

NOTICE
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2012 IL App (4th) 100540-U

Filed 1/13/12

NO. 4-10-0540

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Macon County |
| GREGORY F. WHITELOW, |) | No. 10CF230 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Timothy J. Steadman, |
| |) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The court affirmed the trial court's judgment, finding the State introduced sufficient evidence to prove defendant guilty of attempted murder beyond a reasonable doubt and remanded with directions to amend defendant's sentencing judgment.

¶ 2 In May 2010, a jury convicted defendant, Gregory F. Whitelow, of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). In July 2010, the trial court sentenced defendant to a 31-year prison sentence for attempted murder and a concurrent 5-year prison sentence for unlawful possession of a weapon by a felon. The court vacated defendant's aggravated-discharge-of-a-firearm conviction under the one-act, one-crime rule. Defendant appeals, arguing (1) the State failed to introduce sufficient evidence to prove him guilty of attempted murder beyond a

reasonable doubt, and (2) he is entitled to an extra day of credit toward his sentence for time he spent in custody prior to trial. We affirm as modified and remand with directions to amend defendant's sentencing judgment to reflect credit for one additional day spent in custody prior to sentencing.

¶ 3

I. BACKGROUND

¶ 4 In February 2010, the State charged defendant by information with attempted murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2010)). The State further alleged defendant personally discharged a firearm while committing attempted murder, which would add 20 years to any sentence imposed by the trial court upon conviction of that charge. 720 ILCS 5/8-4(c)(1)(C) (West 2010). Defendant pleaded not guilty and requested a jury trial. Prior to trial, the State dismissed the aggravated-unlawful-use-of-a-weapon charge but proceeded on the remaining charges. The evidence introduced at defendant's trial showed the following.

¶ 5 Shannon Foster testified he often picked up his friend Danny Ray from a nearby apartment complex. Instead of ringing Ray's doorbell, Foster would honk his car horn or throw rocks at Ray's window when he arrived to pick Ray up. Foster's behavior upset the woman living below Ray's apartment, whom Foster referred to as Val, Valerie, and Valletta during his testimony (hereinafter Val). Val is defendant's cousin. Defendant lived in the same apartment complex as Foster, though they lived in different buildings. Foster knew defendant by the alias "G-Money" but did not know his real name. The previous summer, defendant spoke to Foster

about changing his behavior at Val's apartment complex because it upset Val.

¶ 6 Between 11 a.m. and noon on Sunday, January 31, 2010, Foster drove to Ray's apartment complex to pick him up. Foster honked his car horn. Ray opened his window and talked to Foster briefly before coming outside and getting into Foster's car. Foster and Ray returned to Foster's apartment to watch a basketball game. While Foster and Ray were watching the game, defendant knocked on Foster's door. Foster did not answer the door but instead told defendant to come inside the apartment. Defendant opened the door and asked Foster to come outside so they could talk. Foster went outside with defendant and closed the door because it was cold.

¶ 7 Outside Foster's apartment, defendant again complained about Foster bothering Val at her apartment complex. Foster testified he and defendant were about five feet apart during the conversation. Defendant was calm and did not threaten Foster during the conversation. After talking to defendant for about one minute, Foster "brushed him off" and turned to enter his apartment. Foster testified defendant also turned to walk away, but defendant turned back toward Foster, said "hold up," and reached into the waistband of his pants. Foster knew defendant carried a gun and hurried through his apartment door.

¶ 8 As Foster entered his apartment, he heard a gunshot. At the time the shot was fired, the door to Foster's apartment was open. Because he turned to run into his apartment, Foster never saw defendant holding or firing a gun. Foster heard a loud bang and heard the bullet go by him. About a second went by between the time Foster turned to enter his apartment and the time Foster heard the bullet go by. Foster testified the bullet "couldn't have been *** far off " because he heard it go by. Foster stated the bullet did not pass near his head but maintained

he heard it as it went by.

¶ 9 The bullet lodged in the doorframe of the apartment next door to Foster's. People's exhibit No. 6, a photograph of Foster's neighbor's door, showed the bullet nicked one side of the doorframe and lodged in the opposite side of the frame, just below the doorknob. People's exhibit No. 10 showed where defendant was standing when he allegedly fired the bullet. Though no official measurements were taken, Foster estimated the bullet entered the doorframe approximately 3.5 feet above the ground. Foster testified the bullet hole in the neighboring apartment's door was not present prior to January 31, 2010.

¶ 10 Once inside his apartment, Foster locked the door and called the police. At one point, a neighbor came by to check on Foster, but Foster refused to open the door. Foster only opened the door after police officers arrived.

¶ 11 Foster told officers he knew defendant by the name "G-Money" and knew he drove a white Ford Explorer. Foster also told police defendant had complained about Foster harassing defendant's cousin, Val, but he could not remember Val's last name or where she lived. Four days later, Foster went to the police department and picked defendant out of a photo lineup.

¶ 12 Sharon Bennett is Foster's girlfriend, and she shared an apartment with him in January 2010. On the day in question, Bennett was in the bedroom of the apartment she shared with Foster packing their things for an upcoming move, when she heard a loud bang outside. Foster and Ray were watching a game in the living room. While Bennett was in the bedroom, she heard Foster yell something. Bennett testified she came out of the bedroom and told Foster to call the police, which he did. While talking to Foster, Bennett noticed he seemed nervous and

refused to open the door until police arrived.

¶ 13 Danny Ray testified Foster picked him up between 11 a.m. and noon on January 31, 2010, and they returned to Foster's apartment to watch a basketball game. Sometimes when Foster would pick Ray up, Foster would honk his horn or throw rocks at Ray's window, rather than get out of the car and ring the doorbell. On the morning of January 31, 2010, Foster honked his horn to let Ray know he was there to pick him up. When Foster and Ray arrived at Foster's apartment, Bennett was in the bedroom packing. Ray testified he and Foster stayed in the living room and began watching a basketball game.

¶ 14 While Ray and Foster were watching the game, someone knocked on the apartment door. Foster yelled for the person at the door to come in, and defendant entered the apartment. Ray previously met defendant on one occasion at Foster's apartment complex. Ray also testified defendant had been over at his apartment complex visiting Ray's neighbor Val, whom he knew to be defendant's cousin. Defendant asked Foster to step outside so they could talk. Ray stayed in the living room.

¶ 15 Ray heard loud talking coming from outside the apartment but did not go outside. Ray thought defendant and Foster were friends and was not concerned. Suddenly, Ray saw Foster hurry into the apartment and at the same time heard a "loud boom." Ray stated the boom sounded like a gun or a large firecracker. Foster then told Ray defendant shot at him. Foster immediately locked the door and called the police. About 15 seconds later, somebody knocked on Foster's door, but Foster refused to answer the door until the police arrived.

¶ 16 On cross-examination, Ray stated he could not identify defendant during a photo lineup conducted a few days after the shooting but maintained defendant was the person he saw

in Foster's apartment just before the shooting on January 31, 2010.

¶ 17 Robert Jones testified he lived in the same apartment complex as Foster and defendant. On January 31, 2010, Jones was outside his apartment when he heard a boom. Jones went downstairs and walked to Foster's apartment to check on him. Jones knocked on Foster's door, and Foster told Jones he was okay but refused to open the door. Jones then got in his car to go to the grocery store, but as he was leaving the parking lot, he saw a white Ford Explorer leaving the area at a "faster than normal" speed. Jones testified the license plate on the vehicle he saw started with A60 but he was unable to remember the rest of the license plate number when he spoke to the police. The license plate number on defendant's white Ford Explorer was later shown to be A608195.

¶ 18 On cross-examination, Jones stated he was unable to identify the driver of the white Ford Explorer he observed leaving the apartment complex on January 31, 2010.

¶ 19 Decatur police officer Jason Derbort testified he responded to a call for shots fired at Foster's apartment complex on January 31, 2010. When he arrived, Derbort met Foster, who Derbort stated appeared to be nervous. Initially, Foster told Derbort he knew defendant only by the name "G-Money," but Foster made a phone call and was able to give him defendant's full name. Derbort relayed a physical description of the suspect to dispatch.

¶ 20 Derbort inspected the area outside Foster's apartment. Derbort saw a gouge in one side of the doorframe of the apartment next to Foster's and a hole in the other side of the frame just below the doorknob. Derbort testified the damage was consistent with a bullet fired from a handgun. The State introduced photos Derbort took of the neighbor's door into evidence.

¶ 21 On cross-examination, Derbort testified Foster was vague regarding questions

pertaining to defendant's cousin, Val. Derbort stated he believed Foster was being evasive.

¶ 22 Decatur police detective Jason Kuchelmeister followed up the initial investigation into the January 31, 2010, shooting. When Kuchelmeister took over the investigation, defendant was actively being sought by the Decatur police department. Kuchelmeister met with Foster on February 3, 2010, and conducted a photo lineup. Foster identified defendant as the individual who attempted to shoot him outside his apartment on January 31, 2010. The State introduced the photo lineup into evidence as People's exhibit No. 1.

¶ 23 Kuchelmeister contacted defendant's cousin, Val, who told him defendant was in a relationship with a woman named Karroll. Kuchelmeister determined Karroll was Karroll Jelks. On February 6, 2010, Kuchelmeister and another officer went to Jelks' residence while searching for defendant. He met with Jelks, who initially told him defendant was not in the residence. Eventually, Jelks allowed Kuchelmeister to enter her home, and he quickly located defendant inside. While he was inside Jelks' residence, another officer informed Kuchelmeister defendant's white Ford Explorer was parked in the backyard. A six-foot-high privacy fence made it impossible to see the vehicle from the street. The Ford Explorer was parked on snow but no tire tracks were visible, indicating it had been parked there prior to the snow falling.

¶ 24 On February 11, 2010, Kuchelmeister went to Foster's apartment complex and recovered a bullet from Foster's neighbor's doorframe. Kuchelmeister testified the positioning of the bullet could be consistent with an individual shooting at someone standing in the doorway of Foster's apartment, depending on where the shooter was standing when the shot was fired. The State introduced photographs of the doorframe and the bullet Kuchelmeister recovered into evidence as People's exhibit Nos. 7, 8, and 9.

¶ 25 On cross-examination, Kuchelmeister stated he was not sure exactly how long the bullet recovered from the doorframe had been there, but the damage to the frame appeared to be new. Kuchelmeister did not take any measurements to determine how high off the ground the bullet was when it entered the doorframe.

¶ 26 Karroll Jelks testified for the defense. Jelks stated defendant was at her house around noon on January 31, 2010. Defendant arrived between 9 and 11 a.m. Sometime around noon, Jelks left the residence to take her daughter somewhere, and defendant stayed at the house. Defendant was still at the house when Jelks returned. Jelks stated defendant sometimes drove the white Ford Explorer, but he owned his own car. Jelks further testified the white Ford Explorer was parked in the backyard because it needed repairs.

¶ 27 On cross-examination, Jelks stated Foster's apartment complex was less than five minutes from her house.

¶ 28 Following closing arguments, the trial court issued jury instructions. The court issued the following instruction regarding attempted murder:

"A person commits the offense of Attempt (First Degree Murder) when he, with the intent to commit the offense of First Degree Murder, does any act which constitutes a substantial step toward the commission of the offense of First Degree Murder.

The offense attempted need not have been committed."

The jury found defendant guilty on all three counts. The jury also found defendant personally discharged a weapon while committing the attempted murder. In June 2010, defendant filed a motion for a new trial, arguing the State failed to introduce sufficient evidence to prove him

guilty of the charges beyond a reasonable doubt. In July 2010, the court denied defendant's motion for a new trial. The court sentenced defendant to a 31-year prison sentence for attempted murder and a concurrent 5-year prison sentence for unlawful possession of a weapon by a felon. The court dismissed defendant's aggravated-discharge-of-a-firearm conviction under the one-act, one-crime rule.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, defendant argues (1) the State failed to prove him guilty of attempted murder beyond a reasonable doubt, and (2) he is due one additional day of credit for time served prior to trial. The State concedes defendant is due one day of credit.

¶ 32 A. Attempted Murder

¶ 33 Defendant argues the State failed to introduce sufficient evidence to prove him guilty of attempted murder beyond a reasonable doubt. Defendant argues no rational trier of fact could have found he intended to kill Foster beyond a reasonable doubt.

¶ 34 When presented with a challenge to the sufficiency of the evidence, the question on review 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. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). The reviewing court's role is not to retry the defendant. *Id.* "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 276 (1985). The burden is on the State to prove all elements of a crime beyond a reasonable doubt, and defendant

is not required to offer any evidence at all. *People v. Phillips*, 127 Ill. 2d 499, 527, 538 N.E.2d 500, 511 (1989).

¶ 35 "To prove defendant guilty of attempted murder, the prosecution must prove that defendant intended to kill and he took a substantial step toward killing his intended victim." *People v. Smith*, 402 Ill. App. 3d 538, 547, 931 N.E.2d 864, 872 (2010). Because intent is a state of mind, it cannot always be shown by direct evidence, but it can be inferred from the surrounding circumstances. *Id.* " 'Since every sane man is presumed to intend all the natural and probable consequences flowing from his own deliberate act, it follows that if one willfully does an act, the direct and natural tendency of which is to destroy another's life, the natural and irresistible conclusion in the absence of qualifying facts, is that the destruction of such person's life was intended.' " *Smith*, 402 Ill. App 3d at 547, 931 N.E.2d at 872-73 (quoting *People v. Koshiol*, 45 Ill. 2d 573, 578, 262 N.E.2d 446, 449 (1970), *overruled on other grounds by People v. Nunn*, 55 Ill. 2d 344, 304 N.E.2d 81 (1973)). However, "intent to inflict great bodily harm is not sufficient to support a conviction for attempt (murder)." *People v. Parker*, 311 Ill. App. 3d 80, 89, 724 N.E.2d 203, 210 (1999).

¶ 36 The State introduced evidence defendant attempted to shoot Foster following a dispute over Foster's behavior toward defendant's cousin. Defendant was in close proximity to Foster when he turned and fired at him. Though Foster was not injured in the shooting, he testified he heard the bullet go past him as he ran into his apartment. The bullet lodged in the neighbor's door frame approximately 3.5 feet off the ground. Photographs introduced by the State indicate the bullet was traveling at a downward trajectory, meaning it was at a higher point when it passed by Foster. The natural tendency of firing a weapon at another person is to

destroy the person's life, absent qualifying evidence. None of the evidence introduced during defendant's trial suggested defendant was attempting to scare defendant or missed intentionally. We will not set aside defendant's conviction where a reasonable trier of fact could have concluded defendant fired his weapon at Foster with the intent to kill him.

¶ 37 Defendant argues his case is analogous to two cases in which this court reversed the defendants' attempted murder convictions. See *People v. Wagner*, 189 Ill. App. 3d 1041, 1046, 546 N.E.2d 283, 286 (1989), *overruled on other grounds by People v. Mitchell*, 241 Ill. App. 3d 1094, 610 N.E.2d 794 (1993); see also *People v. Trinkle*, 40 Ill. App. 3d 730, 734-35, 353 N.E.2d 18, 22 (1976). This court's findings in both *Wagner* and *Trinkle* are distinguishable. This court's ruling in *Wagner*, 189 Ill. App. 3d at 1045-46, 546 N.E.2d at 286, was based on the trial court's erroneous reliance on the defendant's intent to commit great bodily harm to support his attempted murder conviction. In fact, the trial court in *Wagner*, 189 Ill. App. 3d at 1046, 546 N.E.2d at 286, expressly stated it could not find the defendant intended to commit murder. Similarly, this court in *Trinkle*, 40 Ill. App. 3d at 734, 353 N.E.2d at 21-22, vacated the defendant's attempted murder conviction because the State's indictment erroneously replaced intent to kill with knowledge of the likelihood of death or great bodily harm. The court in *Trinkle*, 40 Ill. App. 3d at 734, 353 N.E.2d at 22, also based its ruling on the fact defendant fired his weapon at a building without knowledge of who was inside. In the present case, the jury was not confused over the required mental state for attempted murder, the trial court properly instructed the jury on the elements of attempted murder, and the defendant intentionally fired a handgun at Foster. The cases defendant cites are not analogous to the present case.

¶ 38 B. Defendant's Credit for Time Served

¶ 39 Defendant argues, and the State concedes, he is entitled to credit for an additional day served prior to his sentencing. Under section 5-4.5-100(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2010)), defendant is entitled to credit "for time spent in custody as a result of the offense for which the sentence was imposed." The record shows defendant was arrested by Kuchelmeister on February 6, 2010, and remained in custody until his sentencing on July 12, 2010. Defendant's presentence report gives him credit for time served from February 7, 2010, through July 11, 2010. Defendant is entitled to credit for the time he spent in custody on February 6, 2010. See *People v. Hutchcraft*, 215 Ill. App. 3d 533, 534, 574 N.E.2d 1337, 1337 (1991) ("[I]f a defendant is held in custody for any part of a day, he is entitled to credit against his sentence for that day."). We accord defendant credit for one extra day spent in custody and remand with directions to amend defendant's sentencing judgment to reflect credit for time he spent in custody on February 6, 2010.

¶ 40 III. CONCLUSION

¶ 41 We affirm the trial court's judgment as modified and remand with directions to amend defendant's sentencing judgment to reflect credit for time he spent in custody on February 6, 2010. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed as modified and remanded with directions.