

No. 1-11-2578

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 20921
)	
DIEGO ROQUE,)	Honorable
)	Noreen V. Love,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was proven guilty beyond a reasonable doubt of attempted first degree murder where he pointed a handgun in the direction of a group of young men including a rival gang member and fired four or five shots. The trial court properly rejected defendant's argument that he merely wished to scare the members of the group at whom he fired. Finally, a 25-year firearm enhancement to defendant's sentence was proper because the State proved that defendant inflicted great bodily harm.

¶ 2 Following a bench trial, defendant Diego Roque was found guilty of attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, aggravated battery, and aggravated unlawful use of a weapon. On appeal, defendant contends that the State

failed to prove him guilty of attempted first degree murder beyond a reasonable doubt because there was insufficient evidence of intent to kill. Defendant also contends that the 25-year firearm enhancement was improper because there was insufficient evidence of great bodily harm. We affirm.

¶ 3 At trial, Nicole Rodriguez testified that defendant was a "friend of a friend" and that she had known him for about three years. In 2010, she was dating Victor Arzate, and he was friends with defendant. Both men were members of the Maniac Latin Disciples street gang. On October 24, 2010, she was riding in her mother's gray Dodge Durango; Arzate was driving and defendant was in the back seat. They stopped near defendant's house at 55th Street and 22nd Place. Defendant got out of the Durango, but instead of walking toward his house, he walked behind the vehicle and toward a group of young men walking toward a nearby fast food restaurant. Defendant pulled a handgun out of his "hoodie" and began shooting at the men. The men ran in the opposite direction. After firing four shots, defendant got back into the Durango. Arzate asked defendant if "he got anybody," and defendant replied that he did not know. Arzate then drove away.

¶ 4 Fernando Zavala testified that on October 24, 2010, he was walking to a fast food restaurant with three friends. Zavala was not in a gang, but one of this friends, Hector Riviera, was a Satan Disciple. As they were walking, a gray Durango caught his attention. He did not recognize the vehicle, turned away, and continued walking. As he was walking, he heard a voice from behind him attempt to draw his attention. Zavala turned around and saw a man in a black hoodie pointing a silver handgun at him. He could not see the man's face because the hood was covering his head. Zavala heard gunshots and began to run.

¶ 5 Zavala met up with two of his friends near the restaurant. Zavala told them that he felt something on his leg, saw blood, and realized that he had been shot in the right thigh. Zavala's

friends obtained a car, helped him into it, and drove him to a hospital, stopping on the way to pick up Zavala's mother. At the hospital, "They really didn't do much. They just cleaned the wound and took x-rays and they just wrapped it up with [B]and-[A]ids." Zavala was released from the hospital a couple hours later and did not spend the night there.

¶ 6 Zavala's friends, Hector Rivera, Eduardo Quezada, and Raphael Arteaga, each testified and gave accounts of the shooting consistent with Zavala's.

¶ 7 Melissa Samp, an assistant State's Attorney, testified that on October 28, 2010, she took a statement from defendant, who was in the custody of the Cicero Police Department. In the statement, defendant stated that he was a Maniac Latin Disciple but lived on one of the main blocks for the Satan Disciples "shorties," an area where Satan Disciples gang members "hang out." As a result Satan Disciples had shot at defendant, attempted to burn down his house, and burned his mother's van. Defendant identified Hector Rivera as one of the Satan Disciples responsible for the harassment. Defendant admitted obtaining a handgun and firing at the group including Rivera. Defendant stated that he thought Rivera reached for "something" in Rivera's hoodie. Defendant stated that he fired one shot at the group and then fired four more shots at the street.

¶ 8 On cross-examination, Samp admitted it was possible that not everything defendant said was included in the statement. When asked if it was possible that defendant said that he fired at the group with the intent to scare them, Samp replied, "I don't remember that specifically, but that could be something he said."

¶ 9 The State rested, and the defense rested without presenting testimony from defendant. In closing arguments, defense counsel argued that defendant acted in self-defense and was merely trying to scare the group of young men who had harassed him earlier. The trial court rejected this argument stating, "You don't shoot at somebody with the intention to scare them. You shoot at

people with the intention to kill them." The court found that defendant's statement suggesting that he acted in self defense was not credible and that the State's witnesses testified credibly. The court found defendant guilty of attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, aggravated battery, and aggravated unlawful use of a weapon. After denying defendant's motion for a new trial, the trial court sentenced him to concurrent terms of imprisonment of 31 years for attempted first degree murder (including a 25-year enhancement for personally discharging a firearm that caused great bodily harm), four years for aggravated discharge of a weapon, and one year for unlawful use of a weapon. Defendant now appeals his conviction and sentence.

¶ 10 Defendant first contends that the State failed to prove him guilty of attempted murder beyond a reasonable doubt. When a defendant challenges the sufficiency of the evidence, the relevant question is whether, 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. Flynn*, 2012 IL App (1st) 103687, ¶ 22. Here, defendant challenges the State's proof that he harbored the intent necessary to support a conviction for attempted murder. It has long been established that the offense of attempted murder requires proof of a specific intent to kill. See *People v. Harris*, 72 Ill. 2d 16, 27-28 (1978); see also *People v. Cunningham*, 376 Ill. App. 3d 298, 303 (2007). An intent to do great bodily harm or even knowledge that one's acts may result in great bodily harm or death is insufficient to prove a defendant guilty. *Cunningham*, 376 Ill. App. 3d at 303. Because intent can seldom be proved by direct evidence, the trier of fact may infer intent from the acts committed and the surrounding circumstances. See *People v. Thomas*, 60 Ill. App. 3d 673, 676 (1978); see also *People v. Kirchner*, 2012 IL App. (2d) 110255, ¶ 17 (addressing intent required for attempt to disarm a peace officer).

¶ 11 Here there was ample evidence to support the inference that defendant had the intent to kill the victim. The victim was part of a group that included a rival gang member who defendant stated had been harassing and threatening him because he lived in that gang's territory. This illustrated defendant's clear motive to kill and thus provides indirect evidence of his intent. The trial court also heard consistent testimony from the victim and several friends, who recalled that defendant aimed a handgun at the group and fired repeatedly. To counter this evidence, defendant offered only his statement that he fired four of the five shots toward the ground. Thus, in the face of strong evidence of his intent, defendant offered an explanation that, even taken as true, does not refute evidence that he fired at least one of his five shots directly at the group. The balance of this evidence therefore offers clear support to the trial court's inference that defendant acted with intent to kill.

¶ 12 As part of his challenge to the trial court's guilty finding, defendant also argues that the trial court's reasoning—that "You don't shoot at somebody with the intention to scare them" and "[y]ou shoot at people with the intention to kill them"—amounted to an improper legal presumption that intent to kill is established any time a weapon is discharged in the direction of a person. We reject this argument as a mischaracterization of the trial court's remarks. In context, the trial court's comment appears not as statement of general legal principle, but as a finding of fact, and a refutation of defense counsel's argument that the evidence here shows only an intent to scare.

¶ 13 Defendant next contends that the State failed to prove he was subject to the 25-year firearm enhancement because it failed to prove beyond a reasonable doubt that the victim suffered great bodily harm.

¶ 14 Initially, we note that the parties disagree about whether this issue has been properly preserved. The State argues that this is a sentencing issue, which was forfeited because

defendant failed to file a postsentencing motion. See *People v. Baez*, 241 Ill. 2d 44, 129 (2011) (explaining the purpose of a postsentencing motion). The State argues that defendant must establish plain error to obtain review of the issue. Defendant responds that the issue involves a question of the sufficiency of the evidence and is not subject to forfeiture. See *People v. King*, 151 Ill. App. 3d 644, 647 (1987) (holding that sufficiency of the evidence is not subject to forfeiture). Defendant alternatively argues that any failure by the State to prove him guilty beyond a reasonable doubt would "obviously" be plain error. We conclude that, even if we were to adopt defendant's position that his objection cannot be forfeited, he is not entitled to relief, because we find no error.

¶ 15 The sentencing provision at issue provides that a minimum of 25 years up to a maximum term of natural life shall be added to the sentence imposed by the trial court if the defendant "personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person." 720 ILCS 5/8-4(c)(1)(D) (West 2010). Although defendant argues that the trial court never expressly found that he caused great bodily harm, such a finding is implicit in the trial court's holding that the 25-year sentence enhancement was mandatory. Even so, defendant argues that such a finding was inappropriate here, because the phrase "great bodily harm" is used in conjunction with the phrases "permanent disability" and "permanent disfigurement," so it must have a meaning akin to those phrases and cannot refer to the type of injury suffered by the victim in this case. We disagree.

¶ 16 We recognize that only a limited number of cases have addressed the meaning of the phrase "great bodily harm" used in the 25-year sentencing enhancement. See, e.g., *People v. Mimes*, 2011 IL App. (1st) 082747, ¶ 29. However, that phrase is no stranger to appellate courts and has been extensively discussed with regard to its meaning as used in the aggravated battery statute. See *People v. Lopez-Bonilla*, 2011 IL App. (2d) 100688, ¶ 12. "It is presumed that

statutes relating to the same subject are governed by one spirit and a single policy." *People v. Masterson*, 207 Ill. 2d 305, 329 (2003). Accordingly, we, like the *Mimes* court, will apply the same definition of great bodily harm to the sentencing enhancement provision contained in the attempted murder statute as we have applied to the aggravated battery statute and will look to the aggravated battery cases for guidance regarding the meaning of the phrase. See *Mimes*, 2011 IL App. (1st) 082747, ¶ 29.

¶ 17 Great bodily harm is not susceptible to a precise legal definition, however, it requires an injury of a "greater and more serious character than an ordinary battery." *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991). Whether a victim's injuries rise to the level of great bodily harm is a question of fact, which is neither dependent on the hospitalization of the victim, nor the permanency of his disability or disfigurement. *Id.* A gunshot wound is not necessarily great bodily harm, and whether a gunshot constitutes great bodily harm depends on factors such as whether the wound was clearly visible and whether the victim required medical attention or sought it immediately. See *People v. Ruiz*, 312 Ill. App. 3d 49, 63 (2000) (police officer had minor wound to his knee which was barely visible in a photograph and the officer did not seek medical attention immediately, but attended a police roundtable first); see also *People v. Durham*, 312 Ill. App. 3d 413, 421 (2000) (wound to arm was described as a "nick or cut" and the victim refused medical attention).

¶ 18 Here, there is little evidence in the record describing the victim's injury. Nevertheless, it was clear that: the wound was visibly bleeding; the victim needed assistance getting into the car which took him to the hospital; the victim sought immediate medical attention, pausing only long enough to pick up his mother; and the victim's treatment at the hospital lasted a couple of hours. Defendant argues that "[i]n other words, this was obviously a graze wound." However, those words were never spoken by any witness, and the conclusion defendant reaches is far from

obvious. Viewed in light of the wounds found not to constitute great bodily harm in *Ruiz* and *Durham*, there was evidence here to support the opposite conclusion, namely, that the victim sought immediate medical attention, the wound was clearly visible and actively bleeding, and the victim required assistance getting into the car that transported him to the hospital. Most importantly, however, we must remember our role in this analysis; this a factual question and we may reverse only if we find that no rational trier of fact could have reached the same conclusion. See *Flynn*, 2012 IL App (1st) 103687, ¶ 22. Here, we conclude that a rational trier of fact could have found that the victim suffered great bodily harm. Therefore, the trial court did not err when it held that the 25-year sentencing enhancement was mandatory.

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

¶ 20 Affirmed.