

THIRD DIVISION
April 24, 2013

No. 1-11-0593

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).

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. 10 CR 235
)	
MATTHIAS SCOTT,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Neville and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Where victim of shooting sustained graze-type wounds instead of penetrating bullet wounds, evidence was nevertheless sufficient to sustain conviction for aggravated battery with a firearm, and defendant's sentence was in lower end of statutory range; defendant's conviction and sentence were affirmed.

¶ 2 Following a jury trial, defendant Matthias Scott was convicted of aggravated battery with a firearm and was sentenced to 14 years in prison. On appeal, defendant contends his conviction should be reduced to reckless discharge of a firearm, on which the jury was instructed, because the evidence did not establish that the victim was injured by a firearm. Defendant also argues his

sentence is excessive because the victim sustained only minor injuries. In addition, defendant contends the trial court erred in imposing a DNA fee and also incorrectly credited him for the amount of time he spent in custody. We affirm defendant's conviction and sentence but order correction of the mittimus.

¶ 3 Defendant was charged with three counts of attempted murder, one count of aggravated battery with a firearm, two counts of unlawful use of a weapon (UUW) by a felon, and two counts of aggravated UUW. At trial, Francois Wolfe testified that he worked as an enclosure technician for a private company in Cook County that enclosed and secured vacant and abandoned properties or structures damaged by fire, collapse or other emergencies. Defendant worked for a rival "board-up" company.

¶ 4 At about 9 p.m. on December 7, 2009, Wolfe and his business partner, William Bauer, arrived at a house fire at 6421 South Richmond in Chicago. Wolfe dropped off Bauer at the property and parked his vehicle. As Wolfe approached the building, Bauer was speaking to the building's owner, and the owner was about to sign a contract with Wolfe's company.

¶ 5 Wolfe testified that he saw defendant, whom Wolfe had known for about three years, and defendant's partners, whose last names Wolfe said were Fox and Carvelli, at the site. Defendant approached Bauer and the building owner and knocked the paperwork out of the owner's hand. Wolfe approached defendant asking why he had done that, and Wolfe put his arm around defendant in an attempt to talk to him. Defendant "elbowed" Wolfe and punched him, and the two men began fighting.

¶ 6 After an official at the fire scene broke up their fight, defendant walked toward his car. Wolfe testified Carvelli approached the vehicle and removed a gun from under the hood. Carvelli stood with the gun concealed behind his leg.

¶ 7 Defendant took the gun from Carvelli's hand and shot at Wolfe from "at least three feet away, like point blank range, real close." Wolfe said he "immediately ran" when he saw defendant pointing the gun at him. As Wolfe ran, he heard four or five gunshots and "felt pressure" in his right leg. Wolfe said he "stumbled and rolled and got back up and proceeded to run some more." As Wolfe looked back, he saw defendant firing the gun at him. Wolfe said he felt a sensation in his right upper thigh below his buttock that was "very painful, like a punch, like a thud." Wolfe also felt pain in his left shoulder near his neck.

¶ 8 Wolfe's partner took him to a hospital, where Wolfe spent the night. Wolfe testified his leg injury "felt like a gun wound. It felt like excruciating pain. I was in pain." He said he had a "big swollen welt" on his thigh about the size of a baseball. Wolfe also had a deep welt on his shoulder that he described as a "long, burning scratch." Wolfe testified that during the incident, he wore two jackets and at the hospital, he noticed holes in the back of his jacket in the same spot where he felt the pain in his left shoulder. Photos of both of Wolfe's jackets were entered into evidence. Wolfe testified his leg injury prevented him from working for two months, though he testified his pants did not have a hole in them and his leg was not bleeding.

¶ 9 On cross-examination, Wolfe said he and defendant were at a different "board-up" site the previous day, where defendant was awarded the job. Wolfe testified his leg was not bleeding and there was no hole in his pants. He acknowledged that the photographs of his jacket showed only one hole in each jacket.

¶ 10 Chicago police officer Jose Lule testified he responded to the scene of the fire and was present when defendant and Wolfe were pushing each other. Lule told them to leave the fire scene, and he later saw them across the street and heard them arguing. Lule heard two gunshots and saw defendant holding a gun and Wolfe standing 10 or 15 feet away. Lule heard and saw defendant fire "two additional shots" toward Wolfe and Bauer, who were running away.

¶ 11 Officer Lule chased defendant on foot and saw him running with a handgun in his hands. Defendant tossed the gun in front of a home on Francisco. Lule apprehended defendant as defendant tried to climb a fence. Lule observed holes in Wolfe's jacket after the shooting. A police evidence technician recovered a revolver from under the steps of a porch at a house at 6407 South Francisco; the gun contained four spent rounds and two live rounds. Lule identified that gun as the weapon that defendant discarded during the chase. Both of defendant's hands tested positive for gunshot residue.

¶ 12 In the defense case, Chicago police detective James Anderson testified he interviewed Wolfe at the hospital and observed a welt, which he described as a "little pink mark" on Wolfe's left shoulder. Wolfe came to the police station two days later wearing his work jacket, and photos were taken of the hole in the jacket, which Anderson testified "corresponds to the welt" on Wolfe's shoulder. The jacket was not tested for gunshot residue.

¶ 13 Defendant testified he worked for a company called Community Board-Up Service and would usually speak with the property owner and secure a contract for the work. On the night in question, defendant saw Wolfe and said Wolfe was upset that defendant's company was awarded the work on that structure. Defendant testified Wolfe "swiped" him in the face but he did not strike Wolfe in response.

¶ 14 Defendant testified he then walked toward his van and Wolfe followed and taunted him. Defendant made a call on his cell phone and then heard Wolfe arguing with defendant's co-workers. Defendant retrieved his gun from his vehicle and shot it into the air "three to four times," and Wolfe "took off running." Defendant denied pointing the gun at Wolfe, stating he was only "trying to scare" him. After firing the shots, defendant ran away because he was "scared" and "didn't want to go to jail." On cross-examination, defendant said he threw down the gun when police stopped him.

¶ 15 At the close of testimony, the defense requested a jury instruction on reckless conduct as a lesser included offense of aggravated discharge of a firearm but agreed to a reckless discharge of a firearm instruction. Defendant was convicted of aggravated battery with a firearm.

¶ 16 Defendant's first assertion on appeal is that the State failed to prove beyond a reasonable doubt that he committed aggravated battery with a firearm because no evidence was presented that Wolfe sustained an injury from a gunshot wound. Defendant contends his aggravated battery conviction should be reversed or reduced to reckless discharge of a firearm.

¶ 17 To convict defendant of aggravated battery with a firearm, the State was required to prove that he caused any injury resulting from the knowing or intentional discharge of a firearm. 720 ILCS 5/12-4.2(a)(1) (West 2008). Defendant argues the State failed to prove Wolfe's injuries were caused by a firearm and he further contends they could not have been caused by being shot.

¶ 18 Specifically, defendant contends no evidence was offered that the welts on Wolfe's shoulder and leg resulted from being shot and that no blood seeped from either of those injuries. As to the holes in Wolfe's jacket, defendant argues that Wolfe did not produce his jacket to authorities until two days after he was shot, and the holes in the jacket did not align with the mark on his shoulder. Regarding Wolfe's leg injury, defendant argues Wolfe was merely "angry after he tore his hamstring running away."

¶ 19 In reviewing the sufficiency of the evidence in a criminal case, the inquiry of this court is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Martin*, 2011 IL 109102, ¶ 15; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This court views the evidence in the light most favorable to the State and allows all reasonable inferences from that evidence to be drawn in favor of the prosecution. *People v. Martin*, 2011 IL 109102, ¶ 15. This court may not substitute its judgment for that of the jury, as the trier of fact, as to the weight of the evidence or the credibility of the witnesses or set aside a

criminal conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009).

¶ 20 Here, contrary to defendant's testimony that he fired shots into the air, Wolfe testified defendant pointed the gun at him and fired. Officer Lule testified he saw defendant fire two shots toward Wolfe as Wolfe ran away. Although defendant asserts that Wolfe failed to display signs of being struck by gunfire, this court has observed that bullet wounds can leave grazing or scraping marks, as opposed to entrance and exit wounds. See *People v. Walker*, 392 Ill. App. 3d 277, 282-83 (2009); *People v. Witherspoon*, 379 Ill. App. 3d 298, 309-310 (2008) (in noting "severe bodily injury" for purposes of consecutive sentencing, court set out numerous examples of gunshot wounds resulting in grazes to victim's skin and nicks or cuts); *People v. Jones*, 323 Ill. App. 3d 451, 461 (2001) (victim sustained "grazed-type" gunshot wound on cheek but needed no medical attention). Therefore, Wolfe's injuries were consistent with contact with bullets.

¶ 21 Defendant challenges the overall credibility of Wolfe's account and also that of Officer Lule, asserting that their testimonies were flawed and inconsistent on points such as where defendant concealed his weapon and the series of events in the parties' initial fight. Defendant contends the accounts of the State witnesses "just [do] not make sense." However, it is the role of the jury, as the trier of fact, to hear the testimony of witnesses and adjudge their credibility, resolve any inconsistencies and determine the weight to be given their testimony and draw reasonable inferences from all the evidence presented. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); *People v. Sweigart*, 2013 IL App (2d) 110885, ¶ 18. The jury's finding in this case is not so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt.

¶ 22 Defendant's second contention on appeal is that his 14-year sentence for aggravated battery with a firearm should be reduced. He asserts his sentence of eight years over the

minimum term for that offense is excessive because Wolfe sustained only minor injuries, and he further argues the sentence should be reduced because he will be required to serve 85 % of that term.

¶ 23 Aggravated battery with a firearm is a Class X felony punishable by a sentence of between 6 and 30 years in prison. 720 ILCS 5/12-4.2(a)(1), (b) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008). Defendant's sentence of 14 years therefore not only fell within the applicable range but sits in the lower half of that spectrum.

¶ 24 A trial court has broad discretion in determining the appropriate sentence for a particular defendant, and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation, including the defendant's criminal history, character, education and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010).

¶ 25 At sentencing, the court heard evidence of defendant's seven prior felony convictions and also was presented with mitigating evidence of defendant's background and family history. The existence of mitigating factors does not mandate the imposition of the minimum sentence nor preclude imposition of the maximum sentence (*People v. Flores*, 404 Ill. App. 3d 155, 158 (2010)), and the sentencing court is not required to give more weight to a defendant's chance of rehabilitation than to the nature of the crime. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). Although defendant contrasts his 14-year sentence to the terms he received for previous offenses, arguing that none of those crimes resulted in a sentence of more than 4 years, that analysis is faulty, as the sentencing range for each offense is different. Moreover, the existence of prior felony convictions on defendant's record supports a greater sentence in the instant case than in his

earlier criminal cases. For all of those reasons, defendant's sentence will not be disturbed on appeal.

¶ 26 Defendant's remaining contentions are that the trial court erred in imposing a \$200 DNA fee and also in awarding him \$30 in credit for time spent in custody as opposed to \$35. He asserts this court should reduce his fines and fees from \$690 to \$485.

¶ 27 The State agrees with defendant on both points. First, our supreme court has held in *People v. Marshall*, 242 Ill. 2d 285 (2011), that an offender's DNA can be taken, and payment of the DNA analysis fee should be paid, only where that defendant is not currently registered in the DNA database. Because the DNA analysis and fee requirement has been in effect since 1998, and defendant has been convicted of multiple felonies since that date and prior to the instant offense, we presume that the circuit court imposed this requirement as part of defendant's sentence following at least one of those prior convictions. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38.

¶ 28 Secondly, defendant asserts he is entitled to a \$5-per-day credit against any fines imposed against him for each day he served in custody prior to sentencing. See 725 ILCS 5/110-14 (West 2008). Among the fines and fees assessed against defendant were the \$30 Children's Advocacy Center fine and the \$5 Drug Court fine. Defendant should therefore have received \$35 in credit against his other costs, as the State concedes. We therefore order the fines and fees order corrected to reflect \$35 in credit toward defendant's presentence custody. See *People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008) (this court may correct a mittimus without remand by ordering the clerk of the circuit court to make the required change).

¶ 29 Accordingly, we affirm defendant's conviction and sentence. We vacate the \$200 DNA analysis fee and direct the circuit court to modify the mittimus as described above.

¶ 30 Affirmed as modified.

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