weight," and that it "certainly will not use that as substantive evidence to prove that he had the requisite intent to commit murder."

¶ 13 On cross-examination, Keating acknowledged that she had been dating Garcia for six years, and that they were dating when the shooting occurred. At the time of trial, she was unemployed, sometimes stayed with Garcia, and agreed that "he is taking care of [her] financially[.]" She denied that Garcia met with defendant to purchase marijuana, and denied giving him a gun. Defendant was about three feet from Garcia when Keating heard the first round of gunshots. During the encounter, defendant's companion, whom she later learned was nicknamed Skidow, said nothing and "just stood like a statue" with his hands folded.

¶ 14 Calumet Park police sergeant John Shefcik testified that, on August 9, 2010, he was a patrol officer assigned to canvas the area of the shooting as part of an attempted murder investigation. He observed and photographed what appeared to be a bullet hole in a nearby garage door, and he identified that photograph in court. Shefcik later became a detective assigned to the investigation. On February 4, 2011, Garcia and Keating both separately identified defendant from photo arrays. Defendant was arrested in Callaway County, Missouri, on July 6, 2011, and brought to the Calumet Park Police Department on August 12, 2011. That same day, Garcia and Keating separately identified defendant from physical lineups. When Keating entered

the room to view the lineup, she "immediately starting crying," and repeated, "he shot to kill, he shot to kill" several times.

¶ 15 On cross-examination, Shefcik testified that, during his investigation, he learned that Garcia and defendant exchanged "several" phone calls in the hours leading up to August 9, 2010, but he did not remember how many. Shefcik also learned that Christopher Williams, also known as "Skidow," was with defendant during the shooting. The State introduced into evidence the photographs identified by Garcia, Keating, and Shefcik, and rested.

¶ 16 The defense moved for a directed verdict, which the court denied.

¶ 17 The defense called Calumet Park police officer Lynell Porch, who testified that he interviewed Garcia at the hospital at approximately 12:20 a.m. on August 9, 2010. Defense counsel asked Porch how Garcia described defendant's gun, but the trial court sustained the State's objection.

¶ 18 Defendant testified that, prior to the shooting, he had been convicted of commercial burglary and sentenced to probation. Defendant stated that he owned a 1977 Grand Prix LJ on August 8, 2010. That day, Garcia called defendant "probably about thirty" or more times to arrange a marijuana deal. Defendant did not have any marijuana to sell when Garcia had called earlier, but he was able to procure some from his friend, Christopher "Skido[w]" Williams. Garcia, defendant, and Skidow agreed to complete the transaction at 125th and Winchester, ultimately gathering in the alley around midnight. Defendant had asked Garcia to park by the garage, but "[h]e took it upon himself to park in the alley." When Garcia pulled up, he said "a few choice words" to defendant. Skidow interjected, "Why you guys are arguing in the alley? It's twelve o'clock at night, and I have this marijuana on me. Do you want it or not?" Garcia

confirmed that he did, and told his girlfriend, Amanda, "Pass me that." Amanda handed Garcia a chrome gun, which he aimed at Skidow. In fear for his own life, defendant pulled a gun from his waistband and aimed it through the back window. Defendant told Garcia to put down his gun and drive away, but Garcia replied, "Fuck that nigger." According to defendant, Garcia began to swing his arm toward defendant. Believing that Garcia was about to shoot him, defendant fired an unknown amount of shots in Garcia's direction to defend himself, backing away as he fired. Garcia did not fire his gun, and drove off "at a high rate of speed."

¶ 19 Defendant went home to tell his family what had happened, and then went to his sister's house in Missouri because he thought that he had violated his probation. He was arrested and extradited to Illinois in August 2011, approximately one year later. Defendant admitted that he lied to Shefcik in an interview because he was "scared" and "didn't want to tell him that I shot somebody." Defendant testified that he did not shoot at Keating and was not trying to kill Garcia, but was merely defending himself.

¶ 20 On cross-examination, defendant testified that he had been friends with Garcia for approximately 2½ years and saw him about five times per month. They never had a problem with each other and never had an issue while completing marijuana transactions before. Defendant was not worried that Garcia would rob him, but carried a gun in his waistband "for protection." When Garcia arrived, he was upset that defendant did not answer his phone. Defendant agreed that Keating was in the front passenger's seat during the shooting. While pointing a gun at Skidow, Garcia demanded the marijuana and the contents of their pockets. When Garcia began to swing his arm, defendant covered his eyes with his left arm and fired several shots towards Garcia. Defendant backed up as he fired, starting about 5 steps from the car and ending about 10

steps from the car. He acknowledged that he shot Garcia in the head, neck, and back, but testified that he was only trying to scare him so that he would leave. Defendant continued firing as Garcia drove away.

¶ 21 The day after the shooting, Garcia went to defendant's house and told his uncle that he was not going to tell the police what happened "because we were both in the wrong." Defendant sat in the yard as his uncle and Garcia spoke by the street. Defendant believed that Garcia would keep his word, but still feared that he would be caught for a parole violation because the police had been to his house the night of the shooting. Defendant spoke to Shefcik after he was extradited to Illinois, but he never told Shefcik that he saw Garcia on the day of the shooting, that Garcia had a gun, or that he acted in self-defense. He told Shefcik that he was not with Skidow at the time of the shooting because he did not want him to get in trouble. Rather, defendant claimed that he was at his friend Trumane's house at the time of the shooting, and that Trumane was unable to verify his alibi because he had committed suicide. Defendant testified that he did not tell Shefcik about his involvement in the shooting because he "d[id]n't know what to say in that situation."

¶ 22 On redirect-examination, defendant stated that he lied to Shefcik because he was scared and did not want to say that he shot someone. When he fired the gun, he was not aiming at Garcia, but was aiming at the car.

¶ 23 Defense counsel admitted into evidence certified copies of Garcia's two convictions for misdemeanor battery, and renewed the motion for a directed verdict, which the court denied. The defense rested.

¶ 24 During closing arguments, the State contended that Garcia was the victim of a premeditated "planned execution" that left him permanently disabled. Defense counsel argued that Garcia pulled a gun on defendant during a marijuana deal, and that defendant shot him in self-defense. After closing arguments, the court found defendant guilty on counts VII (aggravated battery with a firearm), X, and XI (aggravated discharge of a firearm). Defendant was found not guilty on counts III through VI (attempt murder). In announcing its findings, the court stated that it did not believe that Garcia attempted to rob defendant, or that Keating passed Garcia a gun. The court opined that it did not understand why defendant did not tell the police that he was defending himself once he was returned to Illinois. Accordingly, the court announced, "I do not believe that the defendant acted in self-defense." The court also stated that it did not believe Garcia's testimony that he was only going to give defendant a ride, and it rejected the State's theory that the shooting was a "failed execution." The court concluded that, "I'm convinced that drugs were somehow involved in the situation." Finally, the court found that defendant fired multiple bullets, but "Whether any of them struck the victim Garcia, I don't know." However, the court stated that Garcia suffered some type of "injuries as a result of the discharge of the weapon," whether from a direct hit, ricochet, or debris.

¶ 25 Defendant moved for a new trial, which the court denied. Following a sentencing hearing, the court merged counts X and XI (aggravated discharge of a firearm) into count VII (aggravated battery with a firearm), and sentenced defendant to 10 years' imprisonment. Defendant's motion to reconsider sentence was denied.

¶ 26 On appeal, defendant first argues that the evidence was insufficient to convict him of aggravated discharge of a firearm and aggravated battery because the State's witnesses gave an

incredible account of the shooting and because he presented evidence that he acted in self-defense. In response, the State maintains that it adduced enough credible evidence to support the trial court's findings of guilt.

¶ 27 On a claim of insufficient evidence, a reviewing court must determine whether, taking 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. Gray*, 2017 IL 120958, ¶ 35. It is the trier of fact's responsibility to weigh, resolve conflicts in, and draw reasonable inferences from the evidence, and it is better positioned to do so as it heard and observed the witnesses testify. *Id.*; *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59-60. A reviewing court does not retry the defendant, *i.e.*, it does not substitute its own judgment for the trier of fact's on the weight of the evidence and the credibility of witnesses. *Gray*, 2017 IL 120958, ¶ 35. After taking all the evidence as a whole, the trier of fact must be convinced of the defendant's guilt beyond a reasonable doubt, but it need not be satisfied as to "each link in the chain of circumstances." *Jonathon C.B.*, 2011 17750, ¶ 60. A conviction will not be reversed for insufficient evidence unless it is so improbable, unreasonable, or unsatisfactory as to raise a reasonable doubt of the defendant's guilt. *Gray*, 2017 IL 120958, ¶ 35.

¶ 28 As charged here, a person commits aggravated battery with a firearm when, in the course of a battery, he knowingly causes injury to another person by discharging a firearm. 720 ILCS 5/12-4.2(a) (West 2010). Battery occurs when, without legal justification, a person knowingly causes bodily harm to another or makes insulting or provoking physical contact with another. 720 ILCS 5/12-3(a) (West 2010). A person commits aggravated discharge of a firearm when he

knowingly discharges a firearm in the direction of another or in the direction of a vehicle that he knows to be occupied by another. 720 ILCS 5/24-1.2(a)(2) (West 2010).

¶ 29 Here, viewed in the light most favorable to the State, the evidence showed that Garcia and Keating drove to the alley at 125th and Winchester around midnight, where they met defendant and Skidow. Defendant opened the rear passenger door, mumbled a few words, and fired several shots into the car at close range. He knew that Keating was in the vehicle, although he was aiming in Garcia's direction. Garcia was hit three times, which defendant acknowledged on cross-examination. Keating was seated next to Garcia and evaded the bullets by a few inches. The State presented photographs showing a bullet hole in the top of the vehicle and a cracked windshield that corroborate Garcia's account of the shooting. Although, as defendant notes, the court stated that it did not believe Garcia and Keating's testimony as to why they met defendant in the alley, it was not required to disregard other parts of their testimony. See *Gray*, 2017 IL 120958, ¶ 47 (flaws in testimony do not necessarily destroy the credibility of a witness, and it is the trier of fact's responsibility to determine when, if ever, the witness told the truth). Similarly, the trial court was not required to discredit material parts of Keating's testimony simply because she was financially dependent on Garcia. This evidence sufficed to show that defendant committed aggravated battery with a firearm and aggravated discharge of the firearm.

¶ 30 Defendant does not contest that he fired multiple shots into Garcia's car, but instead argues that the State failed to prove that he was not acting in self-defense. To succeed on a claim of self-defense, a defendant must present evidence that (1) unlawful force was threatened against a person, (2) the person threatened was not the aggressor, (3) there was a danger of imminent harm, (4) his use of force was necessary, (5) he subjectively believed that the use of force was

required to prevent the harm, and (6) his belief was objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Once a defendant raises evidence of self-defense, the State has the burden of proving beyond reasonable doubt that he did not act in self-defense. *Gray*, 2017 IL 120958, ¶ 50. If the State negates any of the elements listed above, the defendant's claim of self-defense fails. *Lee*, 213 Ill. 2d at 225. On review, the standard is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that defendant did not act in self-defense. *Gray*, 2017 IL 120958, ¶ 51. It remains the role of the trier of fact to decide the credibility of witnesses, the weight to be assigned to the testimony, and the inferences to draw from the evidence. *Id.*

¶ 31 Accordingly, although there was conflicting testimony as to whether Garcia was armed during the shooting, it was the province of the trier of fact to decide which testimony to credit. *Id.* ¶ 35. The trial court, as trier of fact, stated that it did not believe that Keating handed Garcia a gun or that defendant acted in self-defense, and those findings are not unreasonable. There is no evidence, other than defendant's testimony, that Garcia was armed. It is undisputed that Garcia never shot a gun, and defendant admitted to firing several more shots at Garcia's car even after he drove away. Additionally, defendant did not report the incident to police, but instead fled to Missouri, where he stayed for nearly one year until he was arrested and extradited to Illinois. Upon returning, defendant did not tell Shefcik that he shot Garcia in self-defense. Rather, defendant denied ever meeting Garcia that night and fabricated an alibi for the time of the shooting. Although defendant argues that, given the trial court's stated belief that drugs were involved, the "most likely scenario" is that Garcia planned to rob him, the court was not required to credit defendant's testimony. See *Gray*, 2017 IL 120958 ¶51 ("In deciding a claim of self-

defense, it is the function of the [trier of fact] to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence."). Here, viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that defendant did not act in self-defense.

¶ 32 Defendant next argues that the trial court erred in admitting Keating's out-of-court statement that, referring to defendant, "he shot to kill" because, even if it was admissible pursuant to an exception to the hearsay rule, it was irrelevant for any proper purpose. In response, the State contends that the statement was relevant and admissible as a statement made during identification.

¶ 33 Although defense counsel objected to the admission of Keating's statement before and during trial, defendant concedes that his counsel failed to include the matter in his posttrial motion. As such, defendant has forfeited the issue. *People v. Naylor*, 229 Ill. 2d 584, 592 (2008) (both a trial objection and written posttrial motion are required to preserve an issue that could have been raised at trial). Defendant argues that we may nevertheless review the issue under the plain-error doctrine, which provides a "narrow and limited exception" to the general forfeiture rule. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The plain-error doctrine allows a reviewing court to consider a clear and obvious error when either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process. *Naylor*, 229 Ill. 2d at 593. Under either prong, the defendant bears the burden of first establishing that a clear and obvious error occurred. *Id.*

¶ 34 A trial court's evidentiary rulings are generally reviewed for abuse of discretion. *People v. Stechly*, 225 Ill. 2d 246, 307 (2007). When, as here, a trial court is the trier of fact, a reviewing court presumes that the trial court considered the evidence only for its proper purposes. *Naylor*, 229 Ill. 2d at 603. This presumption may be rebutted, but only "if the record affirmatively demonstrates the contrary." *People v. Tye*, 141 Ill. 2d 1, 26 (1990).

¶ 35 Turning to the present case, the record shows that the trial court stated that it would not use Keating's statement as substantive evidence of defendant's mental state, and defendant cites nothing in the record that suggests that it did otherwise. We also note that the court found defendant not guilty of the attempted murder counts, the only charges which required the State to prove that defendant had the intent to kill.

¶ 36 Moreover, we cannot conclude that the trial court erred in considering the statement for the limited purpose of corroborating Keating's identification of defendant. In order to be admissible, evidence must be relevant, meaning it must have any tendency to make a fact of consequence more or less probable. Ill. R. Evid. 401 (eff. Jan. 1, 2011). The identity of the shooter, albeit not in dispute, was essential to the State's case-in-chief, and the fact that defendant was the shooter at least slightly increased the possibility that he was guilty of the charged offenses. See *People v. Gonzalez*, 142 Ill. 2d 481, 488 (1991) (finding evidence relevant "[t]o the extent [it] strengthened the victim's identification testimony"). Thus, Keating's statement that "*he shot* to kill" has relevance because it was made in the context of a physical lineup. (Emphasis added.) Finally, although defendant does not explicitly argue that the statement was inadmissible as hearsay, we also note that Keating's statement falls within a statutory hearsay exception because (1) the statement was "one of identification of a person

made after perceiving him," (2) she testified at trial, and (3) she was available for cross-examination. 725 ILCS 5/115-12 (West 2010). It was within the court's discretion to determine that Keating's statement was "one of identification," as it was made during her viewing of a physical lineup, and conveyed that defendant was the man who shot a gun in the alley. As previously mentioned, the court acknowledged that it would not consider the statement to prove defendant's mental state, and nothing in the record suggests that it did not so limit its consideration. In sum, the trial court did not abuse its discretion in admitting Keating's statement, and consequently, plain-error review is unmerited.

¶ 37 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 38 Affirmed.