

2012 IL App (1st) 101912-U

FIRST DIVISION
DATE 4-16-12

No. 1-10-1912

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 3769
)	
JOHN GONZALEZ,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for aggravated discharge of a firearm in the direction of a peace officer is affirmed where the police officer's testimony was sufficient to prove defendant guilty beyond a reasonable doubt.

¶ 2 Following simultaneous but severed bench trials, defendant John Gonzalez¹ and codefendant Javier Fernandez² were convicted of two counts of aggravated discharge of a firearm

¹Defendant spells his last name "Gonzales," but his name is misspelled throughout the record, including the indictment and the notice of appeal, as "Gonzalez."

²Codefendant's direct appeal is pending before this court in case number 1-10-1913. He is not a party to this appeal.

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in the direction of a peace officer and one count of burglary to a vehicle. The trial court merged defendant's convictions into one count of aggravated discharge of a firearm and sentenced him to 19 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of the aggravated discharge of a firearm offense because the police officer's testimony was contradicted by the physical evidence, uncorroborated by a sheriff's deputy, and contrary to common sense. We affirm.

¶ 3 Defendant and codefendant were charged with two counts of attempted first degree murder, two counts of aggravated discharge of a firearm in the direction of a peace officer, and one count of burglary to a motor vehicle. At trial, Chicago police officer Claudio Salgado testified that about 10:45 a.m. on Sunday, January 20, 2008, he arrived late to church and parked his car in a church parking lot underneath the Dan Ryan Expressway. He was off duty, but was wearing his police badge and gun. When he exited his vehicle, he heard the sound of breaking glass and walked toward the noise. Officer Salgado approached the passenger's side of a green SUV parked in the lot and saw defendant reaching into that vehicle with both of his arms through a broken driver's side window. The officer displayed his badge and yelled "Chicago police" three times. Defendant pulled himself out of the driver's window and faced Officer Salgado, who was standing directly across from him on the passenger's side of the green SUV. Defendant then walked backwards, still facing Officer Salgado, to a maroon SUV driven by codefendant Fernandez. The maroon SUV slowly approached the back of the green SUV, with the driver's side of the maroon vehicle facing Officer Salgado. The maroon SUV stopped, and defendant ran around the back of that vehicle to the passenger's side, opened the door and stepped up onto the metal runner. Officer Salgado moved away from the green SUV at this time and stood about 5 feet from the driver's side of the maroon SUV and 15 feet from the passenger's side of that vehicle. While standing on the runner with the passenger's door open, defendant pointed a gun at

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Officer Salgado over the hood of the SUV and fired three shots. Officer Salgado immediately drew his weapon and returned fire aiming toward defendant as the SUV sped away. Officer Salgado thought he fired four or five gunshots, but later learned he had fired seven. His shots struck the SUV's windows and windshield, and three shots hit codefendant Fernandez.

¶ 4 The defendants fled the scene in the maroon SUV. Officer Salgado returned to his car and chased after them. A few minutes later, Officer Salgado saw a Cook County sheriff's vehicle. He identified himself to those officers, told them that he had been involved in a shooting, and gave them a description of the SUV. The sheriff's officers told Officer Salgado to wait for back-up, and they then pursued the maroon SUV. When other Chicago police officers and detectives arrived, Officer Salgado returned to the church parking lot with them. Later that afternoon, Officer Salgado viewed a photo array and identified defendant and codefendant as the two offenders. The following evening, Officer Salgado viewed a lineup and again identified defendant and codefendant. Officer Salgado could not describe the gun defendant fired at him, and acknowledged that he did not see or find any bullets fired from that gun. He also acknowledged that he did not see defendant remove any items from the green SUV, nor did he see a weapon or burglary tool in defendant's hands at that time. Officer Salgado testified that, at the time of this shooting, he had been a police officer for about a year, and he previously served in the Chilean army for five years.

¶ 5 Cook County sheriff's police investigator Enola Lera testified that he and his partner, Nikita Johnson, were sitting in their marked squad car writing a report shortly before 11 a.m. when they heard three to four rapidly fired gunshots. He could not tell if the gunshots were fired from one or two guns. They immediately called their dispatcher and reported hearing shots fired. About 20 seconds later, a burgundy SUV sped past them. A few seconds later, Officer Salgado drove up to them and said that he had been involved in a shooting, and that he was chasing the

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burgundy SUV. The sheriff's officers drove around the area searching for the SUV, but could not find it. On cross-examination, Officer Lera confirmed that Officer Salgado told them that he had been shot at. He testified that Officer Salgado told them "I was involved in a shooting. I was shot at. I exchanged fire back." Officer Lera acknowledged that he never told his dispatcher, police detectives, or the police review authority investigators that Officer Salgado expressly stated "I was shot at." Instead, he told them that Officer Salgado stated that he was "involved in a shooting." On redirect examination, Officer Lera testified that he told the independent police review authority investigator James Lucas that the off duty police officer told them that he exchanged gunfire with a man in the SUV.

¶ 6 Codefendant's sister, Marial Fernandez, testified that codefendant borrowed her red Nissan Extera about 9:30 a.m. to run some errands. That afternoon, she called codefendant and told him she needed her car. Shortly thereafter, he returned home without the car and told her some gangbangers had shot at him while he was driving it. Codefendant was very pale, appeared ill, and was bleeding from his hand or finger. He told her that he left her car at 51st Street and Winchester Avenue. Marial and her sister Roxanna drove to that location, but her car was not there. Marial called police, who arrived at the location and spoke with her. The next day, Marial was called to police headquarters and learned that codefendant had been arrested, that he underwent surgery for being shot, and that her car had been recovered. When she retrieved her car, it had five or six bullet holes to the front windshield, the driver's side and the rear hatch. Marial confirmed that codefendant was friends with defendant.

¶ 7 Florencio Diaz testified that codefendant called him about noon and asked to meet him at Diaz's house at 5002 South Winchester Avenue. Diaz arrived at his home 10 minutes later and found codefendant waiting for him with defendant. The tricep area of codefendant's arm was hanging open and codefendant said he had been in a shootout with some gangbangers.

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Codefendant said he was not going to go to the hospital because he did not want to get involved with police. Diaz saw codefendant's sister's burgundy car parked in his backyard. Codefendant left the car there, did not say anything to Diaz about it, and left with defendant. After they left, Diaz saw several bullet holes in the back of the car. Later that day, the police came to Diaz's house and took him to the police station where he viewed a photo array and identified defendant and codefendant as the men who had been at his house earlier that day.

¶ 8 Chicago police forensics investigator Edward Perez testified that he arrived at the church parking lot underneath the expressway about 11:40 a.m. and investigated the scene for evidence related to the shooting. He saw a green SUV with a broken driver's side window and dusted it for fingerprints. The broken glass from that window was on the ground. There was a second area of broken automobile glass in the center of the parking lot about 10 to 15 feet away from the green SUV. Officer Perez recovered seven shell casings from the ground. The casings were recovered from various distances of 3 feet to 15 feet away from the pile of broken glass in the center of the lot. The officer also retrieved Officer Salgado's gun from him and found 8 bullets remaining in the 15-bullet magazine. Officer Perez did not recover any bullets from the scene, nor did he see any bullet damage to any of the other cars or the concrete pillars in the parking lot. He testified that revolvers do not eject shell casings, and that if a revolver was fired during the shooting, there would not be a shell casing on the ground from that gun for him to collect.

¶ 9 Chicago police detective Paul McDonagh testified that he and his partner, Detective Patrick Deenihan, responded to a call of an officer involved in a shooting at the church parking lot and found a green SUV with a broken driver's side window and seven shell casings on the ground. All of those shell casings came from Officer Salgado's gun. No physical evidence from any other firearm was recovered. Detectives McDonagh and Deenihan later went to 51st Street and Winchester Avenue and interviewed codefendant's sisters, Marial and Roxanna Fernandez.

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After that interview, the detectives were looking for defendant, codefendant and Diaz. At police headquarters, the detectives showed Officer Salgado a photo array, and the officer identified defendant as the man who shot at him and codefendant as the man driving the maroon SUV.

¶ 10 Chicago police detective Patrick Deenihan testified substantially the same as Detective McDonagh regarding their investigation on the day of the shooting, adding that he later went to Diaz's house with two other detectives and saw the maroon SUV parked in the backyard. The SUV had multiple bullet holes and broken glass. Detective Deenihan asked Diaz to come to the police station where Diaz viewed a photo array and identified defendant and codefendant as the men that came to his house earlier that day and left the SUV parked in his yard.

¶ 11 Chicago police detective Carlos Cortez testified that the day after the shooting, Officer Salgado viewed a lineup at the police station and identified defendant as the person who shot at him, pointing directly at defendant and stating, "I'll never forget his face." Officer Salgado then pointed at codefendant and said "he's the driver of the vehicle."

¶ 12 Celestino Martinez testified that he owned the green Ford Explorer SUV involved in this case. Martinez parked his vehicle in a parking lot underneath the Dan Ryan Expressway while he attended church. When he returned to his vehicle after the service, he discovered that his driver's side window had been broken and that his daughter's I-Pod had been taken from inside the vehicle. Martinez denied that he gave anyone permission to enter or damage his vehicle that day.

¶ 13 The parties stipulated that forensic ballistics analyst Justin Barr of the Illinois State Police crime laboratory analyzed two bullets recovered from the driver's side of the maroon SUV and one bullet recovered from codefendant's body and found that all three bullets were fired from Officer Salgado's gun. Barr also determined that the seven cartridge casings recovered from the parking lot were all fired from Officer Salgado's gun.

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¶ 14 The trial court granted the defendants' motions for directed findings as to the attempted first degree murder charges, finding that there was no evidence of a specific intent to kill. The defense then rested. In closing argument, defense counsel argued that there was no evidence that defendant fired a gun at Officer Salgado.

¶ 15 The trial court expressly found that Officer Salgado's testimony was credible. The court stated "a person knows when he's being shot at, and a person who is a Chicago police officer, a person that had military experience, as I've heard the evidence, ought to really know if he's been shot at." The court stated that it found no import in the fact that no ballistic evidence was recovered from the scene of the shooting. The court explained that there was no testimony that the type of weapon fired at Officer Salgado was the kind that would leave shell casings at the scene. The court further stated that the fact that investigators could not find bullets at the scene, which could have traveled anywhere, had no impact on the credibility of Officer Salgado's testimony that he was shot at. The court also found that the physical evidence corroborated Officer Salgado's testimony regarding the identity of the people involved in this case. The court noted that the bullets recovered from codefendant Fernandez and the maroon SUV matched Officer Salgado's gun. In addition, the court stated that it did not believe that Officer Salgado needed to justify his use of force by claiming he was shot at when he was not, and concluded "I believe that he was shot at." The trial court found both defendant and codefendant guilty of two counts of aggravated discharge of a firearm in the direction of a peace officer and one count of burglary to a vehicle. The court subsequently merged defendant's convictions into one count of aggravated discharge of a firearm and sentenced him to 19 years' imprisonment.

¶ 16 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of the aggravated discharge of a firearm offense because Officer Salgado's testimony that defendant fired a gun in his direction was contradicted by the physical evidence,

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which showed that there were no bullets, casings, or bullet damage found from any gun other than Officer Salgado's. Defendant argues that this evidence shows that there was no other gun present or fired at the scene. Defendant also argues that Officer Salgado's testimony was not corroborated by Cook County sheriff's officer Lera because Officer Lera testified that Officer Salgado said he was "involved in a shooting," not that someone shot at him. In addition, defendant contends that it is contrary to common sense that Officer Salgado watched defendant draw, point and fire a gun at him, but was unable to describe that gun, especially with his extensive experience and knowledge of firearms. He argues that it is not believable that a trained police officer and military combat soldier fired seven shots at defendant, who was 15 to 20 feet away, and missed him entirely. Defendant claims that if he pointed a gun at Officer Salgado, the officer would have shot defendant to save his life, and thus, the situation must have been different than what the officer described. Defendant also claims that the fact that the trial court found no evidence of intent to kill shows that it must have partially agreed that Officer Salgado's story was illogical and that his testimony lacked credibility. Defendant asks this court to reverse his conviction for aggravated discharge of a firearm and remand this case for resentencing on the burglary conviction.

¶ 17 The State argues that the evidence was sufficient to find defendant guilty where Officer Salgado's detailed and credible testimony clearly established that defendant shot at him. The State argues that the lack of physical evidence of another gun does not diminish the officer's credibility and notes that Officer Perez testified that not all guns eject shell casings. The State further argues that Officer Salgado's testimony was corroborated by Officer Lera, who testified that Officer Salgado told him that he had been shot at and he returned fire. The State also asserts that the trial court specifically stated that it found Officer Salgado's testimony credible.

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¶ 18 In reply, defendant maintains that Officer Salgado's testimony was vague, doubtful and contradictory, particularly where there was no physical evidence to support his claims.

Defendant also asserts that Officer Lera admitted that he never told the police review authority that Officer Salgado said that someone shot at him and he fired back. Defendant then argues that it is "telling" that codefendant Fernandez's written statement to the police does not mention the use or possession of a firearm. Defendant claims that, in his statement, codefendant had already admitted to "their devious reasons for being in the parking lot" and blamed defendant. Therefore, there was no reason for codefendant to exclude the use of a firearm, and if either he or codefendant had fired a gun, codefendant would have mentioned it in his written statement.

¶ 19 As a threshold matter, we first note that codefendant Fernandez's written statement to police was specifically excluded as evidence against defendant at trial. Prior to trial, defense counsel moved for severance based on the fact that codefendant made a statement. That motion was granted. During trial, when the Assistant State's Attorney (ASA) began testifying about her interview with codefendant after he waived his *Miranda* rights, the court interrupted and asked defense counsel if she was moving that the ASA's testimony only applied to codefendant and not to defendant. Counsel answered "[y]es," and reminded the court that it had granted her motion for severance based on the fact that codefendant made a statement. Because codefendant's statement was excluded as evidence against defendant at trial, defendant cannot now rely on that statement as evidence in support of his argument before this court. See *People v. Canulli*, 341 Ill. App. 3d 361, 367-68 (2003) ("The purpose of appellate review is to evaluate the record presented in the trial court, and review must be confined to what appears in the record.").

¶ 20 When defendant argues that the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a

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reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). A guilty finding will not be reversed based on insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt. *Id.* at 281. In a bench trial, the trial court, sitting as the trier of fact, is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence and drawing reasonable inferences therefrom. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). This court is prohibited from substituting its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *Jackson*, 232 Ill. 2d at 280-81.

¶ 21 In this case, to prove defendant guilty of aggravated discharge of a firearm, the State was required to prove that defendant intentionally or knowingly discharged a firearm in the direction of a person he knew to be a peace officer, while that officer was executing his official duties. 720 ILCS 5/24-1.2(a)(3) (West 2008). The positive and credible testimony of a single witness is sufficient to support a conviction. *Siguenza-Brito*, 235 Ill. 2d at 228. Physical evidence connecting a defendant to an offense has never been required to establish his guilt. *People v. Williams*, 182 Ill. 2d 171, 192 (1998). On review, this court will not reverse defendant's conviction simply because he claims that a witness was not credible or that the evidence was contradictory. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 22 Here, we find that the evidence was sufficient for the trial court to find defendant guilty beyond a reasonable doubt of the aggravated discharge of a firearm offense. Officer Salgado testified that defendant stood on the metal runner of the maroon SUV with the passenger's door open, pointed a gun at him over the hood of that SUV, then fired three gunshots at him. This action caused Officer Salgado to immediately draw his weapon and fire several shots back toward defendant. The trial court expressly stated that it found Officer Salgado's testimony credible, explaining "a person knows when he's being shot at, and a person who is a Chicago

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police officer, a person that had military experience, as I've heard the evidence, ought to really know if he's been shot at." Based on the trial court's credibility determination, Officer Salgado's testimony alone was sufficient for the court to find defendant guilty.

¶ 23 Although there was no physical evidence of another gun at the scene, such as fired bullets or cartridge casings, such evidence was not required to find defendant guilty. The record shows that in rendering its decision, the trial court considered the lack of physical evidence and found it of no import. Forensics investigator Perez had testified that some firearms, such as revolvers, do not eject shell casings, and if a revolver was fired during this shooting, there would not be a shell casing on the ground from that gun for him to recover. The trial court noted that there had been no testimony regarding the type of weapon that defendant fired at Officer Salgado, and therefore, no evidence that the gun defendant used was a type that would have ejected a shell casing at the scene. The court further found that the bullets fired from defendant's gun could have traveled anywhere, and that the absence of such evidence had no impact on the credibility of Officer Salgado's testimony that defendant fired a gun at him. Moreover, the trial court found that the bullets that were recovered from the maroon SUV and codefendant's body matched Officer Salgado's gun, thereby corroborating his testimony identifying defendant and codefendant as the offenders involved in this case.

¶ 24 We reject defendant's argument that Officer Salgado's testimony was not corroborated by Cook County sheriff's officer Lera because Officer Lera testified that Officer Salgado said he was "involved in a shooting," rather than stating that someone shot at him. Officer Lera testified that he heard three to four rapidly-fired gunshots, and 20 seconds later, a burgundy SUV sped past him. Officer Lera further testified that a few seconds later, Officer Salgado drove up to him, said that he had been involved in a shooting, and that he was chasing the burgundy SUV. On cross-examination, Officer Lera expressly confirmed that Officer Salgado told him that he had been

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shot at. Officer Lera testified that Officer Salgado told him "I was involved in a shooting. I was shot at. I exchanged fire back." The fact that Officer Lera did not tell detectives or investigators that Officer Salgado specifically stated "I was shot at" is of no import. We find that the testimony from Officer Lera substantially corroborated Officer Salgado's testimony.

¶ 25 Finally, we find no merit in defendant's argument that Officer Salgado's testimony was contrary to common sense because he was unable to describe the gun used by defendant. At the close of Officer Salgado's testimony, it was the trial court that asked him if he could describe the gun he saw defendant fire at him. Officer Salgado said that he could not. The record discloses no reason for his inability to do so. Sitting as the trier of fact, it was the trial court's responsibility to determine the credibility of the witnesses and to weigh the evidence. The trial court stated that it did not believe that Officer Salgado needed to justify his use of force by claiming he was shot at when he was not. The court expressly concluded "I believe that he was shot at." Based on the record before this court, we find no reason to disturb the trial court's determinations here.

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

¶ 27 Affirmed.