2012 IL App (1st) 110815-U

FIFTH DIVISION
June 22, 2012

No. 1-11-0815

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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. 07 CR 21901
	)	
OMAR DIXON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices J. Gordon and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence found sufficient to sustain defendant's convictions for aggravated battery with a firearm and aggravated discharge of a firearm; 40-year extended-term sentence was not excessive.

¶ 2 Following a bench trial, defendant Omar Dixon was found guilty of aggravated battery with a firearm, aggravated discharge of a firearm and aggravated unlawful use of a weapon by a felon, then sentenced to concurrent, respective terms of 40, 15 and 7 years in prison. On appeal, defendant contends that the evidence was insufficient to prove him guilty of aggravated battery with, and aggravated discharge of a firearm, and that judgment should be entered on the lesser-included offense of reckless discharge of a firearm. He further contends that this case should be remanded for a new sentencing hearing because his 40-year extended-term sentence is excessive.

¶ 3 The record shows that defendant was charged with attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm and aggravated unlawful use of a weapon by a felon based on an incident that occurred outside the Black Room social club on the southeast side of Chicago, on October 7, 2007. At trial, five occurrence witnesses were called by the State, all of whom, except for Demitrius Champs, acknowledged their arrests or convictions for drug-related, weapons-related or business violation charges. They all testified that no promises had been made to them for their testimony in this case.

¶ 4 Jason Jones testified that on the evening of October 6, 2007, he and several women were drinking with defendant at defendant's house. Later in the evening, defendant told Jones that defendant and the women were going to the Black Room, but Jones remained at defendant's home and fell asleep. Jones awoke when defendant arrived home in the early morning hours, at which time, Jones noticed that defendant was bleeding from a gash on top of his head where

someone had hit him with a bottle or a gun. Jones testified that defendant "wasn't happy about it."

¶ 5 Jones further testified that he and defendant then drove to the Black Room in defendant's Cadillac, and thought they were going there to pick up the women. From his vantage point in the passenger seat, Jones saw that defendant had a black handgun on his lap. Defendant parked the car around the corner from the club and exited, but Jones did not see what direction he went. Jones stayed in the car, where he was joined by two women, then heard "a bunch of gunshots" ring out from the direction of the club. He did not see who was firing the gun, and about 10 minutes later, defendant returned to the car with the gun, set it between the armrest and Jones' side, and drove away from the club. The police pulled them over shortly thereafter, and Jones ran away when prompted by defendant.

¶ 6 John Fuller testified that he was the sergeant at arms, the bouncer, at the Black Room, but, on the night of the shooting he was there merely to socialize. He spent about 20 minutes in the Black Room, then left at 5 a.m. to walk several women to their car. At that time, he saw defendant standing about 20 to 30 feet away from him, and, as he drew closer, he heard defendant "mumbling and mad about something." When Fuller asked defendant what was wrong, defendant told him to "step back, get the f*** back by him." Fuller then saw that defendant was holding a black pistol, which "went off." He testified that defendant, who was standing two feet away from him, "raised it up, and that's when I got hit in the leg." Fuller fell

down and crawled behind a car to duck out of defendant's way. He heard another gunshot at that point, but did not know where it came from, nor see what defendant did after he shot him.

¶ 7 Fuller further testified that he did not have a gun that morning, that he had not seen defendant earlier in the evening, and that he had not fought with defendant or threatened him. Although other people were in the area during the shooting, Fuller did not see anyone else with a gun. Later that day, Fuller viewed a lineup and identified defendant as the shooter. Fuller testified that he was shot in the right leg below the knee, and as a result, suffers from nerve damage.

¶ 8 Robert Gladney, whose nickname is Pedro, testified that he was outside the Black Room at 5 a.m. on October 7, 2007, when he heard a "tussle" inside the club. He saw security escorting defendant, who was bleeding from his head, out of the club, and stated that Fuller was not involved in that incident. Once outside, defendant walked down the street and disappeared, but he saw him 10 or 15 minutes later shouting while standing at the back door of the club. He then saw Fuller approach defendant and speak to him. As he approached the two men, he saw a gun in defendant's hand and heard defendant tell him not to walk up on him. Fuller, who did not have a weapon of any kind, told him that defendant had a gun and pushed him out of the way. As he ran, he heard two gunshots, then ran into the club and informed everyone about the shooting. When he came back outside, he saw Fuller on the ground.

¶ 9 Demitrius Champs testified that on October 7, 2007, he saw Fuller standing on the corner outside of the Black Room at approximately 5 a.m. speaking with someone. He then heard

several gunshots and ducked behind a car. When the shooting stopped, he went to the corner and saw that Fuller had been shot in the leg and was on the ground. Champs then saw a "husky" man run down the street and enter the driver's side of a Cadillac. Champs followed the Cadillac on his motorcycle and flagged down the police. When they curbed the Cadillac, the front passenger exited the car and ran. Champs identified defendant in court as the driver of the Cadillac.

¶ 10 Kenyada Fort testified that in October 2007, she was the secretary of the Black Room; Fuller, her son's father, was the president; Pedro was the sergeant at arms and defendant was a club member. On October 7, 2007, she saw defendant and a woman nicknamed "Skeeter" walking toward the Black Room entrance sometime between 3 a.m. and 4 a.m. To her knowledge, defendant was not allowed to enter because he was drunk. Defendant asked her to come to the side door, but she did not do so. At 5 a.m., she saw Fuller speaking with defendant on a nearby corner. After 30 to 45 seconds, she saw Fuller push Pedro, and then saw defendant, who was about two feet away from Fuller at the time, lift a black gun in his right hand and shoot it. Neither Fuller nor Pedro had guns. Fort ran back into the club and heard multiple shots. She ran outside once the shooting stopped and found Fuller in the street injured from a shot to the leg.

¶ 11 Officer Gregory Wood testified that shortly after 5 a.m. on October 7, 2007, he received a flash message regarding the incident, then spotted and curbed the Cadillac, which contained four passengers. Officer Wood ordered defendant, the driver, out of the car and handcuffed him. He noticed that defendant was bleeding from a wound to his forehead. Officer Wood saw one of the other officers on the scene recover a handgun from inside the car.

¶ 12 Officer Hernandez testified that, as he approached the car, he saw a black gun on top of the console between the driver and passenger sides. The gun was a .45-caliber weapon in the slide lock position, meaning that all of the bullets had been fired. Detective Luke Connolly testified that he conducted a lineup on October 7, 2007, where Fuller immediately identified defendant as the shooter.

¶ 13 Officer Richard Strugala, a forensic investigator, testified that on October 7, 2007, he administered a gunshot residue test to defendant and described the mechanics of the test. Officer Brian Devan testified that on October 7, 2007, he processed the evidence from the crime scene in this case. That evidence included six, fired, .45-caliber cartridge cases, which were found within the immediate vicinity of one another.

¶ 14 The parties then stipulated that: (1) the results of the gunshot residue test performed on defendant indicated that he had discharged a firearm; (2) the six, .45-caliber cartridge cases were all fired from the same .45-caliber gun recovered from defendant's car and (3) defendant had a prior qualifying felony offense for purposes of the unlawful use of a weapon by a felon count.

¶ 15 Elzie Johnson testified for the defense that he was "highly intoxicated" when he saw his friend, the defendant, involved in an altercation with four security men at the Black Room sometime between 4:30 a.m. and 5 a.m. Johnson testified that one of those men was "brandishing something real shiny. Kind of like steel. Probably resembled a handgun" and that defendant was repeatedly struck on the head with this object. The men dragged defendant, who was bleeding from the head, out the door. Johnson left the club shortly thereafter.

¶ 16 Andrea Killingsworth testified for the defense that about 5 a.m. on October 7, 2007, she was outside the Black Room and saw four or five men jumping on defendant. Defendant was bleeding from his head and reaching for a gun held by one of those men. As Killingsworth walked to her car, she heard several gunshots from the same area, which sounded like different guns. She did not see who was firing the guns, then got into her car and left the area without calling police. She knew defendant socially and visited him in jail, but did not know why he was in jail or that it was related to the incident from October 2007. Killingsworth also acknowledged her prior 2002 felony conviction for possession of a controlled substance.

¶ 17 Defendant testified that on October 7, 2007, he drove to the Black Room in a gold Cadillac with Jones and two women. He arrived there about 3:30 a.m. and parked down the street from the club while Jones remained in the car because he was drunk. About an hour and a half after entering the club, defendant was hit in the face by one of the security men without provocation. Defendant hit him back and was attacked by three more security men, one of whom was Pedro. One man had a silver gun and another man had a black gun which they were using to hit him in the head. Defendant ran out of the club, but was stopped by Fuller, who held him until the security men arrived and continued to assault him. Fuller hit him in the head with a black gun. Defendant thought they were going to kill him, so he took Fuller's gun from him. Everyone then spread out, but Fuller remained close to defendant and to his right. Pedro, who was approximately 15 feet from defendant, then shot a silver gun at him and he fired back at Pedro.

Defendant ran down the street and continued to fire the gun at Pedro until he was out of bullets. He drove away in the Cadillac and was pulled over by police, who found the gun in the car.

¶ 18 Prior to announcing its decision, the trial court stated that the testimony of defendant, Killingsworth and Johnson "strain[ed] the bounds of credibility" and that Jones' testimony was "most compelling and the most believable." The trial court also stated that it believed defendant's blood was boiling from the altercation and his desire was to go home and even the score with weaponry. The court further stated that defendant's blood cooled down under the law, and he chose to return to the club with a weapon which he fired and injured Fuller. The trial court then found defendant guilty of aggravated battery with a firearm, aggravated discharge of a firearm, and unlawful use of a weapon by a felon, and not guilty of attempted first degree murder.

¶ 19 Prior to sentencing, the court heard evidence in aggravation and mitigation. In aggravation the State provided testimony from John Eannace, who successfully prosecuted defendant for murder and attempted armed robbery stemming from an incident in 1984. Eannace recounted the incident, in which the victim was shot and killed after defendant, who was found guilty under a theory of accountability, told his friend "let's shoot this punk." The State argued that instead of walking away from the incident in the instant case, defendant chose violence and fired the six bullets that were in his gun. The State noted that when defendant shot Fuller, defendant was out on bond for a pending unlawful use of a weapon by a felon charge and had the murder conviction in his background.

¶ 20 In mitigation, defense counsel pointed out that defendant had obtained his GED, an Associate's Degree in general studies, as well as a certificate in culinary arts while in the penitentiary, and that after he was released, he was employed for a significant period of time. He maintained that defendant was not a dangerous person, and informed the court that defendant was not a gang member, that he was taking care of his sick mother, and has shown that he can be rehabilitated. The presentence investigation report reflected that defendant was a former gang member, that he was 41 years old at the time of his sentencing hearing, that he has a young daughter, and prior to the incident, was living with his mother and employed by his sister's janitorial company.

¶ 21 Defendant exercised his right of allocution, and told the court that he had bettered himself while in prison and had worked after he was released from prison. He pointed out that his mother is ill, that he has a young daughter, and that he would like to be able to help his family again. He stated that he would spend the rest of his life in prison if he were sentenced to anything over 30 years. He further stated that "maybe [he] made a mistake" in going to the Black Room that night, but maintained that he was the one who was assaulted, even after he had tried to walk away peacefully.

¶ 22 Before announcing its decision, the court noted that it had carefully considered the statutory factors in aggravation and mitigation, as well as the evidence presented at trial, the presentence investigation report, the evidence presented in aggravation and mitigation, the financial impact of incarceration and defendant's statements in allocution. The court noted that,

given defendant's choice to arm himself, he learned "absolutely nothing" from the 16 years he had served on his 30-year sentence for first degree murder and attempted murder. The court further stated that the circumstances under which defendant chose to arm himself "def[ied] *** all common sense, all reasonableness, and any sense of rehabilitation from service of that earlier sentence." The court referred to defendant's conduct as "barbaric," noting that "when gunplay is involved," the chances are greatly increased that someone's life could be lost. The court concluded that an extended term was necessary "to deter others from engaging in similar conduct," then sentenced defendant to a 40-year extended term for aggravated battery with a firearm, and concurrent terms of 15 and 7 years for aggravated discharge of a firearm and aggravated unlawful use of a weapon by a felon. Defendant subsequently filed a motion to reconsider sentence, which the trial court denied.

¶ 23 On appeal, defendant challenges the sufficiency of the evidence to prove him guilty of aggravated battery with a firearm and aggravated discharge of a firearm. He maintains that he did not act knowingly or intentionally, but only recklessly, and requests this court to reverse his convictions for the aggravated weapons offenses, and enter judgment on the lesser-included offense of reckless discharge of a firearm.

¶ 24 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). This standard applies to all criminal cases, whether

the evidence is direct or circumstantial, and acknowledges the responsibility of the trier of fact to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). A reviewing court will reverse a conviction only where the evidence is so improbable or unsatisfactory as to create a reasonable doubt of a defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 25 In this case, defendant does not contest that he fired the gun, but challenges the sufficiency of the evidence to establish that he acted "knowingly or intentionally," arguing that it showed no more than recklessness. A person commits the offense of aggravated battery with a firearm when he knowingly or intentionally, by means of the discharging of a firearm, causes any injury to another person. 720 ILCS 5/12-4.2(a) (West 2007). A person commits the offense of aggravated discharge of a firearm if he knowingly or intentionally discharges a firearm in the direction of another person. 720 ILCS 5/24-1.2(2) (West 2007). Thus, to be convicted of either offense, the evidence must show that defendant acted knowingly or intentionally.

¶ 26 A person acts intentionally to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct. 720 ILCS 5/4-4 (West 2007). Here, Jones testified that defendant returned to his house angry, then returned to the club with a gun. Fuller and Fort testified that defendant raised the gun and shot Fuller from a distance of two feet. Although neither Pedro nor Champs saw the actual shooting, they saw defendant standing near Fuller immediately prior to the shooting, and with Fuller and

Fort heard multiple gunshots. Defendant himself testified that he fired the gun, albeit at Pedro, as he ran down the street towards his car until there were no bullets left in the gun. From this evidence, the trial court could reasonably infer that defendant acted intentionally when he fired the gun and injured Fuller. *People v. Robinson*, 379 Ill. App. 3d 679, 685 (2008).

¶ 27 The evidence further shows that defendant's conduct was "knowing." A person acts knowingly if he is consciously aware that his conduct is practically certain to cause injury (720 ILCS 5/4-5(b) (West 2007)), whereas, a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the victim would be harmed (720 ILCS 5/4-6 (West 2007). The determination of defendant's mental state many be inferred from circumstantial evidence. *People v. Moore*, 358 Ill. App. 3d 683, 688 (2005).

¶ 28 Viewed in the light most favorable to the prosecution (*Siguenza-Brito*, 235 Ill. 2d at 224) the testimony of Jones, whom the trial court found to be "the most believable" witness, showed that defendant was upset over an altercation that had occurred at the Black Room and he returned to the club after arming himself with a gun at home. Defendant's anger did not dissipate in the time it took him to retrieve his gun and drive back to the club, as evidenced by Fuller's testimony that defendant appeared upset when he ran into him outside the club, and by Pedro's testimony that defendant disappeared after he was kicked out of the club, but returned about 15 minutes later shouting outside the club shortly before Fuller approached him. Both Fuller and Fort testified that defendant shot Fuller from a distance of two feet, and by defendant's own account Fuller was "close" to him when he fired the gun. Based on this evidence, the trial court could

reasonably infer that defendant's mental state at the time he fired the gun at Fuller was "knowing." *Moore*, 358 Ill. App. 3d at 687-88.

¶ 29 Although defendant testified that he had been attacked inside the club by security men, and that he took Fuller's gun from him while Fuller was holding him outside the club, the trial court found that the defense testimony "strain[ed] the bounds of credibility." Defendant also testified that he fired the gun until he ran out of bullets as he ran away from the club as Pedro fired at him, however, the physical evidence and testimony contradict defendant's account. Officer Devan testified that the six, fired, .45-caliber bullets were recovered from the same immediate vicinity and the parties stipulated that all of those bullets were fired from the gun recovered from defendant. Champs testified that he saw defendant running away from the scene *after* the shooting stopped, not that defendant was being chased and fired upon as he ran away from the scene, as defendant claims.

¶ 30 Notwithstanding, defendant argues that the fact that Fuller was shot below the knee establishes that the gun went off accidentally. Although that is one inference that can be drawn from the evidence, it is not the only one. Based on the totality of the evidence adduced at trial, the trial court was free to find defendant's assertions that the gun went off accidentally self-serving based on the circumstances (*Moore*, 358 Ill. App. 3d at 688), and rationally infer that defendant knowingly shot at Fuller striking him once.

¶ 31 In reaching that conclusion, we have considered *People v. Hoover*, 250 Ill. App. 3d 338 (1993), cited by defendant, and find it distinguishable. In *Hoover*, defendant was convicted of

involuntary manslaughter after the loaded weapon she was holding discharged as she wrestled with her victim and the defendant claimed that her actions were accidental. 250 Ill. App. 3d at 350-51. On appeal, the court considered only whether the evidence was sufficient to sustain her conviction of involuntary manslaughter and did not address whether it was sufficient to establish the mental states of intent or knowledge. *Hoover*, 250 Ill. App. 3d at 350-51. Accordingly, we find, as we did in *Moore*, 358 Ill. App. 3d at 688, that *Hoover* is not instructive in this case.

¶ 32 Defendant also contends that this case should be remanded for a new sentencing hearing because his 40-year extended term sentence was excessive. Defendant maintains that the trial court ignored the facts of the case and was motivated by vindictiveness based on his prior murder conviction.

¶ 33 The sentencing range for aggravated battery with a firearm, a Class X felony, is 6 to 30 years. 730 ILCS 5/5-8-1(a)(3) (West 2010). Defendant was eligible for an extended term sentence of 6 to 60 years because his current conviction occurred within 10 years of having been released from prison for the murder of which he was convicted (730 ILCS 5/5-5-3.2(b)(1) (West 2010); 730 ILCS 5/5-8-2 (West 2010), a fact he does not contest.

¶ 34 Where, as here, the sentence imposed by the court falls within the statutory range for the offense of which defendant is convicted, it may not be disturbed unless it constitutes an abuse of discretion. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). Such a sentence will be found excessive only if it is manifestly disproportionate to the nature of the offense or if it is at great

variance with the spirit and purpose of the law. *People v. McGee*, 398 Ill. App. 3d 789, 795 (2010). We do not find this to be such a case.

¶ 35 Defendant's sentence fell within the appropriate sentencing range, and was imposed after the trial court heard arguments from both counsel and stated that it had considered the evidence in aggravation and mitigation, including the presentence investigation report and defendant's own words. The fact that defendant was sentenced to more time in this case than for his previous murder conviction does not mean, as defendant argues, that his current sentence is excessive. The goal of the extended term provision in section 5-5-3.2(b), a recidivist statute, is to impose harsher sentences on offenders whose repeated convictions have illustrated their resistence to correction. *People v. Garcia*, 241 Ill. 2d 416, 421-22 (2011).

¶ 36 In this case, the court specifically considered defendant's rehabilitative potential and noted that the circumstances under which defendant chose to arm himself defied "any sense of rehabilitation" from serving his earlier prison sentence. Based on defendant's conduct, the court questioned his rehabilitative potential and decided that a longer term was necessary. The court is not required to give greater weight to rehabilitative potential than to the circumstances of the offense (*People v. Hunzicker*, 308 Ill. App. 3d 961, 966 (1999)), and here, the trial court specified that an extended term was necessary in order to deter others from engaging in similar conduct, another proper sentencing factor (*People v. Mimes*, 2011 IL App (1st) 082747, ¶ 41; *Hunzicker*, 308 Ill. App. 3d at 966). It is not our function to reweigh the factors considered by the court and substitute our opinion for that of the trial court (*People v. Burke*, 164 Ill. App. 3d

889, 902 (1987)), and here we find no abuse of discretion in the 40-year extended term imposed by the court.

¶ 37 Defendant relying on *People v. Nolan*, 291 Ill. App. 3d 879 (1997), nevertheless claims that the trial court was motivated by vindictiveness. In *Nolan*, this court reduced the defendant's sentence from the maximum extended term of 30 years, to 15 years, stating that the "factual matrix" did not warrant the 30-year term. *Nolan*, 291 Ill. App. 3d at 887. This court pointed out that the victim was the initial aggressor, the defendant was trying to extract himself from the situation, the shooting was not premeditated, and that his two previous convictions, residential burglary and possession of a stolen motor vehicle, did not indicate that the defendant was a "dangerously aggressive criminal." *Nolan*, 291 Ill. App. 3d at 887. Here, by contrast, defendant's extended term sentence is not at the maximum of the range permitted, his previous criminal history involves the use of guns, and the "factual matrix" of this case indicates dangerous conduct and aggressiveness by defendant, who armed himself and returned to the club, seeking retaliation. As such, there is no basis for the court to modify the sentence imposed by the trial court. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 38 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.