No. 1-09-2945

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
June 24, 2011

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 61082
	)	
BRANDON TERRY,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Cahill and R. E. Gordon concurred in the judgment.

O R D E R

HELD: Where defendant was proven guilty of aggravated battery with a firearm beyond a reasonable doubt, the trial court's judgment was affirmed; where defendant's conviction for aggravated discharge of a firearm violated the one-act, one-crime rule, the conviction was vacated.

Following a bench trial, defendant Brandon Terry was convicted of aggravated battery with a firearm and aggravated

discharge of a firearm and sentenced to two concurrent terms of eight years' imprisonment. On appeal, defendant asserts that the State failed to prove him guilty beyond a reasonable doubt of both offenses. He also contends that his conviction for aggravated discharge of a firearm should be vacated because it violates the one-act, one-crime rule. We affirm as modified.

The evidence showed that at about 10:30 p.m. on June 7, 2008, the victim, Eddie Edwards, parked his car near his parents' residence at 150 West Ivanhoe Terrace in Riverdale. Defendant approached Eddie and told him that he had an argument with the owner of a black S.U.V., which was parked across the street. Following this conversation, a third man walked behind Eddie and told defendant to "light it up." Five or six shots were fired, and Eddie was shot in the hand. Defendant was subsequently arrested and charged with multiple offenses in connection with the shooting, including aggravated battery with a firearm and aggravated discharge of a firearm.

At trial, Eddie Edwards testified that at about 10:30 p.m. on June 7, 2008, he parked his car near his parents' house. Defendant, who was wearing a white t-shirt and blue jean shorts, approached Eddie, who knew defendant for a couple of years. Defendant asked Eddie questions regarding a black S.U.V. that was parked across the street. Defendant told Eddie that someone who previously occupied the S.U.V. had exchanged "words" with him.

Following this conversation, Eddie started to proceed into the house, but realized he left his keys in the ignition, and went back to the car to retrieve them. As he proceeded to his car, a "dark skinned" man walked behind Eddie and told defendant to "light it up." Five or six shots were fired, and Eddie realized he was shot in the hand. Eddie thought that the shots had been fired at the black S.U.V., but did not know who fired them.

After the shooting, Eddie went inside of his parents' house and spoke with a 9-1-1 dispatcher. When Eddie was on the phone with the dispatcher, he believed that he had been shot with a BB gun. Eddie then went to the hospital, and when he returned, he examined his car and saw a distortion in his passenger's side door that looked like it was caused by a bullet. When Eddie examined the distortion, he found a small piece of metal inside. The next day, Eddie identified defendant in a photo line-up, and, on June 10, 2008, he identified defendant in a line-up.

Timothy Edwards, the victim's father, testified that he lived at 150 West Ivanhoe Terrace in Riverdale on June 7, 2008. At about 10:30 p.m., he was home and went downstairs to greet Eddie who had just arrived. As Timothy opened the front door, he heard about four or five gunshots. Timothy identified defendant, who used to be his neighbor, as the individual firing those gunshots. Defendant was standing directly in front of Timothy's house, about 8 to 10 feet away, wearing a long white t-shirt and

blue shorts, with his right arm extended toward LaSalle Street. When Timothy was asked on direct examination if he could see what was in defendant's hand, he responded that, "[h]e had a gun in his hands."

Defendant, who still had his arms extended, turned toward Timothy. When defendant looked Timothy in the face, he lowered his arms and ran away. Timothy came out of the house to check on the status of Eddie, who had been shot in the hand. Timothy took Eddie into the house, cleaned his hand, and told his wife to call 9-1-1. After police were called, Timothy took Eddie to the hospital where his hand was treated. On June 10, 2008, Timothy went to the Riverdale police station where he viewed a line-up and identified defendant as the shooter.

On cross-examination, the following colloquy occurred between Timothy and defense counsel:

> "Q. Now, when that person who was shooting turned to the right, pointed that gun in your direction, you were look[ing] right at that gun, weren't you?
>
> A. I was looking at the face.
>
> Q. But, you knew that the gun was being pointed at you, correct? You saw the gun, correct?
>
> A. I saw his arm extended with a weapon in his hand.

Q. You were able to focus on the weapon also. You were looking at the weapon knowing it was a gun?

A. I was looking at his face

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Q. Would it be fair to say you really wasn't [*sic*] focusing on that person's hand to see what he had in his hand?

A. I had already heard the shots, so, I already knew what he had in his hand.

Q. But you didn't see, is that correct?

A. No, I didn't see.

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Q. That's why you didn't know what length it was or color or what type it was, because you didn't actually see it?

A. Correct."

Timothy further testified on cross-examination that while defendant lived across the alley from him they had one disagreement about two years prior to the incident in question. Timothy stated that defendant's dog attacked him and he told defendant that if the dog bit him, he'd kill defendant.

Aaron Zambrano testified that on June 7, 2008, he was at his grandmother's house located on LaSalle Street in Riverdale. At 10:30 p.m., Zambrano looked out of the window because he thought

he heard five or six gunshots. He observed an African American man, who was about five feet, eight inches tall, wearing a white t-shirt, blue jean shorts, and holding something in his hands.

Detective Glen Williams testified that on June 7, 2008, he was dispatched to 150 Ivanhoe Terrace after being informed that shots were fired at that location. Williams investigated the area and observed that a black S.U.V. parked on LaSalle Street had an apparent bullet hole in the rear driver's side window. He also observed that the victim's car, parked across the street from the S.U.V., had blood on it. Williams further testified that although a BB gun could put a hole into a car window, it would not have been as big as the hole left in the S.U.V.

Detective Willie Darkried testified that he interviewed Eddie, and that Eddie identified defendant in a photo array as the person who shot him. Subsequently, Darkried testified that both Eddie and Timothy identified defendant in a line-up at the police station.

Defendant's mother, Olga Terry, testified that there had been numerous confrontations between Timothy Edwards and defendant while they were neighbors.

Following the evidence, the trial court found that there was "no doubt in [his] mind" that defendant fired the weapon. The court also found that defendant knowingly committed the offenses

of aggravated battery with a firearm and aggravated discharge of a firearm.

On appeal, defendant first contests the sufficiency of the evidence proving him guilty of aggravated battery with a firearm beyond a reasonable doubt. Defendant specifically contends that the State failed to show that he caused the victim's injuries, that he did so intentionally or knowingly, and that he did so by discharging a firearm.

Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

In order to sustain a conviction for battery, the State must prove beyond a reasonable doubt that the defendant knowingly caused bodily harm to an individual or made physical contact of

an insulting or provoking nature with an individual. 720 ILCS 5/12-3(a) (West 2008). A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm causes any injury to another person. 720 ILCS 5/12-4.2 (West 2008).

A defendant acts knowingly if he is consciously aware that his conduct is practically certain to cause injury. 720 ILCS 5/4-5(b) (West 2008); *People v. Moore*, 358 Ill. App. 3d 683, 688 (2005). It is well settled that a person is presumed to intend the natural and probable consequences of his deliberate acts. *People v. Varnell*, 54 Ill. App. 3d 824, 827 (1977). Determination of defendant's mental state may be inferred from circumstantial evidence (*Moore*, 358 Ill. App. 3d at 688), including the actions of the defendant (*Varnell*, 54 Ill. App. 3d at 827). The trier of fact's finding that a defendant acted intentionally is a factual one, and will not be reversed unless there is a reasonable doubt of his guilt. *In re T.G.*, 285 Ill. App. 3d 838, 843 (1996).

We believe that the evidence, when viewed in the light most favorable to the State, was sufficient to prove defendant's guilt beyond a reasonable doubt. As the victim was retrieving his keys from his car, a "dark skinned" man walked behind him and told defendant to "light it up." Five or six shots were fired, and the victim was shot in the hand. Although the victim did not

know who fired the shots, Timothy Edwards saw defendant shooting across LaSalle Street. Additionally, although Aaron Zambrano could not positively identify defendant as the shooter, he observed a man matching defendant's description across the street, who held an object, turn and flee. The evidence further showed that when defendant shot at the S.U.V., he had to fire passed the victim and his vehicle because the S.U.V. was across the street from where defendant was shooting and the victim was standing. Because the victim was in defendant's line of fire, defendant's conduct was "practically certain" to result in Eddie being shot. Therefore, defendant knowingly shot the victim. See *Varnell*, 54 Ill. App. 3d at 828 (holding that the jury could have inferred that the defendant fired his weapon, after pointing it at a window, with the knowledge that harm to someone in the window was practically assured).

Defendant's argument that Timothy never saw the gun is rebutted by the record. On direct examination, Timothy stated that defendant "had a gun in his hands." Defendant, however, highlights Timothy's testimony on cross-examination where he stated that he did not see the gun in question during the brief moment where defendant pointed it in his direction after defendant turned to face him. Timothy explained, however, that, at that moment, Timothy was focused on defendant's face.

Moreover, the trier of fact expressly found "no doubt" that defendant "fired the weapon."

We also reject defendant's contention that he did not knowingly cause any injury to the victim because it was an accident caused by his poor aim when he fired towards the empty S.U.V. As stated above, however, when defendant fired at the S.U.V., it was practically certain that he would injure the victim who was in the path of the bullets. Moreover, we find defendant's argument that he did not realize that the victim had turned around to retrieve his keys, making him more in the line of fire than defendant first thought, mere speculation. The evidence showed that the victim had returned to get his keys from the ignition only moments after exiting the car and conversing with defendant.

Moreover, we find defendant's argument that the State did not prove that he discharged a firearm unpersuasive. Defendant specifically maintains that the evidence at trial indicated that a BB gun, not a firearm, was used in the commission of the crime. In support, defendant points to the victim's testimony that he told the 9-1-1 dispatcher that he thought he was shot with a BB gun. The use of a deadly weapon during the commission of a battery may be established by circumstantial evidence if there is some evidence from which the use of a weapon may be inferred. *People v. Thomas*, 191 Ill. App. 3d 187, 192 (1989). In

evaluating circumstantial evidence, the trier of fact is not required to "search out a series of potential explanations compatible with innocence and elevate them to the status of a reasonable doubt." *People v. Harris*, 34 Ill. App. 3d 906, 908 (1975).

Here, the evidence showed that, after the shooting occurred, the victim returned to his car and retrieved what appeared to be a bullet fragment from it. In addition, Detective Williams' finding that a bullet caused a hole found in the S.U.V.'s window was based on his professional experience as a police officer. Moreover, Timothy specifically testified that he saw defendant shooting a gun. Therefore, when taken in its entirety, the evidence showed that defendant discharged a firearm, and the fact that the victim suffered minor injuries and initially thought he was shot with a BB gun does not necessitate a different result.

Defendant next maintains, and the State concedes, that this court should vacate his conviction for aggravated discharge of a firearm because it violates the one-act, one-crime rule.

The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). If the same physical act forms the basis for two separate offenses charged, a defendant could be prosecuted for each offense, but only one

conviction and sentence may be imposed. *People v. Segara*, 126 Ill. 2d 70, 77 (1988). Where guilty verdicts are obtained for multiple counts arising from the same act, a sentence should be imposed on the most serious offense. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997).

Here, the mittimus shows that the trial court found defendant guilty of aggravated battery with a firearm, a Class X felony (720 ILCS 5/12-4.2(a)(1),(b) (West 2008)), and aggravated discharge of a firearm, a Class 1 felony (720 ILCS 5/24-1.2(a)(2),(b) (West 2008)), based on the shooting of the victim. Because the convictions are based on the same physical act, the two convictions cannot stand under the one-act, one-crime rule. We thus vacate defendant's conviction for aggravated discharge of a firearm, the less serious offense. See *People v. Nunn*, 357 Ill. App. 3d 625, 641 (2005) (vacating defendant's conviction for aggravated discharge of a firearm where he was also convicted of second degree murder and aggravated battery with a firearm). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we vacate defendant's conviction and sentence for aggravated discharge of a firearm.

Because defendant's conviction for aggravated discharge of a firearm is vacated as violating the one-act, one-crime doctrine, we need not address the merits of defendant's contention that the

State failed to prove him guilty beyond a reasonable doubt of that offense.

Accordingly, we vacate the judgment entered on defendant's conviction of aggravated discharge of a firearm; order the clerk of the court to correct the mittimus to reflect a single conviction for aggravated battery with a firearm; and affirm the judgment of the trial court in all other respects.

Affirmed in part; vacated in part; mittimus corrected.