FIFTH DIVISION
DECEMBER 4, 2015

No. 1-14-0131

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. 08 CR 16890
	)	
MARK ANDERSON,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated discharge of a firearm is affirmed where the evidence established he fired a weapon in the direction of the victim's vehicle. Moreover, the prosecutor's description in closing argument of the testimony of an eyewitness was based upon the evidence and reasonable inferences drawn from that evidence.

¶ 2 Following a jury trial in 2010, defendant Mark Anderson was convicted of the first degree murder of Darryl Hart, the attempted murder of Ozier Hazziez and aggravated discharge of a firearm as to Hazziez. The last conviction was merged into defendant's attempted murder conviction, and defendant was sentenced to a total of 71 years in prison. After defendant's

attempted murder conviction was reversed on appeal and the case was remanded (*People v. Anderson*, 2012 IL App (1st) 103288), the State nol-prossed the attempted murder count, and the trial court entered judgment on the conviction for aggravated discharge of a firearm. In this appeal, defendant contends his conviction for aggravated discharge of a firearm should be reversed because the evidence did not establish that he fired a weapon in the direction of Hazziez's vehicle. Alternatively, defendant argues he should receive a new trial on that count because the prosecutor misstated the evidence in closing argument by saying that defendant fired shots at Hazziez's vehicle. For the reasons set out below, we affirm defendant's conviction but order correction of the mittimus.

¶ 3 At defendant's trial, Hazziez testified that at about 2 a.m. on July 25, 2008, he went to Orbitz, a sandwich shop at 71st Street and Euclid Avenue in Chicago, after leaving his job at a hotel. Another customer, later identified as Hart, also was in the shop and was talking on a cellular phone. After placing his order, Hazziez went outside and then returned inside the shop.

¶ 4 At that point, defendant entered the shop along with Quentin Cooper and Centrell Jackson. Hazziez did not know any of those men. Hazziez testified one of those men sold drugs to a person who entered the store. After that transaction, Hart argued with defendant, Cooper and Jackson, telling them they "don’t belong around here" and "this is my area."

¶ 5 Hazziez went outside and returned to the shop after a minute to find the men still arguing about selling drugs. After Hart left the shop, Hazziez and Cooper went outside. Defendant followed them outside. Hazziez's vehicle was parked nearby on the same side of the street as the shop. Hazziez further testified:

"[Defendant] came out kind of mad or whatever, fussing and [Hart] was outside bickering, telling him you might as well just shoot me and he shot him. And like I said, I jumped in my car and took off."

The prosecutor asked Hazziez to "[s]how us what the defendant did when he shot the man," and the following colloquy took place:

"A. He pulled out his gun and shot him, that's when I ran to my car and took off.

Q. What part of the victim's body did he point the gun [*sic*]?

A. I wouldn't know that *** ma'am. Like I said, I wasn't paying attention at the time. He just pulled out the gun and shot him and I jumped in my car.

Q. What happened to the victim after he was shot?

A. He fell on the ground.

Q. You saw that?

A. Yes, ma'am, that's when I jumped in my car.

Q. What happened after he fell to the ground?

A. I took off in my car, and I heard like three more gunshots.

Q. Could you tell in what directions the shots were being fired?

A. No, ma'am. Like I say, I jumped in my car, dug down, I took off. I just heard three more shots.

Q. How many men had guns out there that night –

A. Just –

Q. – that you saw?

A. Just one.

Q. Did the man that had a cell phone and was talking in the store have any type of weapon on his person that you could see?

A. No.

Q. And how far was the defendant from that man when the defendant shot him?

A. Like five feet away.

Q. And how far away were you from the defendant and the man that he shot?

A. About ten feet away."

¶ 6 Hazziez testified he drove around for about 20 minutes and went home. After talking to his brother, Hazziez went to a police station, spoke to police and viewed a photo array in which he identified Jackson as one of the men inside the shop. He did not identify anyone in a second photo array that included photos of defendant. Three weeks later, Hazziez viewed a physical lineup in which he identified defendant as the shooter.

¶ 7 Hazziez identified defendant at trial and identified the location of his own parked vehicle from still photos taken from the restaurant's surveillance video. As the surveillance video was played for the jury, Hazziez identified defendant. He stated that after gunshots were heard on the video, the next audible sound was his "tires squealing."

¶ 8 One of the photographs taken from the surveillance video depicted two vehicles parked on the street outside the shop. One of the vehicles was identified by Hazziez at trial as his vehicle, and the other vehicle was a blue Cadillac in which defendant, Cooper and Jackson had arrived.

¶ 9 On cross-examination, Hazziez said Jackson was the only person in the shop when the shots were fired. When defendant pointed the gun at Hart, Hazziez ran towards his vehicle "and

jumped in it and took off." Defense counsel asked Hazziez if he "had heard four or five shots after that," and Hazziez replied he did. Hazziez acknowledged he told police he did not observe defendant fire those later shots.

¶ 10 Hazziez said his vehicle was 10 feet away from the shooting and he heard more shots "after he took off." Hazziez said he and his vehicle were not struck by bullets. He did not observe which hand defendant used to fire the weapon but said defendant used an automatic weapon and held his arm out straight in front of him as he shot Hart.

¶ 11 Cooper testified he and defendant had been friends for about 12 years and were both friends of Jackson. Cooper admitted he, defendant and Jackson went to Orbitz on the night in question but claimed no shooting occurred and they all left together. On August 13, Cooper spoke with police and signed a statement. He said he signed the statement and later testified before a grand jury only because he was told he would be charged with murder if he did not cooperate.

¶ 12 Cooper's written statement and grand jury testimony were introduced to impeach his trial testimony. As portions of his written statement and grand jury testimony were read, Cooper repeatedly said he did not recall those statements. According to the statement and grand jury testimony, defendant was upset because Hart, who Cooper knew by the nickname "Sizzle," sold drugs in the area. Cooper told police that defendant reached around him and shot Hart, who collapsed at the first shot, and then fired twice more at Hart. Cooper stated defendant turned and started firing at "another guy who was in the sub shop earlier but was standing outside" when defendant shot Hart.

¶ 13 Specifically, Cooper gave the following testimony before the grand jury, which he recanted at trial:

"Q. What did you see [defendant] do then?

A. He looked at the person standing out there with us, seeing him, got to shooting at him.

Q. How many times did he shoot at that person?

A. About twice.

Q. What did that person do?

A. Jumped into his car and rode off."

¶ 14 Jackson also testified for the State. He said he went to grammar school and high school with defendant and was with defendant and Cooper at Orbitz. Jackson first observed Hart inside the shop talking on a cellular phone. He testified the shop was Hart's "turf." Jackson and Hart argued after Jackson sold two bags of crack cocaine to an unidentified person outside the shop. Jackson testified defendant was present and "there was a lot of arguing" involving "everybody," including Hart and a man who was with Hart.

¶ 15 Jackson said he was inside the shop purchasing a beverage when defendant grabbed Jackson's food and left. Jackson heard three shots or "maybe four at the most" fired outside. Jackson stood inside for a few minutes and then went outside. Hart was on the ground, and Cooper was present but defendant was not. Cooper and Jackson left in a vehicle.

¶ 16 Chicago police detective Sylvia Vanwitzenburg testified as to the investigation following the shooting, and the trial court admonished the jury that the detective's testimony was offered for the limited purpose of explaining how an investigative alert was issued for defendant. Several

officers viewed the shop's surveillance video, identified those present, and prepared a photo array in which Hazziez identified Jackson as one of the people with the gunman. In the second photo array, which included an older picture of defendant, Hazziez told Vanwitzenburg that defendant looked "familiar to him" but he could not identify defendant with complete certainty from a photograph. Hazziez identified defendant from two still photos made from the shop's surveillance video.

¶ 17 Detective Vanwitzenburg further testified Hazziez told her he observed defendant point a gun at Hart and heard Hart say, "You might as well shoot me." Hazziez said he stepped toward his automobile and opened the door. He heard four or five shots fired and thought defendant had shot at his automobile. Hazziez sped away in his automobile, squealing his tires.

¶ 18 Chicago police forensic investigator Carl Brasic testified he recovered five fired cartridge casings on the sidewalk on 71st Street in the hours after the shooting. Brasic also recovered a jacket with a cigarette in the pocket that bore defendant's fingerprint.

¶ 19 At the close of the State's case, defendant told the court he did not wish to testify. The defense rested without calling witnesses or presenting evidence.

¶ 20 The jury found defendant guilty of first degree murder, attempted first degree murder and aggravated discharge of a firearm. In addition, the jury found that defendant personally discharged a firearm during the commission of the first degree murder causing death to another person. The jury also found that defendant personally discharged a firearm during the commission of the attempted murder.

¶ 21 The trial court sentenced defendant to an aggregate of 71 years in prison, consisting of 20 years for first degree murder, with a 25-year enhancement for discharging a firearm and a

consecutive 6-year term for attempted murder, with a 20-year enhancement for discharging a firearm. The court ordered defendant's conviction for aggravated discharge of a firearm would merge into the attempted murder conviction. In addition, the court awarded defendant credit for 774 days served in custody prior to his sentencing.

¶ 22 On appeal, this court affirmed defendant's first degree murder conviction and the related findings supporting the firearm enhancements to defendant's sentence. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 54. However, this court held the trial court erred in issuing a jury instruction for attempted murder that referred to "an individual" as opposed to specifically naming Hazziez. *Anderson*, 2012 IL App (1st) 103288, ¶ 67. Accordingly, this court reversed and remanded to the trial court for a new trial on defendant's attempted murder charge. *Anderson*, 2012 IL App (1st) 103288, ¶ 67. This court also noted that in contrast to the trial court's award of 774 days of presentence credit, the record indicated that defendant in fact spent 787 days in pretrial custody and ordered that the mittimus be corrected to reflect 787 days in custody. *Anderson*, 2012 IL App (1st) 103288, ¶ 69.

¶ 23 On remand, the State nol-prossed the attempted murder charge. The court entered judgment on the count of aggravated discharge of a firearm and sentenced defendant to six years on that count to run consecutively with defendant's sentence for murder.

¶ 24 In this appeal, defendant contends his conviction for aggravated discharge of a firearm should be reversed because the State did not prove beyond a reasonable doubt that he fired a weapon in the direction of Hazziez's vehicle. Defendant argues Hazziez's testimony and that of other witnesses established that he only shot at Hart, and Hazziez's vehicle was not struck by bullets. Alternatively, defendant contends this court should remand for a new trial on aggravated

discharge of a firearm because the prosecutor misstated the evidence by saying that Cooper observed defendant shoot in the direction of Hazziez's vehicle. The State responds that defendant's conviction was supported by the testimony of Hazziez and Cooper and the reasonable inferences to be drawn from those accounts.

¶ 25 When weighing a challenge to the sufficiency of the evidence, this court considers 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. Belknap*, 2014 IL 117094, ¶ 67 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction will be reversed only where the evidence is so unreasonable, improbable or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Belknap*, 2014 IL 117094, ¶ 67. "A defendant's conviction will not be reversed 'simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible.' " *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 52 (quoting *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009)). The trier of fact 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.

¶ 26 A person commits aggravated discharge of a firearm when he or she knowingly or intentionally discharges a firearm "in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person." 720 ILCS 5/24-1.2(a)(2) (West 2008). In charging defendant with aggravated discharge of a firearm, the State alleged he "knowingly discharged a firearm in the direction of a vehicle that he knew or reasonably should have known to be occupied by Ozier Hazziez." An essential element of the

offense is the defendant's awareness of the presence of an individual in the direction in which he fires a weapon. *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 64. Eyewitness testimony that a defendant aimed a weapon at the vehicle in question and fired the weapon is sufficient to support a conviction for aggravated discharge of a firearm. *Daheya*, 2013 IL App (1st) 122333, ¶¶ 75-78; *People v. Juarez*, 278 Ill. App. 3d 286, 292 (1996).

¶ 27 Viewed in the light most favorable to the State, the evidence and reasonable inferences from the evidence were sufficient to support a conviction for aggravated discharge of a firearm based on defendant's act of firing his weapon in the direction of Hazziez's vehicle. Hazziez testified he was standing about 10 feet away from defendant when defendant shot Hart. Hazziez then ran to his vehicle, which was parked nearby, and "took off." After that point, he heard three more gunshots but could not tell in what direction the shots were being fired. Although Hazziez conceded he did not observe defendant fire those shots, he checked his vehicle for bullet holes.

¶ 28 Hazziez's testimony must be considered in conjunction with Cooper's testimony. The State's evidence may be sufficient even where it consists entirely of the prior, recanted statements of an eyewitness. *People v. Ivy*, 2015 IL App (1st) 130045, ¶ 56. Cooper's written statement and grand jury testimony, which he recanted at trial, described the shooting scene and supports a determination that defendant fired in the direction of Hazziez's vehicle. Cooper stated that after defendant fatally shot Hart, defendant turned and fired at "another guy who was in the sub shop earlier but was standing outside" at the time defendant shot Hart. Hazziez met that description, because according to his own testimony and Jackson's testimony, he had been inside the sub shop earlier. Moreover, Hazziez was standing outside – in fact, within 10 feet of

defendant – when defendant shot Hart and then Hazziez fled and entered his vehicle after the initial shots but before defendant fired three more shots.

¶ 29 Accordingly, the combined testimony of Hazziez and Cooper, notwithstanding Cooper's recantation at trial, establishes that Hazziez was in his vehicle when the second round of shots were fired, and therefore, when defendant shot at Hazziez, he necessarily had to shoot at the vehicle occupied by Hazziez. Moreover, only two vehicles were in the area – the Cadillac used by defendant and his companions, and the vehicle used by Hazziez. Furthermore, where, as here, a charge of aggravated discharge of a firearm is based upon the firing of a weapon in the direction of a vehicle, it is not an inherent element of the offense that the bullets actually strike the vehicle. See *Daheya*, 2013 IL App (1st) 122333, ¶¶ 64, 78 (noting that "[p]oor marksmanship is not an affirmative defense" in this situation); *People v. Ellis*, 401 Ill. App. 3d 727, 731 (2010) (not every case of aggravated discharge of a firearm "threatens the same amount of harm").

¶ 30 We do not find the facts at bar comparable to those in *People v. Hartfield*, 266 Ill. App. 3d 607 (1994), on which defendant relies. There, the defendant was convicted of aggravated discharge of a firearm for firing a weapon at a police officer during a foot chase. *Hartfield*, 266 Ill. App. 3d at 608. The officer testified that he did not observe anyone else during the pursuit and did not observe the defendant fire his weapon. *Hartfield*, 266 Ill. App. 3d at 608. On appeal, this court reversed defendant's conviction because in addition to the officer's testimony that he did not observe defendant fire at him, no evidence was presented that defendant aimed his weapon at the officer. *Hartfield*, 266 Ill. App. 3d at 608-09.

¶ 31 Here, in contrast to *Hartfield*, Cooper said in his statement and grand jury testimony that after defendant shot Hart, defendant turned and fired at "another guy who was in the sub shop earlier" and who was standing outside and who "[j]umped in his car and rode off" after being shot at. That testimony corroborated Hazziez's account. Based upon the testimony of those two witnesses, the evidence, viewed in the light most favorable to the State, was sufficient to support defendant's conviction for aggravated discharge of a firearm.

¶ 32 Defendant next contends that if his conviction is not reversed, this court should remand for a new trial on aggravated discharge of a firearm because the prosecutor misstated the evidence by saying that Cooper testified that he saw defendant shoot in the direction of Hazziez's vehicle. He argues the remark prompted the jury to find the State had proven that element of the offense. The State responds that defendant did not preserve this issue for appeal and further contends the prosecutor's remarks were based on the evidence presented at trial.

¶ 33 Defendant acknowledges he did not contemporaneously object to the prosecutor's comments or include this issue in his posttrial motion. He nevertheless contends this issue should be reviewed under either prong of the plain error doctrine or, alternatively, as a claim of the ineffective assistance of his trial counsel for failing to object to the prosecutor's misstatement of the evidence. A review of a plain-error argument begins with determining whether an error occurred. *People v. Rinehart*, 2012 IL 111719, ¶ 15.

¶ 34 In closing argument, the prosecutor made the following assertions as to the second element of the offense of aggravated discharge of a firearm:

> " 'Secondly, the defendant discharged a firearm in the direction of a vehicle he knew to be occupied.' What is this talking about? Talking about when Ozier [Hazziez] ran away,

> jumped in his car, and you heard him tell you that he ducked down in his car as he was driving away to avoid being shot. So did the defendant shoot the gun in the direction of a car with Ozier being in it. Absolutely he did. And how do you know this? Because Quentin [Cooper] told ASA Groth, and it says 'Quentin states that Mark fired two shots at that guy,' referring to Ozier. And in his grand jury testimony Cooper said, 'The defendant looked at the person standing with them, shot the gun at him, shot about twice, and then he jumped in the car. The defendant looked at the person getting standing with them [*sic*]. The defendant shot at him and he shot about twice and that person has jumped in the car and drove off.'
>
> So Quentin tells you through his grand jury testimony and through his handwritten statement that he gave to ASA Groth that he saw Mark Anderson shoot at the car that Ozier was driving away in. So we know the defendant is guilty of the crime of aggravated discharge of a firearm."

¶ 35 A prosecutor is generally afforded wide latitude in the content of their closing arguments, and he or she may comment on the evidence and on any fair and reasonable inferences that the evidence may support, even if those inferences are unfavorable to the defendant. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009); *People v. Runge*, 234 Ill. 2d 68, 142 (2009). Cooper testified before the grand jury that defendant shot at a person who had been standing outside when defendant shot Hart. The second person at whom defendant shot jumped in his vehicle and drove away, which is consistent with Hazziez's account. The portion of the State's closing argument quoted above was based on that testimony and reasonable inferences to be drawn from that testimony.

¶ 36 Although defendant directs us to a contrary conclusion in *People v. Jackson*, 2012 IL App (1st) 102035, we do not find the prosecutor's remarks here are comparable to those in *Jackson*. There, the defendant was convicted of unlawful use of a weapon for having constructive possession of a gun recovered from the defendant's vehicle, which he was driving and which also contained a passenger. *Jackson*, 2012 IL App (1st) 102035, ¶ 14. At the defendant's jury trial, the prosecutor stated in rebuttal closing argument that the defendant "told the officers he found a gun in his car." *Jackson*, 2012 IL App (1st) 102035, ¶ 18. Noting the closeness of the evidence, this court found the prosecutor's statement constituted first-prong plain error because the defendant in fact had denied having any knowledge that the gun was in his vehicle, noting that position was "the core of his defense." *Jackson*, 2012 IL App (1st) 102035, ¶ 19. Here, in contrast to *Jackson*, the prosecutor's statement that defendant fired two shots at Hazziez was a reasonable inference from Cooper's grand jury testimony that defendant fired at a person standing outside, coupled with Hazziez's testimony that he was 10 feet away from defendant when defendant shot Hart and then jumped in his vehicle, which was the only vehicle in the immediate vicinity other than the vehicle belonging to defendant's companion.

¶ 37 Because the prosecutor's statements were based on the testimony and reasonable inferences to be drawn from the testimony, no error occurred that would support a finding of plain error or ineffective counsel for the failure to object to that portion of the prosecutor's argument. See *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 28 (citing *People v. Mahaffey*, 194 Ill. 2d 154, 173 (2000)) (the prejudice prong of the test for ineffective counsel cannot be established where no error exists).

¶ 38 Defendant's remaining contention on appeal is that despite this court's earlier pronouncement that defendant should receive credit toward his sentence for 787 days spent in custody prior to trial (*People v. Anderson*, 2012 IL App (1st) 103288, ¶ 69), the mittimus issued on remand from that 2012 decision does not reflect 787 days of credit. The State agrees that defendant was in custody for that period of time prior to his sentencing and that the mittimus should be corrected as such. Therefore, this court again directs the clerk of the circuit court to correct defendant's mittimus to show 787 days of credit. See *People v. Cotton*, 393 Ill. App. 3d 237, 268 (2009) (remand not required for correction of the mittimus).

¶ 39 In conclusion, we affirm defendant's conviction for aggravated discharge of a firearm because the evidence was sufficient to show that defendant knowingly fired a weapon in the direction of Hazziez's vehicle that defendant knew or reasonably should have known was occupied by Hazziez. Furthermore, we reject defendant's alternate argument that the prosecution misstated the evidence in closing argument. We also order that the mittimus be corrected to reflect 787 days of sentencing credit.

¶ 40 Affirmed; mittimus corrected.