THIRD DIVISION
June 6, 2012

No. 1-10-3363

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	No. 09 CR 1004
JUAN ROMERO,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Stanley J. Sacks,
	)	Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

HELD: The trial court did not abuse its discretion in denying defendant's proffered jury instruction on reckless discharge of a firearm, nor in admitting certain evidence over defendant's objection; defendant's sentence was not excessive.

¶ 1 Defendant Juan Romero was convicted by a jury of aggravated battery with a firearm against

a peace officer and aggravated discharge of a firearm against a peace officer. Defendant appeals his convictions and sentence. First he argues the trial court erred in denying his requested jury instruction of reckless discharge of a firearm as a lesser-included offense of aggravated discharge of a firearm. He next argues the trial court erred in admitting evidence relating to how defendant obtained the weapon used to commit the crimes of which he was convicted. Defendant maintains that such evidence was unfairly prejudicial. Finally, he argues that his sentence of 42 years was excessive. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On the evening of December 4, 2008, the defendant, Juan Romero was walking home after visiting his girlfriend. Two officers of the Chicago Police Department, Ryan Delaney and Tom Olson, were driving in an unmarked squad car when they spotted Romero. They decided to stop and question Romero about a prior incident. Romero noticed the car and turned onto another street; the officers followed him in their car. Romero heard the car following him, then heard the officers open their car doors. Romero assumed they were getting out to approach him, so he turned around and fired two shots from the gun he was carrying, one of which struck Officer Olson near his clavicle. Officer Olson radioed for assistance, while Delaney pursued Romero, who had begun to run after firing his weapon, on foot. During the pursuit, Officer Delaney fired at Romero, hitting him. Romero was eventually apprehended and arrested.

¶ 4 Romero proceeded to face trial on attempt murder, aggravated battery with a firearm against a peace officer with respect to Officer Olson and aggravated discharge of a firearm against a peace officer with respect to Officer Delaney. A jury acquitted him of the attempt murder charge, but

convicted him of the other two charges. He was sentenced to 30 years for the aggravated battery and 12 years for the aggravated discharge; the sentences to run consecutively. This timely appeal followed.

¶ 5 ANALYSIS

Reckless Discharge Instruction

¶ 6 Defendant moved at trial to have the jury instructed on reckless discharge of a firearm as a lesser-included offense of aggravated discharge. The trial court denied this request, finding no evidence in the record to warrant giving this instruction. Defendant argues the trial court erred in denying his tendered instructions on reckless discharge of a firearm.

¶ 7 The decision on whether to issue a jury instruction is within the discretion of the trial court and such decision will not be reversed absent an abuse of that discretion. *People v. Woodard*, 367 Ill.App.3d 304, 315 (2006). Where there is even slight evidence which, if believed by the jury, would reduce a charged crime to a lesser-included offense, the instruction on the lesser offense should be given. *People v. Roberts*, 265 Ill.App.3d 400, 402-403 (1994). However, even where a lesser-included offense is identified, the defendant is not automatically entitled to an instruction to the jury on such offense. The instruction is only warranted where a jury could rationally find him guilty of the lesser offense and acquit him of the greater offense. *People v. Kolton*, 219 Ill.2d 353, 360 (2006).

¶ 8 A person commits aggravated discharge of a firearm against a peace officer if he or she knowingly or intentionally discharges a firearm in the direction of a peace officer while that officer

is engaged in the execution of any of his or her official duties or to prevent the officer from performing his or her official duties. 720 ILCS 5/24-1.2(a)(3) (West 2008). On the other hand, a person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual. 720 ILCS 5/24-1.5(a) (West 2008).

¶ 9 Conflicting testimony was presented at trial regarding the shooting. Officer Olson testified that defendant stopped, turned around to face the officers and carefully fired, holding the gun close to his body. He further testified that Romero fully extended his arm in the officers' direction before firing the second shot. Officer Delaney testified that defendant paused and aimed the gun at him before firing the second shot. To the contrary, the defendant testified that he did not aim at anything specific, and simply turned around while still moving. He stated that he was trying to simply scare the officers to force them to duck so he would have time to get away and that he was surprised that he actually hit anyone. He denied aiming at either officer or pausing between firing the two shots.

¶ 10 Yet the facts show that he actually hit Officer Olson. Officer Delaney was standing on the other side of the car, or about six feet from Officer Olson. Given that one of the officers was hit and defendant knew that the other officer was standing nearby, we cannot conclude that the jury could rationally have found defendant guilty of reckless discharge of a weapon and acquitted him of aggravated discharge if the instruction had been given. Therefore, we find no error in the trial court's denial of the instruction on reckless discharge of a firearm.

Admission of Evidence

¶ 11 Defendant next argues that the trial court erred in admitting his statement regarding his purchase of the weapon. While under arrest, assistant State's Attorney Romano DiBenedetto took

a statement from the defendant at the hospital, where he was undergoing treatment for the wounds incurred during the incident. Defendant recounted the events that took place that night. Defendant said he was a member of the Imperial Gangsters gang. He stated that before going to visit his girlfriend he purchased the gun used that evening from a drug addict in exchange for two bags of crack cocaine. He explained that he wanted a gun for protection because his girlfriend lived in the territory of a rival gang, and recently there had been a lot of gang activity in the area. Defendant then detailed his version of what happened after he left his girlfriend's house.

¶ 12 Before trial, defendant filed a motion *in limine* to have the trial court bar his statement to DiBenedetto from the jury. The State objected to the complete barring of the statement, and the trial court agreed to admit the statement with all references to gang activity redacted; witnesses were to be instructed not to refer to defendant's gang activity. However, the following remained in the statement:

> "Juan states that earlier last night at about 6:00 at night, he bought a gun from a hype, who was feening. Juan states that feening means that he needed drugs. Juan states that he bought a .380 automatic for two bags of crack."

Defendant argued at trial, as he does now that the method by which he purchased the gun - illegally in exchange for crack cocaine - was proof that he was a gang member and maintains the jury necessarily inferred that he was a gang member from this statement alone. He contends that this statement prejudiced the jury against him while serving no evidentiary purpose for the State's case. Defendant further argues that the admission of this statement was proof of another crime for which defendant was not charged and not relevant to the issues at trial.

¶ 13 Admissibility of evidence is a matter that rests soundly within the discretion of the trial court. *People v. Illgen*, 145 Ill.2d 353, 364 (1991). The manner of purchase here - in exchange for drugs - is in no way conclusive of gang activity. Further, and more importantly, defendant cites nothing in the record that would show that, but for proof of the manner of purchase of the gun, defendant would have been acquitted of the charges. Defendant notes that the credibility of the witnesses was the main issue here, as the case hinged mainly on defendant's state of mind when firing at the officers. However, there is no reason to conclude that the jury found him unbelievable solely because of the evidence as to how he acquired the weapon he used.

¶ 14 Defendant also contends that the evidence should have been excluded as proof of other crimes. Evidence of other crimes is admissible if relevant for any reason other than to show defendant's propensity to commit crime. *People v. Abernathy*, 402 Ill.App.3d 736, 749 (2010). In determining whether the evidence is admissible, the trial judge must balance the relevancy of the evidence against its prejudicial effect. *People v. Miller*, 254 Ill.App.3d 997, 1010-1011 (1993). Any such evidence deemed admissible by the trial judge will not be reversed absent a showing of abuse of discretion. *People v. Markiewicz*, 246 Ill.App.3d 31, 38 (1993).

¶ 15 Defendant contends that the trial court did not weigh the prejudice against the defendant to the relevance of the evidence. In fact, the trial court did consider prejudice but dismissed defendant's argument without lengthy discussion. Further, as defendant himself notes, erroneous admissions are only to be reversed by a reviewing court if the evidence was a material factor in the defendant's conviction, without which the verdict would likely have been different. *People v. Adkins*, 239 Ill.2d 1, 23 (2010). Defendant has made no argument that any error in admitting this

evidence materially contributed to his convictions.

¶ 16 Defendant has not shown that the trial court abused its discretion under either general admissibility rules, or under the more specific admissibility rules governing other crimes. Nor has defendant shown that if the trial court erroneously admitted this evidence that the result of the trial would have been different. We cannot say that a reversible error was committed.

Excessive Sentence

¶ 17 Defendant finally contends that his sentence of 42 years was excessive. When the sentence imposed is within the permissible statutory range, a reviewing court only has the power to disturb that sentence if it finds the trial court abused its discretion. *People v. McGee*, 398 Ill.App.3d 789, 795 (2010). Such a sentence is only excessive where it is at great variance with the spirit of the law or manifestly disproportionate to the nature of the offense. *Id.*

¶ 18 Defendant makes no argument that his sentence violates either of these principles. He instead argues that rehabilitation is one of the purposes behind sentencing legislation, and such a long sentence will deprive him of the opportunity to return to society as a law-abiding citizen. However, a defendant's potential for rehabilitation is entitled to no more weight than the seriousness of the offense. *People v. Coleman*, 166 Ill.2d 247, 261 (1995).

¶ 19 The crime of aggravated battery with a firearm against a police officer required a sentence of imprisonment of not less than 15 years and no more than 60 years. Aggravated discharge of a firearm against a police officer required a term of imprisonment of not less than 10 years and no more than 45 years. Further, aggravated battery with a firearm is a Class 1 felony. Consecutive sentences are required in the commission of any Class 1 felony in which the defendant inflicted

serious bodily injury. 730 ILCS 5/5-8-4(d)(1) (2008). Thus, defendant could have been sentenced to a minimum of 25 years and a maximum of 105 years.

¶ 20 Defendant makes no direct argument as to the basis on which he finds his sentence excessive, except to liken it to a life sentence; the defendant was 17 years old at the time of the crime and with actual time served will be nearing 50 years of age upon his release. Defendant also points out the numerous mitigating factors in his favor: he is a young man, he is a high school graduate, he was gainfully employed at the time of the offense, he came from a loving, stable family and at the time of the crimes he was still saddened by the loss of his father two years earlier. Defendant does not suggest that the trial court did not consider any of these factors, and in fact the record is quite clear that the trial court considered all of these factors. However, the trial court also noted that the defendant had two juvenile adjudications for weapons violations, and in fact was on probation for the second violation at the time of the instant offense. The court also noted that Officer Olson sustained a serious injury; namely being struck by a bullet. These are all appropriate factors to consider when determining a sentence. A reviewing court may not substitute its own judgment for that of the trial court simply because the reviewing court would have weighed the relevant factors differently. *Coleman*, 166 Ill.2d at 261-262. We cannot conclude that the sentence imposed was excessive.

¶ 21 The judgment of the trial court is affirmed.