2017 IL App (1st) 143715-U

FIRST DIVISION
September 11, 2017

No. 1-14-3715

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. 12 CR 8828
	)	
ARTHUR GRAISE,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's convictions for aggravated discharge of a firearm and for mob action are affirmed. Defendant's conviction for aggravated battery is reversed. This case is remanded for resentencing on the remaining convictions.

¶ 2 Following a bench trial, defendant Arthur Graise was convicted of one count of aggravated battery with a firearm, two counts of aggravated discharge of a firearm, and one count of mob action. The trial court sentenced him to eight years for each of the first three counts and two years for the mob action conviction, to be served concurrently. On appeal, Mr. Graise

contends that: (1) the State failed to present sufficient evidence to support his convictions for aggravated battery with a firearm, aggravated discharge of a firearm, and mob action; (2) his mob action conviction violates the one-act, one-crime rule because it is based on the same act as his conviction for aggravated battery with a firearm; and (3) his trial counsel was ineffective. For the reasons that follow, we reverse Mr. Graise's conviction for aggravated battery with a firearm, affirm his other convictions, and remand for resentencing.

¶ 3 BACKGOUND

¶ 4 After a shooting that occurred on April 8, 2012, the State filed a 30-count indictment against Shurron Clark, Arthur Graise, Savaan Wilson, and Brandon Williams. Mr. Graise was charged with one count of attempted first degree murder, one count of aggravated battery, three counts of aggravated discharge of a firearm, four counts of aggravated unlawful use of a weapon, and one count of mob action. Mr. Williams pled guilty to one count of unlawful use or possession of a weapon by a felon (UUWF) and the State proceeded to a joint bench trial against Mr. Clark, Mr. Graise, and Mr. Wilson (collectively, the three defendants), each of whom waived his right to a jury trial. The four-day trial was conducted between September 5, 2013, and July 2, 2014. Although the three defendants were tried together, only Mr. Graise's convictions are before us on this appeal. Mr. Clark and Mr. Wilson filed separate appeals before this court. We already released our opinion in *People v. Clark*, 2017 IL App (1st) 143657-U. *People v. Wilson*, 2017 IL App (1st) 143663-U is being released with this opinion.

¶ 5 On the evening of April 8, 2012, an outdoor memorial was held near 12th Avenue and Fillmore Street in Maywood, Illinois, for Timothy Steele, who had recently been killed in that area. Approximately 15 to 30 people were gathered near the memorial. At around 5:30 p.m., Brandon Williams drove his silver SUV on 12th Avenue with Jasmine Jordan sitting in the front

passenger seat. Mr. Williams backed the SUV into Ms. Jordan's driveway at 2030 South 12th Avenue, which was directly across from where the memorial was taking place, and both of them remained in the parked vehicle. A group of individuals then approached the SUV, including the three defendants and Terrence Steele, Timothy Steele's brother. Mr. Clark approached the driver side of the SUV, and Mr. Wilson and Mr. Graise went to the passenger side. The primary focus of the trial was the exchange that took place between the individuals who approached the SUV and its occupants, which resulted in several gunshots being fired, one of which hit and injured Devonte Cole, who was several houses away and not involved in the exchange.

¶ 6 At trial, Jasmine Jordan testified that, as she was sitting in the SUV in the driveway, she saw two cars pull up to her driveway and saw Mr. Wilson and Mr. Steele exit those vehicles. According to Ms. Jordan, Mr. Steele initially approached the SUV alone, and "[h]e was angry." He asked Ms. Jordan to get out of the vehicle "so he [could] ask [her] some questions." Ms. Jordan said that she did not comply with his request, and then "[a]bout ten" more men approached and surrounded the SUV, including the three defendants. Ms. Jordan testified that she knew Mr. Graise and the other two defendants from growing up with them. Ms. Jordan's window was closed and she locked the doors of the vehicle. Ms. Jordan stated that there was "a lot of screaming going on," the men were banging on the driver-side and passenger-side windows of the SUV, and Mr. Williams was asked what he knew about "the killing."

¶ 7 Ms. Jordan testified that she then heard the sound of breaking glass—the driver-side window shattering—and multiple gunshots "at the same time." Although Ms. Jordan testified that she saw certain individuals with guns at the scene, she provided conflicting testimony as to when she saw each of the guns. She first stated that she saw Mr. Williams with a gun prior to the glass breaking, but then stated that she saw his gun after hearing the glass break and did not see

anyone with a gun prior to that time. Ms. Jordan stated that she then looked around to see if anyone else had a gun and saw a silver gun located in Mr. Wilson's waistband when he lifted his shirt up and he was about two feet from her door. Ms. Jordan also saw Mr. Clark, who was "on the car" and "[b]anging on the window," with a gun in his hand before the glass broke, but did not see him with a gun after that. Ms. Jordan stated at one point that she did not see anyone else with a gun while the SUV was in the driveway.

¶ 8 Ms. Jordan testified that, just after the window shattered, she exited the SUV and ran to the end of the driveway near her house. According to her, Mr. Wilson followed her and pointed a gun at her head, then Mr. Clark came up to Mr. Wilson, "grabbed him by his arm," and "directed him" towards the street. Ms. Jordan stated that she did not see where the two went after that. Ms. Jordan testified that after she exited the SUV, she saw Mr. Williams drive the SUV away from the scene, while Mr. Graise was standing in the street at the end of the driveway and shooting multiple times at the SUV. She heard multiple gunshots fired and saw no one else firing a gun in that direction. Ms. Jordan then went inside of her house, where her mother was already calling the police.

¶ 9 On cross-examination, Ms. Jordan testified that she did not know the difference between a semi-automatic gun and a revolver and that she did not know what gunpowder smelled like. She testified that Mr. Wilson "could have [had] braids" in his hair and that Mr. Graise "had a haircut." On cross-examination by Mr. Wilson's attorney, Ms. Jordan agreed, in response to a question, that, in her mind, "there is no confusing Arthur Graise and Savaan Wilson." When cross-examined by counsel for Mr. Graise, she denied being unable to focus on the surrounding events while Mr. Wilson was pointing a gun at her, but she acknowledged that what was happening in the street was not her main concern. When asked how far apart in time her

observation of Mr. Graise shooting at the SUV was from when she had a gun pointed at her, she stated "[i]t was actually at the same time." Ms. Jordan testified that Mr. Graise had stopped shooting at the SUV by the time Mr. Clark pulled Mr. Wilson away from her in the driveway and that her view of Mr. Graise in the street was not blocked by those two individuals. She could not describe the gun Mr. Graise was firing.

¶ 10 Byron Palmer testified that he was at the memorial at the time of the incident and witnessed the events from where he was standing in the middle of the street. He stated that a group of "seven or eight" men approached the SUV after it was parked in the driveway across the street "to find out what happened [to Timothy Steele] the day before." Mr. Palmer then heard glass breaking, followed by a number of gunshots, "[a]bout five to ten, about ten or twelve maybe." Mr. Palmer stated that he did not see anyone fire a weapon; he heard the sound of glass breaking and gunshots "simultaneously" and was not sure which occurred first.

¶ 11 Officer Luis Vargas testified that on April 8, 2012, he arrived at the scene in response to a call of a shooting. Officer Vargas noticed Mr. Graise "standing on the small patch of grass in front of the residence" and "all of a sudden he bent over and grabbed a handgun" which had been on the grass "and put it in his waistband." Officer Vargas arrested Mr. Graise, took the handgun from his waistband, and laid it on the grass for an evidence technician to inventory. He stated that he later learned that the gun recovered from Mr. Graise was a .22-caliber revolver.

¶ 12 Sergeant Wayne Welch assisted as an evidence technician in the investigation. When shown photographs of the scene, Sergeant Welch identified a .22-caliber revolver that "was laying on the front yard of 2032 South 12th Avenue." Sergeant Welch also identified three .40-caliber shell casings "in the parkway grass of 2030 South 12th Avenue" and two 9-millimeter shell casings "on the sidewalk in front of 2030 South 12th Avenue" and "in the parkway grass of

2032 South 12th Avenue." Sergeant Welch testified that the revolver, the only firearm that he documented and recovered, "had four spent 22 caliber shell casings still in the cylinder."

¶ 13 Sergeant Tracey Branch and Detective Charles Porter testified about conversations they had with Mr. Wilson soon after the incident. They testified that Mr. Wilson admitted that, when Mr. Williams started shooting, Mr. Wilson "ran to his spot on the block and he got his gun," a revolver. According to Sergeant Branch, Mr. Wilson stated that, as Mr. Williams pulled out of the driveway and drove away, "he *** was in the street running behind the car, shooting at the car." After the SUV "left the block," Mr. Wilson "just threw the gun and *** started calling for his friends."

¶ 14 Prior to the close of the State's case, the parties stipulated that, if called, Sergeant Patrick Grandberry would have testified that he administered gunshot residue collection kits to Mr. Wilson and Mr. Clark on the evening of April 8, 2012. The test for Mr. Wilson was positive and the test for Mr. Clark was negative. No gunshot residue collection kit was administered to Mr. Graise.

¶ 15 The parties also stipulated that, if called, Tonia Brubaker, an expert in the forensic science field of firearms examination and identification, would have testified that she examined the .22-long-rifle-caliber revolver and found it to be in firing condition and that four Winchester .22-long-rifle-caliber fired cartridge cases that were collected were fired from that revolver. Ms. Brubaker also would have testified that the two 9-millimeter-caliber fired Ruger cartridge cases that she examined were both fired from a single firearm, and the three .40-caliber fired Smith & Wesson cartridge cases that she examined were all fired from a single firearm. The bullet that was recovered from Mr. Cole's body was determined to be a 9-millimeter or .38-caliber bullet that matched the 9-millimeter casings recovered from the sidewalk in front of 2030 South 12th

Avenue and in the parkway grass of 2032 South 12th Avenue. The parties also stipulated that Commander Willis would have testified that on April 9, 2012, he recovered two 9-millimeter shell casings from the garbage can directly behind Mr. Williams's residence.

¶ 16 The defense called Brandon Williams to the stand, who testified that he pled guilty to possessing a gun as a felon and that shell casings were found in the garbage can behind his house. Mr. Williams stated that when he was in the SUV with Ms. Jordan on April 8, 2012, he had his semiautomatic handgun with him. Mr. Williams did not know and had never before seen the group of men who approached the SUV while he and Ms. Jordan were sitting in the driveway. He testified that "[s]ome words were exchanged," the men wanted Ms. Jordan to get out of the car but she did not want to, and then "things escalated." Mr. Williams stated that the men were yelling at him and that he was fearful at that point. Mr. Williams then pulled the gun out from under his seat and put it on his lap. He stated that "[o]ut [of] the corner of [his] eye, [he] saw a chrome object" but did not see who was holding it because "[i]t all happened so fast."

¶ 17 Mr. Williams further testified that when he saw that chrome object, he "heard [his] window bust and gunfire and [he] fired" his gun three times out of the window of the SUV. Mr. Williams stated that the SUV window was already broken before he fired any shots. At that point, the group of people "scattered," he pulled the SUV out of the driveway and drove south on 12th Avenue while ducking down. Mr. Williams did not continue firing his gun, but heard other gunshots being fired as he drove away.

¶ 18 Mr. Williams testified that at the time of the incident, he saw a chrome handgun in someone's hand, but he did not see the person who was holding it. Mr. Williams stated that the gun was to his side, "[n]ot even a couple feet" away from him, but "right at the door at the window" and it was pointed down, not at anyone. Mr. Williams heard the first gunshot a

"[c]ouple seconds" after he saw that gun, and the second gunshot a "[c]ouple seconds" after the first. After hearing those two gunshots, he took his gun in his hand and immediately fired about three times out the SUV window while looking the other direction and trying to pull out of the driveway. Mr. Williams stated that he fired his first shot only after hearing at least two gunshots. Before he fired his gun, he was not able to see the hands of every person that surrounded the SUV or what each of them was doing. Mr. Williams testified that once he started driving on 12th Avenue, he did not fire any additional gunshots. When he looked in his rear view mirror as he drove away, he saw "a figure standing in the middle of the street" and heard three or four gunshots, which sounded like they all came from the same gun, but he was not sure if the person he saw in the street was the one who fired the shots.

¶ 19 Leon Mays and Haneef Perkins, who were both at the memorial on April 8, 2012, also testified for the defense. Mr. Mays testified that he did not see Mr. Graise with anything in his hands or pointing any object towards the SUV, or anything that looked like an explosion or fire coming from Mr. Graise. Mr. Perkins also testified that he never saw Mr. Graise holding or firing a gun. On cross-examination, Mr. Perkins stated that once he was away from the scene, he heard a different kind of gun being fired than the kind he had initially heard. Although Mr. Perkins stated that he never saw a gun in anyone's hand and did not know how many people were shooting that afternoon, he heard two different types of guns being fired during the incident.

¶ 20 Each of the three defendants elected not to testify.

¶ 21 The trial court issued its ruling on August 11, 2014. After providing a detailed chronology of what occurred during the incident, the court found that Mr. Williams, Mr. Wilson, and Mr. Graise each fired a weapon during the incident of April 8, 2012:

"The evidence is clear that there [were] at least three shooters out there. We know

> Brandon Williams shot out of his car. We know Savaan Wilson shot at Brandon Williams who was driving away in that vehicle. We know that. From Jasmine [Jordan] we know that Arthur Graise had a gun and was firing also at the vehicle."

¶ 22 The trial court ruled as follows on the charges against Mr. Graise. The court found him not guilty of attempted murder, aggravated discharge of a firearm in the direction of Ms. Jordan, and aggravated unlawful use of a weapon with no valid FOID card. As to the remaining charges, the court stated:

> "However, on the aggravated battery charge, I believe that there was sufficient evidence to make him accountable for the shooting of Devonte Cole because he was witnessed with a gun shooting in the direction of the SUV as it fled from that scene.
>
> With regard to the aggravated discharge of a firearm in the direction of Brandon Williams, I find him guilty.
>
> * * *
>
> With regard to the aggravated discharge of a firearm in that he knowingly discharged a weapon in the direction of the vehicle occupied by Brandon Williams, I do find him guilty of that.
>
> * * *
>
> With regard to mob action, I find him guilty."

The court noted that, although the type of bullet that struck Mr. Cole possibly came from the same gun that was used by Mr. Williams, because Mr. Wilson and Mr. Graise also shot at Mr. Williams's vehicle, they were also accountable for injuries that resulted, whether from their own weapons or from Mr. Williams's weapon.

¶ 23 Each of the three defendants filed a motion asking the trial court to reconsider its rulings

or, in the alternative, for a new trial. In denying these motions, the court said the following about Mr. Graise's convictions:

> "A group of people from across the street armed with weapons ***, including the three defendants, crossed the street. *** When they got to the window, [Ms. Jordan's] testimony is clear about what she saw, who she saw have guns. *** I believe that her testimony was supported by other witness testimony as to the people who had guns and who didn't have guns.
>
> * * *
>
> There is accountability here by the defendants as to what occurred. They were in a group. They were the mob. They were the group that surrounded the car. They began the loud discussion, the request, or demand that [Ms. Jordan] get out of the car, who did not want to get out of the car."

¶ 24 The trial court sentenced Mr. Graise to eight-year prison terms for the aggravated battery conviction and each of the two aggravated discharge convictions, to be served at 85%, along with a two-year term for the mob action conviction served at 50%, noting that all of the sentences would run concurrently. The court denied Mr. Graise's motion to reconsider his sentence.

¶ 25 JURISDICTION

¶ 26 Mr. Graise timely filed his notice of appeal in this matter on November 24, 2014, the same day that he was sentenced. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 27 ANALYSIS

¶ 28 I. Sufficiency of the Evidence

¶ 29 We first consider Mr. Graise's challenge to the sufficiency of the State's evidence to support his convictions for aggravated battery with a firearm, aggravated discharge of a firearm, and mob action. To sustain a conviction of a criminal offense, due process requires the State to prove every element of the alleged offense beyond a reasonable doubt. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008). When a criminal defendant challenges the sufficiency of the evidence, the function of the reviewing court is not to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, the reviewing court must "carefully examine the evidence while giving due consideration to the fact that the [trier of fact] saw and heard the witnesses." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The relevant question 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." (Internal quotation marks omitted.) (Emphasis in original.) *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). It is within the province of the trier of fact to weigh the credibility of the witnesses and to resolve any conflicts and inconsistencies in the evidence. *People v. Schott*, 145 Ill. 2d 188, 206 (1991). A conviction will not be reversed by a reviewing court "unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *People v. Evans*, 209 Ill. 2d 194, 209 (2006).

¶ 30 A. Aggravated Battery with a Firearm

¶ 31 Mr. Graise argues that the State's evidence was insufficient to prove that he was legally accountable for aggravated battery with a firearm for the shooting of Devonte Cole because there was no evidence that he or Mr. Wilson shot Mr. Cole and he could not be accountable for a

shooting by Mr. Williams. The State initially contested this argument but then filed an amended brief in which it conceded this point. We agree and commend the State for recognizing that this conviction was not proper.

¶ 32 A person is legally accountable for the conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012). The State acknowledges that "the evidence established that Brandon Williams and not [Mr. Graise] or [Mr. Graise's] accomplices fired the shot that struck Devonte Cole." The State failed to show that Mr. Graise had either a shared intent or a common criminal design with Mr. Williams. Accordingly, we reverse Mr. Graise's conviction for aggravated battery with a firearm.

¶ 33 B. Aggravated Discharge of a Firearm

¶ 34 Mr. Graise contends that the State failed to prove him guilty on either of the two charges of aggravated discharge of a firearm—shooting in the direction of Mr. Williams or shooting at the car he knew was occupied by Mr. Williams. To prove a defendant guilty of aggravated discharge of a firearm, the State must prove that he discharged 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 2012).

¶ 35 Mr. Graise challenges what he describes as "incredible testimony" from Ms. Jordan, the only witness that testified that she saw him fire a gun in the altercation. Mr. Graise is correct that there was no gun residue or other physical evidence that showed that he had fired a gun and no witness other than Ms. Jordan who claimed to have seen him do so. But "in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh

evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). "[T]he testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant." *Id.*

¶ 36 Mr. Graise claims that Ms. Jordan's testimony cannot be relied on to sustain his conviction for several reasons. First, he points to the fact that several witnesses specifically testified that they never saw Mr. Graise fire a gun. However, Messrs. Palmer, Perkins, and Mays, each of whom testified either that he could not see who fired at the SUV or that he never saw Mr. Graise with a gun, were all running away from the SUV (and, thus, Mr. Graise) at the time the shots were fired. Ms. Jordan, by contrast, testified that she had a fixed, unobstructed view of the street and of Mr. Graise when she testified that she saw him fire a gun at the SUV as it rode away. To the extent these narratives conflicted, the trial court, as fact-finder, resolved those conflicts and credited Ms. Jordan's account. See *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 37 Mr. Graise also points out that, according to Officer Vargas's testimony, he picked up a gun after the shooting had stopped. However, the fact that Mr. Graise picked up the revolver *after* the shooting had stopped, and that Mr. Wilson admitted that he had been firing during the shooting, does not necessarily belie Ms. Jordan's account that she also saw Mr. Graise firing a gun earlier in the altercation.

¶ 38 Mr. Graise insists he cannot be guilty of discharging a weapon because the evidence was clear that there was only one shooter other than Mr. Williams and that additional shooter was Mr. Wilson, as evidenced by Mr. Wilson's admission to the police that he shot at the SUV as it drove away. He points to Mr. Perkins's testimony that he heard only two guns fired that day, one by Mr. Williams and another by a person behind the SUV shooting at Mr. Williams. But Mr.

Perkins's testimony is not quite that clear, as he actually stated that he heard two different gunshots after the SUV pulled out of the driveway. He further confirmed on cross-examination that he had "no idea how many people were shooting that afternoon."

¶ 39 Mr. Graise also points to the fact that only one gun was recovered: the gun that Mr. Wilson admitted firing. This is correct but there was physical evidence to support the trial court's finding that three guns were fired. Police recovered 9-millimeter shell casings that matched the discarded casings recovered from the garbage behind Mr. Williams's residence. They recovered a .22-caliber revolver that held four spent shell casings. They also recovered .40-caliber casings at the scene, although they did not recover a gun that could have produced those casings. While Mr. Graise is correct that those casings might have been there prior to the confrontation, we cannot say that the trial court's explicit finding that "[t]he evidence is clear that there [were] at least three shooters out there," is not sufficiently supported by the evidence. In sum, we find that the evidence was sufficient to affirm Mr. Graise's convictions for aggravated discharge of a firearm.

¶ 40 C. Mob Action

¶ 41 Mr. Graise argues that if we reverse his conviction for aggravated battery with a firearm, we must also reverse his conviction for mob action. We do not agree.

¶ 42 To sustain a conviction for mob action, pursuant to section 25-1(a)(1) of the Criminal Code of 2012 (720 ILCS 5/25-1(a)(1) (West 2008)), the State must prove that the defendant "and at least one other person, acted together, without legal authority, with the use of force or violence to disturb the peace." *People v. Jimerson*, 404 Ill. App. 3d 621, 636 (2010). The indictment in this case provided an additional detail beyond a recitation of the elements of the crime by specifying that the three defendants "engaged in the knowing use of force, disturbing the public

peace, by two or more persons acting together and without authority of law, *to wit: they shot Devonte Co[l]e about the body*." (Emphasis added.)

¶ 43 Mr. Graise relies on this additional "to wit" language to tie his conviction for mob action to his conviction for aggravated battery and contends that since he cannot be found guilty of aggravated battery he cannot be found guilty of a mob action. Mr. Graise's emphasis on the "to wit" language in the indictment raises an issue we addressed in the appeal of his codefendant, Mr. Clark (*People v. Clark*, 2017 IL App (1st) 143657-U). Mr. Clark was acquitted by the trial court of aggravated battery in the shooting of Mr. Cole but was convicted of mob action. We sustained the conviction for mob action. As we noted in our unpublished order in Mr. Clark's case (*id.* at ¶ 55), not every variance between the facts alleged in the indictment and the facts proved at trial requires reversal.

¶ 44 A defendant's due process right to notice of the charges brought against him prevents him from being "convicted of an offense he has not been charged with committing." *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). "To vitiate a trial, a variance between the allegations in a criminal complaint and the proof at trial must be material and be of such character as may mislead the defendant in making his or her defense, or expose the defendant to double jeopardy." *People v. Maggette*, 195 Ill. 2d 336, 351 (2001). An indictment must state the name of the accused; set forth the name, date, and place of the offense; cite the statutory provision the defendant allegedly violated; and set forth in the statutory language the nature and elements of the charged offense. *Collins*, 214 Ill. 2d at 219. "Where an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage." *Id.*

¶ 45 We agree with the State in this case that, although the charge as written was based upon Mr. Cole's gunshot wound, that language was surplusage. The circuit court found that Mr. Graise

participated in a public disturbance by approaching the SUV with the group that initiated the altercation. They surrounded the SUV, shots were fired, and the vehicle drove off. Mr. Graise then fired a weapon at Mr. Williams and his SUV. As we ruled in *Clark*, 2017 IL App (1st) 143657-U, ¶¶ 59-60, the additional phrase regarding Mr. Cole's gunshot wound can be disregarded without affecting the validity of the indictment. In *Clark* we agreed with the trial court that the State had proved all the elements of mob action completely separate and apart from the charge of aggravated battery, on which Mr. Clark was found not guilty. *Id.* at ¶59. It is unclear from the transcript whether the trial court found Mr. Graise guilty of mob action on the same basis on which she found Mr. Clark guilty of that crime or on the basis that the trial court had concluded (incorrectly) that he was responsible for the shooting of Devonte Cole. It does not matter because, even without proof that Mr. Graise was responsible for the shooting of Devonte Cole, the State proved him guilty of all of the necessary elements of mob action. See *People v. Burdine*, 362 Ill. App. 3d 19, 24 (2005) ("When a crime can be committed by several acts, as in this case, a variance between the act named in the indictment and the act proved will not be fatal.")

¶ 46 Mr. Graise also seeks reversal of his mob action conviction on the basis that it was predicated on the same physical act as his conviction for aggravated battery, namely the shooting of Mr. Cole. He argues this violates the one-act, one-crime rule and warrants reversal. See *People v. Almond*, 2015 IL 113817, ¶ 47. We have reversed Mr. Graise's aggravated battery conviction, which moots this issue. His conviction for mob action is affirmed.

¶ 47 II. Ineffective Assistance of Counsel

¶ 48 To the extent that we do not reverse his convictions, Mr. Graise asks us to remand for a new trial because his trial counsel was ineffective for: (1) failing to move to sever his trial from

Mr. Wilson's, where the two defenses were antagonistic; and (2) failing to clarify with the court that Mr. Wilson's inculpatory statement to the police was admissible as evidence in Mr. Graise's trial. We do not think that either of these were errors by trial counsel that can support a claim of ineffective assistance of counsel.

¶ 49 To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test, originally set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Mahaffey*, 165 Ill. 2d 445, 457 (1995). "First, the defendant must prove that counsel made errors so serious, and that counsel's performance was so deficient, that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *Id.* at 457-58. To show this, a defendant must establish that counsel's performance was below an objective standard of reasonableness. *People v. Mercado*, 397 Ill. App. 3d 622, 633 (2009). "[I]n order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Manning*, 241 Ill. 2d 319, 327 (2011).

¶ 50 Second, the defendant must demonstrate prejudice by proving that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mahaffey*, 165 Ill. 2d at 458. If a reviewing court concludes that the defendant did not suffer prejudice, the court need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 51 While Mr. Graise claims that his attorney should have sought to sever his trial, "[g]enerally, defendants who are jointly indicted are to be jointly tried unless a separate trial is necessary to avoid prejudice to one of the defendants." *Mahaffey*, 165 Ill. 2d at 469. Severance is appropriate when codefendants' defenses are "so antagonistic" that one or both of the defendants cannot receive a fair trial if they are tried jointly. *People v. Olinger*, 112 Ill. 2d 324, 346 (1986).

Mr. Graise submits that standard was met here because Mr. Wilson argued, based on Ms. Jordan's testimony, that Mr. Graise was the person shooting at the SUV, while Mr. Graise claimed that Ms. Jordan mistakenly identified him as the shooter and the shooter was actually Mr. Wilson. He references the closing statements of his trial counsel and counsel for Mr. Wilson, where each codefendant essentially pointed the finger at the other.

¶ 52 Mr. Graise is correct that Illinois courts have found defenses to be sufficiently antagonistic, requiring severance, when "each codefendant implicates the other in the offense, and professes his own innocence." *People v. McCann*, 348 Ill. App. 3d 328, 335 (2004). But here Mr. Graise cannot show that he was prejudiced by a joint trial. Ms. Jordan's testimony would have come in even if Mr. Graise had been tried alone. While Mr. Graise is correct that Mr. Wilson's attorney joined the State in emphasizing Ms. Jordan's identification of Mr. Graise as the shooter, it was Ms. Jordan, not Mr. Wilson, who "implicated" Mr. Graise as being guilty of aggravated discharge of a firearm.

¶ 53 Mr. Graise also points to what he views as an error in trial counsel's handling of the State's objection regarding Mr. Wilson's inculpatory statement to police that he shot at the SUV. When Mr. Graise's attorney attempted to cross-examine Sergeant Branch about the statement, the State objected on the basis that Sergeant Branch's testimony about the statement revealed an admission by a party opponent—a valid exception to hearsay in Mr. Wilson's case—but was inadmissible hearsay in Mr. Graise's case. In the colloquy between counsel for Mr. Graise and the trial court, the court expressed confusion as to "why you [Mr. Graise's attorney] feel you have to get up and cross this witness that has nothing to do with your defense or defendant." The court reasoned that examining the officer on Mr. Wilson's statement to impeach Ms. Jordan's testimony on the theory that only one person could have been in the street shooting at the SUV

was faulty:

> "[T]he physical evidence in this case was that casings, a gun, were recovered from 3 different weapons at the scene of this shooting. *** [Therefore, the] reasonable inference is that there were other people out there shooting. Now, how does that have to do with your cross examination of this witness to impeach [Ms. Jordan]?"

Nonetheless, the court allowed counsel for Mr. Graise to continue examining Sergeant Branch.

¶ 54 When Mr. Graise moved for a directed verdict and referenced Mr. Wilson's inculpatory statement as impeaching Ms. Jordan's eyewitness account, the State again objected on the grounds that it was inadmissible hearsay. Trial counsel for Mr. Graise did not argue an explicit exception to hearsay, and the court instructed him to just "[m]ove on" with the argument.

¶ 55 Mr. Graise now isolates this portion of his counsel's argument in favor of a directed verdict as ineffective assistance of counsel. He asks for a new trial under *Strickland* because his trial counsel did not continue in his argument that Mr. Wilson's admission was proper evidence in Mr. Graise's case. The parties, on appeal, spend large portions of their briefs arguing whether the statement was proper evidence, under *Chambers v. Mississippi*, 410 U.S. 284 (1973), as a statement-against-penal-interest exception to the hearsay rule.

¶ 56 We need not rule on the admissibility of the statement. Assuming it was admissible, the court made clear that she considered it unimportant because, in her view, there were three guns and three shooters so both Wilson and Graise could be guilty of aggravated discharge of a firearm. An attorney's decision not to emphasize or clarify something—whether during witness examination or in the attorney's later argument—does not show deficient performance under *Strickland* because it falls squarely within "trial strategy." See *Manning*, 241 Ill. 2d at 327; also *People v. Wiley*, 165 Ill. 2d 259, 289 (1995) (finding defense counsel's decision to restrict

examination of key witnesses and emphasize certain evidence in closing argument was exercise of trial strategy); *People v. Burrows*, 148 Ill. 2d 196, 237-39 (1992) (finding no deficiency in defense counsel's strategy of eliciting and emphasizing a hearsay statement from State's witness on cross-examination to set up later impeachment). Mr. Graise's trial counsel was not deficient under *Strickland*, 466 U.S. 668, and he is not entitled to a new trial on this basis.

¶ 57 III. Remand for Resentencing

¶ 58 If his aggravated battery conviction is reversed, Mr. Graise asks us to remand for resentencing on his other convictions. We agree with Mr. Graise that this case should be remanded for resentencing to guard against the possibility that the conviction that we vacated influenced the trial court's sentencing on the remaining convictions. *People v. Alejos*, 97 Ill. 2d 502, 511-12 (1983). When a reviewing court vacates one of several convictions and "cannot determine with any degree of certainty" whether the conviction vacated influenced the imposition of sentences for the remaining convictions, the court should remand for a new sentencing hearing. *People v. Figures*, 216 Ill. App. 3d 398, 404 (1991).

¶ 59 The trial court addressed all three defendants in sentencing, stating that the defendants "chose to act in concert with each other to surround this vehicle armed with weapons in a threatening manner *** that snowballed into *** a shooting of an innocent victim or victims." Given the trial court's reference to the shooting of the innocent bystander, Mr. Cole, and her determination, which we have reversed, that Mr. Graise was criminally responsible for this shooting, we cannot determine from the record whether the vacated aggravated battery with a firearm conviction influenced the sentence for Mr. Graise's other three convictions. See *Figures*, 216 Ill. App. 3d at 404 (remanding for resentencing after vacating armed violence conviction, where it was uncertain whether 12-year sentence for attempted murder and five-year sentence for

aggravated battery were influenced by concurrent 12-year sentence for armed violence). We therefore remand for resentencing on Mr. Graise's remaining convictions.

¶ 60 CONCLUSION

¶ 61 In sum, we reverse Mr. Graise's conviction for aggravated battery with a firearm, affirm the circuit court's findings of Mr. Graise's guilt on the two counts of aggravated discharge of a firearm and one count of mob action, vacate the sentences on those counts, and remand for resentencing consistent with this order.

¶ 62 Affirmed in part; vacated in part; reversed in part; remanded for resentencing.