

No. 1-11-2382

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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. 10 CR 10326
)	
DANTWON DAVIS,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment concurred in the judgment.

ORDER

1. *Held:* Defendant's conviction of aggravated battery with a firearm affirmed over claims of insufficient evidence and ineffective assistance of trial counsel.
2. Following a bench trial, defendant, Dantwon Davis, was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)) and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), then sentenced to concurrent, respective terms of 7 and 10 years' imprisonment. On appeal, defendant challenges the sufficiency of the evidence to sustain his

aggravated battery with a firearm conviction, and also claims that his counsel provided ineffective assistance.

3. The evidence at trial established that in the early morning hours of May 15, 2010, defendant received a phone call from Donetta Harris, the mother of his child, who asked him to pick her up from a party. Defendant drove to the party and brought a gun that he carried in his waistband. When defendant arrived, Harris was standing outside with the victim, Marlo Carter. Carter and defendant were aware that Harris was romantically involved with both men at the time. After defendant and Harris got into an argument, Carter punched defendant, and the two men began to fight. During the fight, defendant took out his gun and the two men struggled for its possession. The gun discharged twice, and the second shot hit Carter.

4. Harris testified that her argument with defendant began after he asked her why she had called him for a ride if she was at the party with Carter. She told defendant that she was not going to leave, and that defendant was "tripping." Although she wanted to leave with defendant, she was being "difficult" because he "had an attitude."

5. Defendant grabbed Harris's arm, but then began to walk away from the group. Harris then heard Carter say that he had "been wanting to do it[.]" and saw the two men begin to fight. During the fight, she heard defendant tell Carter to get off of him and saw him try to walk away. Harris further testified that she attempted to break up the fight, but backed away after she was hit during the scuffle. She then heard two gunshots, and after the second gunshot, Carter fell to the ground. Defendant stood there for a minute "look[ing] like he really didn't try to do it." Someone came out of the residence and told defendant to run, and he did. Harris admitted that prior to her testimony at trial, she had not told anyone that defendant had tried to walk away from the fight, or that defendant had looked like he "didn't try to do it."

6. Carter testified that as Harris and defendant argued, he saw defendant grab her arm and shove her into a gate. Carter then approached defendant and hit him in the face with a closed fist. Carter testified that he only punched defendant once, then saw a gun come out of defendant's sleeve, and the two men began "tussling[.]" Carter was pulling on the gun in an attempt to get it away from defendant, but his finger was not near the trigger. As the two men fought over the gun, they lifted it up in the air and it discharged once. Carter then felt the gun touch the side of his hip before hearing it discharge a second time. The second gunshot hit Carter on the left side of his stomach, and he fell to the ground. While lying there, he saw defendant standing over him with the gun in his hand before running away. Carter was taken to the hospital where he had surgery to repair damage to an artery from the bullet.

7. Defendant testified that after arguing with Harris, he began to walk away. He then heard Carter say he "didn't want to do this," and felt Carter punch him from behind on the right side of his face. Carter grabbed defendant by the back of his jacket, trying to control his movements and to keep him facing away from him. Carter punched him multiple times as defendant tried to gain position to fight back.

8. Defendant testified that after trading several punches, he and Carter briefly separated and defendant tried to walk back to his car. He noticed that his nose was bleeding and that his eye was hurting. Carter then reinitiated the fight, and after they "locked back up, tussling again[.]" defendant reached for his gun to get Carter off of him. Defendant stated that before the second gunshot, Carter "snatched the nose" of the gun, and the force of both men pulling on the gun caused it to discharge again. He testified that he did not intend to shoot Carter, and that it was an accident. He left the scene after someone told him to run. The defense entered into evidence a photograph of defendant taken after his arrest, identifying injuries around his eye, cheek and nose.

9. On cross-examination, the State questioned defendant regarding a written statement he gave to police after he was arrested, in which he stated that he "pulled the trigger [the second] time to try and get [Carter] away from him." Defendant explained during his testimony that he had reached for his gun to get Carter off of him, but the officers continued to question him about whose finger was actually on the trigger. He told police that the tussling for control of the gun made it go off, but admitted that it was his finger on the trigger.

10. Kamara Crosby testified for the State that she was a classmate of defendant and that he had called her after the incident. Defendant told her that he went to pick up his child's mother after a party, got into a fight, "lost it[,] and shot the person with whom he fought. He also told her that he did not go to the party intending to shoot anyone, and that it was not intentional. Crosby explained that she understood "lost it" to mean that defendant lost control of the situation and that he did not intend to shoot Carter.

11. At the close of evidence and argument, the trial court found defendant guilty of aggravated battery with a firearm and unlawful use of a weapon by a felon. In doing so, the court stated:

"I acknowledge that Mr. Carter did throw the first punch. He started the physical confrontation. But it was a punch. It was a punch that did not cause particular harm. It was a punch. And [defendant's] response was to pull out the gun that he had. You can't bring a gun to a fistfight. This was a wholly overreaction, unjustified by law. You can't use deadly force unless you're faced with deadly force.

The fact that Mr. Carter threw the first punch is a mitigating factor, but it's not an exonerating factor. This is an excessive use of force and it was the fact that he brought a gun, it was tussling, the

gun went off once. Not until Mr. Carter was actually shot with the gun did the shooting stop, and then he ran away with the gun. And he was a convicted felon to boot. He's not supposed to have a gun under any circumstances."

12. In this appeal from that judgment, defendant first challenges the sufficiency of the evidence to sustain his conviction of aggravated battery with a firearm. He contends that the facts do not support the finding that he acted with the requisite intent or knowledge.

13. 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). In doing so, we view the evidence in the light most favorable to the prosecution and allow all reasonable inferences from that evidence to be drawn in its favor. *Martin*, 2011 IL 109102, ¶ 15. This court may not substitute its judgment for that of the trier of fact as to the weight of the evidence or the credibility of the witnesses, and will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009).

14. To prove defendant guilty of aggravated battery with a firearm in this case, the State was required to prove that he knowingly or intentionally, by means of discharging a firearm, caused any injury to another person. 720 ILCS 5/12-4.2(a) (West 2010). Viewing the evidence in the light most favorable to the prosecution, the record shows that defendant brought a gun to the residence where he was picking up Harris, got into a fist fight there with Carter, and pulled out the gun as they were fighting. The gun discharged twice, and the second shot hit Carter, injuring him. In a statement to police, defendant admitted that he pulled the trigger the second time to "get [Carter] away from

him[.]" This evidence was sufficient to allow a rational trier of fact to find the essential elements of aggravated battery with a firearm proved beyond a reasonable doubt.

15. Defendant disagrees, relying on *People v. Hamilton*, 48 Ill. App. 3d 456 (1977) to support his contention that his struggle with Carter over control of the gun, which led to the gun's discharge, does not support a finding of intent or knowledge. In *Hamilton*, defendant contended that the victim attacked him and began to beat him about the head. In the process of this attack, a loaded gun was knocked to the floor. Defendant grabbed it, a struggle ensued, and the victim was shot. Defendant reported the incident to the police, cooperated with them in their investigation of the incident, and at all times maintained that the weapon accidentally discharged during a struggle over its possession. On appeal, the court reversed defendant's conviction for voluntary manslaughter, finding that the State had failed to prove that defendant had acted with the requisite intent, and that the evidence presented was consistent with defendant's theory that the shooting was accidental. *Hamilton*, 48 Ill. App. 3d at 458.

16. In this case, by contrast, defendant brought the gun with him to the party where he was picking up Harris, and pulled it out of his waistband during the fight with Carter. In his written statement to police, defendant admitted that he pulled the trigger "to try and get [Carter] away from him[.]" then maintained at trial that the gun had discharged accidentally. In addition, defendant in *Hamilton* reported the incident to police and cooperated in the investigation at all times, while defendant here did not report the incident, but fled the scene. Although the court could have inferred, as defendant contends, that after the shooting he was in shock and merely followed the command of someone telling him to run, the trial court could have equally inferred that defendant's actions demonstrated his consciousness of guilt. *People v. Hart*, 214 Ill. 2d 490, 519 (2005). We thus find *Hamilton* factually distinguishable from the case at bar, and defendant's reliance on it

misplaced.

17. In his reply brief, defendant cites his testimony, and that of Harris and Crosby in support of his claim that this was an accidental discharge. Harris testified that defendant looked like he did not mean to shoot Carter; however, she also testified that she had never told anyone that before testifying at trial. Crosby testified that defendant had told her that he had gotten into a fight, "lost it[,] and shot someone. Although she interpreted "lost it" to mean that he had acted unintentionally and merely lost control of the situation, the trial court was entitled to draw its own inferences as to what defendant meant when he used that phrase, after weighing the evidence and determining the credibility of witnesses. *Siguenza-Brito*, 235 Ill. 2d at 224-25. Moreover, a trial court is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *Siguenza-Brito*, 235 Ill. 2d at 229. Here, we find sufficient evidence to support the trial court's determination that defendant was guilty of aggravated battery with a firearm beyond a reasonable doubt, and no basis for reversal.

18. Defendant next contends that his attorney provided ineffective assistance by failing to argue in the alternative that he acted in self-defense, and that had he done so, there is a reasonable probability that he would have been acquitted. He also claims that he was prejudiced by his counsel's failure to correct the trial court's "erroneous" statement that "[y]ou can't use deadly force unless you're faced with deadly force." The State responds that defense counsel's decision to argue that the discharge of the gun was not intentional, but accidental, was a matter of trial strategy based on defendant's testimony, and that defendant suffered no prejudice based on his counsel's failure to argue self-defense because the trial court actually considered and rejected that theory when making its ruling. The State further argues that the trial court's comments, while not fully defining "deadly force," indicate that the trial court appropriately understood the defense and determined that

defendant's conduct could not be justified under it.

19. Ineffective-assistance-of-counsel claims are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that defendant's trial counsel provided ineffective assistance, he must show that his counsel's performance was so deficient that his representation fell below an objective standard of reasonableness, and that absent this deficient performance, there was a reasonable probability that the outcome of the proceeding would have been different. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). "A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim." *Palmer*, 162 Ill. 2d at 475.

20. In order to establish the first prong, a defendant must show that counsel's performance was so inadequate that counsel was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011). In doing so, the defendant must overcome a strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *Manning*, 241 Ill. 2d at 327. Counsel's choice does not constitute ineffective assistance simply because it was unsuccessful. *People v. Franklin*, 135 Ill. 2d 78, 119 (1990).

21. Here, we find that defense counsel's decision to argue accidental discharge, rather than self-defense, was a matter of sound trial strategy. *People v. Milton*, 354 Ill. App. 3d 283, 290 (2004). Defendant maintained at trial that he had not intended to shoot Carter, and that the gun had gone off accidentally during the struggle for its possession. Under these circumstances, we conclude that counsel's decision to argue accidental discharge, rather than self-defense, was objectively reasonable, and did not render counsel's representation ineffective.

22. Defendant next asserts that counsel's failure to correct the trial court's misstatement on the law of self-defense constitutes ineffective assistance of counsel. His claim stems from the trial

court's *sua sponte* consideration and rejection of the theory of self-defense. In announcing its decision, the court noted that "[y]ou can't use deadly force unless you're faced with deadly force." Defendant argues that this is a misstatement of the law of self-defense, because a person may defend himself with deadly force not only when he reasonably believes such force is necessary to prevent imminent death, but also when he believes it is necessary to prevent imminent great bodily harm. He maintains that, had the court been properly advised, there is a reasonable possibility that the court would have acquitted him, believing that the facts established that he was defending himself against great bodily harm.

23. We note, however, that deadly force is defined as "the use of force which is intended or likely to cause death *or great bodily harm*[".]" 720 ILCS 5/7-1 (Emphasis added). Thus, it is not defined so narrowly as to only include force that may cause death. We therefore find that counsel's representation did not fall below an objective standard of reasonableness by failing to correct the statement, because the trial court stated the law correctly, albeit in an abbreviated fashion.

24. We also conclude that defendant suffered no prejudice from his counsel's failure to pose self-defense as an alternative theory or by failing to correct the trial court's statement. To establish that the use of deadly force was justified by self-defense, defendant was required to show that he reasonably believed such force was necessary to prevent death or great bodily harm. 720 ILCS 5/7-1. In its findings, the trial court acknowledged that Carter had started the fight, but characterized Carter's punch as "not caus[ing] particular harm[".]" and found that defendant exercised an "excessive use of force" in response. Thus, it is clear that even if defense counsel had raised self-defense as an alternative theory, or if counsel had provided a complete definition of the theory to the trial court, the trial court did not believe that defendant was justified in using deadly force and the outcome would have been the same. Accordingly, we hold that defendant has not shown that he was

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prejudiced by counsel's omissions, and we affirm the judgment of the circuit court of Cook County.

25. Affirmed.