

No. 1-10-2039

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 MC6 9523
	)	
MICHAEL MALICK,	)	Honorable
	)	Christopher J. Donnelly,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE GARCIA delivered the judgment of the court.  
Presiding Justice R. E. Gordon and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for aggravated assault is affirmed where the testimony of the State's witnesses proved beyond a reasonable doubt that defendant pointed a BB gun at an 11-year-old victim; defendant's challenge to the term "deadly weapon" in the complaint was without merit.

¶ 2 Following a bench trial, defendant Michael Malick was found guilty of misdemeanor aggravated assault for pointing a BB gun at an 11-year-old boy. The trial court sentenced defendant to one year of conditional discharge and ordered him to pay a \$300 fine. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable

doubt because its witnesses testified to inconsistent accounts of the incident, and defendant's testimony was corroborated by the unimpeached testimony of his witness. Alternatively, defendant contends that the State failed to prove that he used a "deadly weapon" as charged in the complaint, and thus, at most he is guilty of simple assault rather than aggravated assault. We affirm.

¶ 3 In a handwritten misdemeanor complaint, defendant was charged with committing the offense of aggravated assault. The aggravating factor was that defendant "used a deadly weapon in that he knowingly pointed a B.B. gun at Ford, James thereby placing Ford James in reasonable apprehension of receiving a battery" in violation of section 12-2(a)(1) of the Illinois Criminal Code. 720 ILCS 5/12-2(a)(1) (West 2008).

¶ 4 At trial, 11-year-old James Ford testified that on July 16, 2009, he was sitting against a tree in a park with his friend Clarence when three 14-year-old boys named Jordan, Eddie and Dareon approached them and asked what they were doing. James replied that they were sitting there because they were bored. Jordan then began teasing and "cussing" at defendant, who was outside his trailer home, located near the park. Defendant was holding a cane while Jordan and defendant cursed and yelled at each other for about five minutes. Defendant became angry and went inside his house, and Jordan walked away. Eddie and Dareon also left, and only James and Clarence remained in the park.

¶ 5 James testified that about five minutes later defendant came out of his house holding a "rifle" that had a "crank," and defendant cocked the rifle. The prosecutor noted for the record that James made a cocking motion which the court stated could be associated with "[p]otentially a BB gun." James testified that defendant pointed the rifle at him, but did not shoot. James and Clarence then ran across a two-way street and hid by a bench. James explained that he ran because he became afraid when he saw defendant cocking the gun and

aiming the rifle at him. After defendant went back inside his house, the boys ran to James' house to tell his father what had happened. James testified that when defendant came outside with the rifle, he was no longer holding the cane. James denied that anyone threw rocks at defendant's house that day. He also denied seeing a woman with defendant.

¶ 6 Clarence Hill, also 11 years old, testified that he was playing in the park with James when four older boys arrived. Clarence testified that the older boys did not approach them, and he and James kept to themselves because the older boys liked to pick on people who were younger and smaller than them. Defendant was in the yard outside his home, holding his cane and working on something at his picnic bench. Jordan walked towards defendant, cursed at him, and Jordan and defendant began arguing. Defendant went inside his home, and Clarence saw Jordan and Eddie throw three rocks at defendant's house. Clarence denied that anyone threw rocks at defendant. All of the older boys ran from the area, and Clarence and James remained in the park.

¶ 7 About two minutes later, defendant came out of his house. Clarence testified that he could not see defendant when he first exited his house because another building was blocking his view of defendant's door. When defendant walked back into his yard, Clarence saw that he was holding a BB gun with both hands. Clarence knew it was a BB gun because of its long shape and trigger. Defendant walked about 10 feet towards Clarence and James, and the boys ran. Clarence testified that defendant aimed the gun at him and James, and fired three or four gunshots. Clarence knew defendant was shooting the gun because he recognized the "high low pitch sound" from his previous experience of hearing a BB gun being fired. Clarence was afraid that defendant was going to shoot them, so he and James ran and hid behind a bench. After defendant went back inside his house, Clarence and James ran to James' house and told James' father what had happened. Clarence denied seeing a woman at defendant's house.

¶ 8 Cook County sheriff's police officer Stuzim testified that he arrested defendant and brought him to the police station. After being advised of his *Miranda* rights, defendant stated that he did own a BB gun, but denied shooting it at the children.

¶ 9 For the defense, Ebony Phillips, defendant's home helper, testified that she arrived at defendant's house shortly after noon and saw him standing in his backyard with his dog. Defendant was holding his cane, which he uses for walking. She also saw sticks being thrown in defendant's yard, but could not see who was throwing them. She thought it was defendant playing with his dog. Defendant was upset and yelling because he had been hit by the sticks. He told Phillips that kids do not have respect for themselves or others, and always disrespect elderly people. Defendant and Phillips went inside his house and she made him something to eat. Defendant then told her that kids in the park were calling his name and throwing rocks and sticks at him and his dog. Defendant said that someone needed to show the kids that they need respect for the elderly and said that the parents need to teach them how to respect others. Phillips did not see any kids outside that day. Defendant went back outside, still holding his cane. Phillips denied that he was holding anything else in his hands. Defendant walked to the end of his porch, turned around, walked back up to his porch, looked around a bush, then reentered his house and ate his cereal. Phillips denied seeing defendant holding a BB gun or rifle that day.

¶ 10 Defendant testified that he is permanently disabled from a job injury and uses a cane to walk. He testified that about five minutes before noon, he brought his dog outside to run in the backyard. Four kids standing near his neighbor's shed started calling defendant names and swearing at him. Defendant ignored them and turned around to walk inside his house. The kids suddenly came up behind him and defendant was hit in the back of the head with a rock. Phillips then arrived at his house and defendant brought his dog inside and put her in a cage. He told Phillips that the kids hit him in the head with a rock and threw sticks. Defendant went outside to

yell at the kids, but they all ran away, so he went back inside his house. He did not call the police because the kids fled. Defendant said that when he went outside, the only object he held in his hand was his cane. Defendant testified that James was not one of the boys he saw that day. Clarence looked familiar and may have been one of the boys, but defendant was not sure. The boys who were calling him names were bigger than James and Clarence. The four kids who had been harassing him had been doing so for about three years, and defendant was tired of them. Defendant acknowledged that he does own a BB gun, and that he was holding it that day. He had brought the gun outside to shoot at cans in front of his shed. Defendant denied ever shooting his BB gun at a person, and denied pointing his BB gun at James and Clarence that day.

¶ 11 In issuing its ruling, the trial court noted that there was conflicting testimony and stated that it looks for "little nuggets" that reveal the truth. The court found that James did not have anything against defendant and that he was not part of the group of older kids who cursed at defendant. The court found that defendant's testimony that he never saw James before and could not recall seeing Clarence corroborated the boys' testimony that they were not part of the incident that happened with the older boys. The court then questioned how James and Clarence knew that defendant had a BB gun. The court found that there was no reason for the boys to have that knowledge, and no reason for them to bring false accusations against defendant. The trial court expressly stated that it found the testimony of James and Clarence believable, and "based on the evidence" before it, the court found defendant guilty of aggravated assault.

¶ 12 At sentencing, defense counsel stated that defendant admitted that James and Clarence were not the boys that were harassing him that day. Counsel also argued that defendant insisted that he did not have a BB gun with him at the time of his actions. During his allocution, defendant began arguing the facts of his case. The trial court stopped defendant and told him it had already heard the facts. The court then stated "I think I have made it pretty clear that, quite

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frankly that, I didn't believe your story that you have already told me." The court further stated "probably it is a good idea to repeat what I have already said was, I don't believe you." The court sentenced defendant to one year of conditional discharge and ordered him to pay a \$300 fine.

¶ 13 On appeal, defendant first contends that the State failed to prove him guilty beyond a reasonable doubt because James and Clarence testified to inconsistent accounts of the incident, while defendant's testimony was corroborated by the unimpeached testimony of Ebony Phillips. Defendant argues that there were numerous material inconsistencies between the testimony of James and Clarence regarding whether or not the older boys approached them in the park, whether defendant or Jordan instigated the confrontation, whether anyone threw rocks at defendant's property, and whether defendant fired the BB gun. Defendant asserts that these contradictions cast doubt on the boys' testimony and renders their testimony that defendant pointed a BB gun at them questionable. Defendant further argues that Phillips corroborated his testimony that he was holding a cane and not a BB gun when he returned outside to yell at the boys. Defendant claims that the trial court did not adequately resolve the inconsistencies in the testimony and ignored Phillips' testimony.

¶ 14 When defendant argues that the evidence is insufficient to support his guilty finding, 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 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. This standard of review applies whether the evidence is direct or circumstantial, and circumstantial evidence that meets this standard is sufficient to sustain a criminal conviction. *Id.* The trier of fact is responsible for

determining the credibility of the witnesses, weighing the testimony, resolving conflicts in the evidence and drawing reasonable inferences therefrom. *Id.* at 280-81. 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. *Id.*

¶ 15 Here, we find that the evidence was sufficient for the trial court to find that the State proved defendant guilty beyond a reasonable doubt. The record shows that the trial court expressly noted that there was conflicting testimony in this case and stated that it looked for "little nuggets" to determine the truth. After specifically considering the testimony of James, Clarence and defendant, the court found that it was undisputed that James and Clarence were not involved in the harassment of defendant. Defense counsel subsequently acknowledged this fact at sentencing. Based on this factual finding, the court determined that the boys had no reason to bring false accusations against defendant. The court also found that there was no explanation for the boys to know that defendant did, in fact, have a BB gun. The trial court expressly stated that it found the testimony of James and Clarence believable, and at sentencing, the court repeatedly stated that it did not believe defendant's testimony. Sitting as the trier of fact, it was the trial court's duty to resolve the conflicts in the testimony and to determine the credibility of the witnesses. The record clearly shows that the court acknowledged the conflicts and determined that the testimony of James and Clarence was credible, and that defendant's testimony was not. The record further reveals that the court gave consideration to the testimony from all of the witnesses and found defendant guilty "based on the evidence" before it.

¶ 16 In addition, we find that the inconsistencies between the testimony of James and Clarence noted by defendant are not related to the elements of the offense, and thus, are not significant. The record shows that both boys testified that they saw defendant with a rifle BB gun in his hands, saw him aim the gun at them, became fearful that defendant was going to shoot

them, and ran and hid behind a bench until defendant retreated into his house. The trial court found this testimony credible, and we find no reason to disturb that determination.

¶ 17           Alternatively, defendant contends that the State failed to prove that he used a "deadly weapon" as charged in the complaint, and thus, at most he is guilty of simple assault rather than aggravated assault. Defendant argues that the State failed to establish that pointing a BB gun at a person constitutes use of a deadly weapon.

¶ 18           The State responds that the aggravated assault statute not only prohibits use of a deadly weapon, but also use of any device that is "designed to be substantially similar in appearance to a firearm." The State asserts that the complaint sufficiently charged defendant with the offense, and that the "deadly weapon" language was surplusage that could have been omitted and did not mislead defendant in preparing his defense. The State further argues that defendant defended himself against the charge of aggravated assault with a BB gun, which is a device designed to look like a firearm. It notes that defendant's theory of defense at trial was that he never pointed the BB gun at the boys, not that he did not use a deadly weapon.

¶ 19           Defendant replies that he is not challenging the sufficiency of the charging instrument, but instead, is arguing that the evidence was not sufficient to show that the BB gun was a deadly weapon. Defendant asserts that he was not charged with using an object that resembles a gun.

¶ 20           Although defendant claims he is not challenging the sufficiency of the complaint, the argument he presents to this court shows that is exactly what he is doing. Defendant is claiming that the evidence presented at trial does not conform with the offense described in the complaint.

¶ 21           The aggravated assault statute states, in relevant part, that a defendant is guilty of the offense when he commits an assault and "[u]ses a deadly weapon or any device manufactured

and designed to be substantially similar in appearance to a firearm, other than by discharging a firearm in the direction of another person." 720 ILCS 5/12-2(a)(1) (West 2008). As stated above, the evidence presented at trial clearly proved defendant guilty of aggravated assault. Defendant knowingly pointed a BB gun at James, which caused James to be in reasonable apprehension that he was going to be shot.

¶ 22 Here, the complaint, which appears to have been handwritten by Officer Stuzim, who arrested defendant, charged defendant with committing the offense of aggravated assault in that he "used a deadly weapon in that he knowingly pointed a B.B. gun at Ford, James thereby placing Ford James in reasonable apprehension of receiving a battery" in violation of section 12-2(a)(1) of the Illinois Criminal Code. Defendant contends that because the State did not prove that aiming a BB gun at a person constitutes use of a deadly weapon, it did not prove the element as charged.

¶ 23 In order for a variance between a charging instrument and the evidence presented at trial to be fatal, the difference must be material and of such character that defendant is misled in his defense or exposed to double jeopardy. *People v. Burdine*, 362 Ill. App. 3d 19, 24 (2005), citing *People v. Williams*, 299 Ill. App. 3d 143, 151 (1998) and *People v. Rothermel*, 88 Ill. 2d 541 (1982). Such a variance does not exist in this case.

¶ 24 First, defendant has not been exposed to the risk of double jeopardy. The complaint clearly identifies the victim and the date, place and nature of the incident. Consequently, the judgment in this case would bar subsequent prosecution for the same conduct, thus preventing defendant from being exposed to double jeopardy. *Burdine*, 362 Ill. App. 3d at 24, citing *People v. DiLorenzo*, 169 Ill. 2d 318 (1996).

¶ 25 Second, the record shows that defendant was not misled in presenting his defense in this case. The complaint apprised defendant of the offense charged, specifically stating that

defendant knowingly pointed a BB gun at James which placed him in reasonable apprehension of receiving a battery. At trial, defendant argued that he never pointed a BB gun at James. Consequently, we find that defendant actually presented a defense against the statutory charge that he committed an aggravated assault by using a "device manufactured and designed to be substantially similar in appearance to a firearm" rather than using a "deadly weapon."

¶ 26 In addition, we agree with the State's assertion that the phrase "deadly weapon" was surplusage in this case. See *People v. Adams*, 46 Ill. 2d 200, 204 (1970) (where a charging instrument includes the essential elements of the offense under the statute, other matters unnecessarily contained in the complaint may be rejected as surplusage). If the phrase "deadly weapon" was omitted, the complaint still sufficiently alleges the offense of aggravated assault. Accordingly, we find no merit in defendant's challenge to the phrase "deadly weapon."

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

¶ 28 Affirmed.