

No. 1-12-3821

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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 09CR14742 |
| |) | |
| DEMOND CHRISTMAS, |) | The Honorable |
| |) | Brian Flaherty, |
| Petitioner-Appellant. |) | Judge Presiding. |

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

Held: Where the facts, when viewed in the light most favorable to the prosecution, are inadequate to support a conviction for the attempt murder of peace officer Alan Tomlinson, defendant's conviction as to Officer Tomlinson is vacated. Defendant's remaining convictions and sentence are affirmed.

¶1

ORDER

¶2 Following a jury trial, defendant Demond Christmas was convicted of one count of first degree murder and two counts of attempt murder for the shooting death of his girlfriend, Tondelaya Fleming, and the attempt murders of Calumet Park Police detective John Shefcik and Calumet Park Police officer Alan Tomlinson. Defendant was sentenced to 60 years'

imprisonment for first degree murder and consecutive terms of 20 years' imprisonment on each of the attempt murder convictions, for a total of 100 years' imprisonment. On appeal, defendant contends that: (1) the State failed to prove him guilty of the attempt murder of Officer Tomlinson; and (2) the trial court erred in sentencing defendant to a consecutive sentence for the attempt murder of Officer Tomlinson. For the following reasons, we affirm in part and vacate in part.

¶2 I. BACKGROUND

¶3 Evidence at trial established that, on July 19, 2009, defendant and the victim had an argument about whether the victim should attend a friend's wedding. The victim's mother, Sandra McCluster-Fleming, testified that she drove to the victim's apartment that morning to pick the victim up for the wedding. The victim lived in a ground floor apartment at 127th Avenue and Aberdeen in Calumet Park with her young son, Michael, and defendant. Only defendant and the victim were home when Sandra arrived. The victim was dressed for the wedding but, when she picked up her shoes to leave, defendant told her she could not go. After arguing with defendant about how he treated her daughter, Sandra turned to leave. Sandra testified that the victim tried to follow her out the door, but defendant hit the victim and she fell over the sofa. Defendant then closed and locked the door.

¶4 Sandra announced that she was going to call the police, but the victim asked her not to do so. Defendant emerged from the building carrying a black handgun as Sandra walked to her car, however, and said to her, "Hey, where you going? Call the police if you want to." Defendant went back into his apartment. Sandra testified she then heard four shots. She ran to her car.

¶5 Sandra asked a neighbor to call the police, then drove to a relative's house nearby and picked up her nephew. They returned a few minutes later to the apartment complex, which was

by then surrounded by police. Sandra's nephew drove her through the alley and parked on the street and they walked together to the apartment complex. She heard the police say, "We got him." She also saw the paramedics bringing her daughter out on a stretcher. The victim was later pronounced dead.

¶6 Calumet Park Police detective John Shefcik testified that, on July 19, 2009, he responded to a call of shots fired at an apartment in the area of 1137 North 127th Place. He was in uniform at the time. He explained there are several six-flat apartment complexes at that location. When he arrived, he saw Officer Tomlinson there, as well. They spoke with some residents, who told them they had heard fireworks and pointed to an apartment building from which they had heard a woman screaming. Detective Shefcik looked in the foyer window of the apartment building and saw an earring and a drop of blood on the floor. He then hit the buzzer to all of the apartments, and was buzzed into the building. Detective Shefcik entered the building with Officer Tomlinson behind him. Detective Shefcik listened for arguing or screaming, but did not hear anything. Officer Tomlinson stood in the doorway of the foyer, holding the exterior door open. Detective Shefcik approached a nearby apartment door, stood to the side, and knocked high on the door, announcing, "This is the police. Could you please open the door?" Then he heard a gunshot and saw the bullet go through the door just above where his hand had knocked. Detective Shefcik fell down and, while he was down, he heard two more shots, both of which went through the door. He saw Officer Tomlinson back out, and the foyer door shut behind him. Then:

"[ASSISTANT STATE'S ATTORNEY] Q: What happened next?"

[DETECTIVE SHEFCIK] A: At that point, I know that there were several other shots starting to come through the wall, and I retreated upstairs into the second and third floors.

Q: So after you went up those stairs, were you able to see what happened to your partner?

A: Other than him basically fall out of the foyer door, no, I don't.

Q: And so he had physically fallen out, physically fallen out?

A: I remember him backing up like this (indicating), the door shut, and that was the last that I seen of him.

Q: Why did you run up those stairs?

A: There were bullets coming through the drywall at me."

Detective Shefcik was aware then that there were residents in the upstairs floors. He was able to shepherd these residents, including an elderly woman and small children, from the second floor up to an empty apartment on the third floor, where he instructed them to go into the bathroom and stand in the cast iron bathtub for safety from the shooting. Detective Shefcik was in radio contact with other police officers during this time. Eventually, he learned that the shooter had been taken into custody.

¶7 On cross-examination, Detective Shefcik agreed that the door on which he knocked and through which the shooter fired was a solid door with no windows. He also agreed that he did not know whose blood he had seen on the foyer floor, but noted that the blood appeared "relatively fresh."

¶8 Defendant's cousin, Louie Bedar, also testified for the State. At the time of the shooting, Bedar lived in a nearby apartment complex. On the afternoon of July 19, 2009, Bedar received a

cellular call from defendant, who asked to speak to his mother. Bedar left the room while defendant and his mother spoke on the telephone. When he returned to the room, there was a lot of commotion. Bedar took the telephone and walked out of the house to speak with defendant. Defendant then told him in a "normal" voice that there were a lot of police officers in his apartment complex, and the police officers were trying to kill him. Bedar started walking over to defendant's apartment, talking with defendant on the telephone while he did so. When he crossed through an alleyway and approached defendant's apartment complex, he saw police officers. He then told one of the police officers that he had his cousin on the telephone who said the police were trying to kill him. One of the officers took the telephone, and Bedar heard the officer tell defendant that the police were not going to kill him. The officer gave Bedar back the telephone, and Bedar told defendant the police were not going to kill him. Bedar did not remember telling defendant he needed to come out because the police need to get an ambulance in to help the victim. Bedar testified that, at the time of the shooting, police presence in the area of these apartment complexes was "a rather frequent occurrence."

¶9 Illinois State Police sergeant Robert Deel testified that, at the time of the shooting, he was working as a crime scene investigator for the Illinois State Police forensics department. He was called to assess the scene of the shooting, and collected predominantly firearm evidence, including spent shells, discharged cartridge casings, live ammunition rounds, and two firearms. He described the building as a three-story brick apartment building with a courtyard in the middle which opened up to a parking lot. There was an exterior entrance leading to a foyer where there were mailboxes for all the apartments. There was one apartment on either side of the foyer and a stairway leading to the upper floors. There was a bullet hole in the glass window of the foyer, and a fired bullet on the sidewalk right outside the door. There were pieces of

wood, drywall, and various debris on the floor of the foyer, two bullet holes above the door to defendant's apartment, a bullet hole in the drywall above the door, two bullet holes in the center of the door itself, and bullet holes in the wall. In the kitchen inside the apartment, there was a revolver and a semiautomatic machine pistol on the counter and discharged cartridge casings on the floor. The revolver contained two unfired and four fired rounds. The semiautomatic contained live rounds, as well. There were six live rounds of ammunition on top of the dresser in the bedroom, an open gun case on the bed, and a live round of ammunition on the floor. Subsequent investigation showed two fingerprints from defendant on the magazine of the semiautomatic weapon. No fingerprints were found on the revolver.

¶10 Sergeant Deel testified regarding a number of evidence photographs, including photographs from inside the apartment depicting spent cartridges and holes in the walls and door where bullets traveled from within the apartment to outside the apartment, toward the hallway and foyer. One photograph depicted a revolver and a semiautomatic machine pistol which were recovered from inside the apartment.

¶11 Calumet Police officer Thomas Griffin testified he responded to the scene after hearing a call of shots fired. He first went to the rear of the apartment building where he encountered Officer Porch, standing outside the building with his gun drawn. Officer Griffin learned that Detective Shefcik and Officer Tomlinson were in front of the building. When Officer Griffin exited his car, he heard multiple gunshots and screams for help coming from the front of the building. He started to kick the back door of the apartment building in. The shots stopped when he kicked the back door. At this point, Bedar ran up to him, saying, "Please don't kill my cousin." Bedar gave Officer Griffin his cellular telephone. Office Griffin testified:

"[OFFICER GRIFFIN] A: I told him that I knew who he was, and if this is Demond, and is there anyone in there hurt?

[ASSISTANT STATE'S ATTORNEY] Q: And did somebody on the other end of the line respond to you?

A: Yes, he did.

Q: And what did he tell you?

A: He hesitated; and, he said, 'Yeah. My girl is shot. She's shot.' I said, 'Well, you need to stop shooting because we need to get the paramedics in there to get her medical treatment.'"

Officer Griffin testified that he then gave the telephone back to Bedar. Eventually, Officer Griffin took the telephone back and again spoke to defendant:

"[ASSISTANT STATE'S ATTORNEY] Q: Did you eventually get the phone back from Louie Bedar?

[OFFICER GRIFFIN] A: Yes. I snatched the phone from him again.

Q: And, again, you spoke to the person on the other end?

A: Yes, I did.

Q: Was it the same person you had talked to previously?

A: Yes, it was.

Q: Would you tell us what the person on the other end of the line was saying during the second conversation?

A: That he got a AK-47 that would go through our vests if we tried to come in."

Officer Griffin testified that he saw defendant looking out the back window of the apartment. Eventually, defendant came out the back door of the apartment, unarmed, with his hands raised in the air. Officer Griffin apprehended him. Officer Griffin testified that, after the shooting, he saw Officer Tomlinson, who had "blood on the side of his face and his arm." Over defense counsel's objection, Officer Griffin testified that Officer Tomlinson did not have those injuries before responding to the call of shots fired. On cross-examination, Officer Griffin admitted that he did not see Officer Tomlinson when he arrived at the apartment complex, but only first saw him after the shooting. He explained that, after he announced on the radio that defendant was coming out of the building, Officer Tomlinson came around to the rear of the building and was the "cover guy," standing with his weapon trained on defendant as Officer Griffin handcuffed defendant. It was then that Officer Griffin saw what appeared to be blood on Officer Tomlinson's face and arms, but Officer Griffin did not know if the blood was the result of the shooting.

¶12 Blue Island Police Corporal Frank Podbielniak also responded to the scene of the shooting. After defendant was in custody, he and other officers entered the apartment building through the rear door of the apartment. Inside, he saw the victim on the living room floor, facedown and unresponsive. There were no weapons near the victim. He observed a handgun and a semiautomatic gun on the kitchen counter.

¶13 Cook County Medical Examiner forensic pathologist James Filkins testified that the 32 year old victim sustained three gunshot wounds: one to the middle of her back, with stippling indicating she was shot at close range; one to the upper left chest, also with stippling indicating close range firing; and one to the middle of the chest with no stippling. Toxicology tests were negative for drugs or alcohol in the victim's system.

¶14 Patrick Adams testified that he was a friend of defendant's and had been dating the victim's sister. Two days before the shooting, Adams was with defendant, smoking marijuana and drinking vodka. Defendant had been texting on his mobile telephone. Defendant put his phone down and said, "This bitch is going to make me kill her. This bitch is going to make me blow her head off." Adams tried to calm defendant down, but defendant just smirked. Defendant told Adams about guns he owned, but Adams told him he did not want to see them. Defendant told him he had a Walther .38, a .45, and a "bigger" gun, possibly a "Glock". Defendant told him about a previous incident in which he had argued with the victim and, when he held a gun to her head, the victim urinated on herself.

¶15 The State rested. The defense did not present any evidence.

¶16 Regarding the attempt murder of Officer Tomlinson, which conviction is at issue here, the jury was instructed as follows:

"A person commits the offense of attempt first degree murder of a peace officer when he, with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual who was a peace officer who at the time was in the course of performing his official duties, and the defendant knew or should have known that the individual was a peace officer.

The killing attempted need not have been accomplished." Illinois Pattern Jury Instruction, Criminal, No. 6.05XX (4th ed. 2000).

And:

"To sustain the charge of attempt first degree murder of a peace officer, the State must prove the following propositions:

First Proposition: That the defendant performed an act which constituted a substantial step toward the killing of an individual;

and

Second Proposition: That the defendant did so with the intent to kill that individual;

and

Third Proposition: That the individual the defendant intended to kill was a peace officer;

and

Fourth Proposition: That the defendant did so at a time when that peace officer was in the course of performing his official duties;

and

Fifth Proposition: That the defendant knew or should have known that the individual was a peace officer.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty;

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." Illinois Pattern Jury Instruction, Criminal, No. 6.07XX (4th ed. 2000).

¶17 During jury deliberations, the jury sent the court a note, asking:

"An interpretation question:

Attempt First Degree Murder (Alan Tomlinson)

1st proposition → "of an individual"

2nd proposition → that individual

Does this mean that the defendant intended to kill Alan specifically or any officer or individual?"

After conferring with the parties, the court sent the jury a response note, stating:

"That the defendant intended to kill an individual who has now been identified as Alan Tomlinson."

¶18 The jury found defendant guilty of first degree murder and that he personally discharged a firearm causing the death of another, as well as guilty of the attempt first degree murder of peace officer Alan Tomlinson and the attempt first degree murder of peace officer John Shefcik. After a sentencing hearing, defendant was sentenced to 60 years' imprisonment for first degree murder and consecutive terms of 20 years' imprisonment on each of the attempt murder convictions, for a total of 100 years' imprisonment.

¶19 Defendant appeals.

¶20 II. ANALYSIS

¶21 On appeal, defendant first contends the State failed to prove him guilty beyond a reasonable doubt of the attempt first degree murder of Officer Alan Tomlinson. Specifically, defendant argues that, where Officer Tomlinson was standing near the foyer door during the shooting, did not announce his presence, and defendant could not see him through the apartment door, the State failed to prove that defendant was aware of Officer Tomlinson's presence such that a specific intent to kill could be inferred. Defendant does not contest his guilt as to the first degree murder of Tondelaya Fleming or the finding that he personally discharged a firearm

causing the death of another, nor does he contest his guilt for the attempt first degree murder of Detective Shefcik. We agree with defendant and vacate his attempt murder conviction as to Officer Tomlinson.

¶22 When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). A trier of fact determines the credibility of witnesses and the weight to be given their testimony, resolves conflicts in the evidence, and draws reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). We will not substitute our judgment for that of the trier of fact. *Ortiz*, 196 Ill. 2d at 259. A reviewing court must construe all reasonable inferences from the evidence in favor of the prosecution. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Ortiz*, 196 Ill. 2d at 259.

¶23 In order to support a conviction for attempt murder of a peace officer, the State must establish beyond a reasonable doubt that: (1) the defendant performed an act constituting a "substantial step" toward the commission of murder; (2) the defendant possessed the criminal intent to kill the victim; and (3) the defendant knew or reasonably should have known that the victim was a peace officer in the course of performing his official duties. 720 ILCS 5/8-4(a), 720 ILCS 5-9-1 (West 2010); see *People v. Carroll*, 260 Ill. App. 3d 319, 329 (1992). "Intent is a state of mind which, if not admitted, can be established by proof of surrounding circumstances, including the character of the assault, the use of a deadly weapon, and other matters from which an intent to kill may be inferred. [Citations.] Such intent may be inferred when it has been

demonstrated that the defendant voluntarily and willingly committed an act, the natural tendency of which is to destroy another's life." *People v. Winters*, 151 Ill. App. 3d 402, 405 (1986); accord, *People v. Burrage*, 269 Ill. App. 3d 67, 76 (1994). "It is the function of the trier of fact to determine the existence of the requisite intent, and that determination will not be disturbed on review unless it clearly appears there exists a reasonable doubt as to the defendant's guilt." *Winters*, 151 Ill. App. 3d at 406.

¶24 Initially, we note the State argues on appeal that we should affirm defendant's conviction as to Officer Tomlinson based on the theory of transferred intent, which "applies when a third person is injured as a result of a defendant's assault upon another person." *People v. Valentin*, 347 Ill. App. 3d 946, 953 (2004). However, this theory was not advanced at trial, and the State cannot now raise a new theory of the case on appeal. *People v. Homes*, 274 Ill. App. 3d 612, 623 (1995) (On appeal from conviction of, in relevant part, attempt first degree murder, where State's sole theory at trial was transferred intent, and State on appeal denied transferred intent and instead argued that there was sufficient independent evidence that the defendant intended to kill the victim, the court would not allow the State to raise new theory of the case on appeal).

¶25 We therefore turn to the question of whether the State proved defendant had the requisite specific intent to kill Officer Tomlinson, and we find that it did not. Rather, the State failed to show defendant knew Officer Tomlinson was in the foyer where the shots traveled and, therefore, the State's evidence failed to establish that defendant had the necessary specific intent to kill him.

¶26 Evidence presented at trial showed that defendant argued with the victim's mother and physically assaulted the victim in front of her. Defendant then followed the mother out into the parking lot while brandishing a handgun. Defendant returned to his apartment, where he shot and

killed the victim. Police arrived on the scene and one officer—Detective Shefcik—knocked on defendant's apartment door, announcing, "This is the police. Could you please open the door?" The apartment door was solid wood, with no window and no way for defendant to see if there was anybody other than Detective Shefcik on the other side of the door. Officer Tomlinson did not announce his presence. Defendant shot through the door just above the place where Detective Shefcik had knocked, and continued to shoot through the door and wall into the hallway. At this time, Officer Tomlinson was standing in the entranceway of the foyer, holding open the door that led directly outside the building. After the first few shots were fired, Officer Tomlinson backed out of the building, and the foyer door closed behind him. Because these shots were fired from behind a closed door, precluding defendant from seeing outside, defendant could not have known that any person other than Detective Shefcik—let alone Officer Tomlinson—was in the danger zone of the gunfire.

¶27 The facts, when viewed in the light most favorable to the prosecution, are inadequate to sustain a conviction for the attempt murder of Officer Tomlinson. A reasonable juror who considered the evidence presented could not find beyond a reasonable doubt that defendant had the specific intent necessary to be guilty of the attempt murder of Officer Tomlinson, the officer who followed Detective Shefcik into the apartment building. While the evidence shows that Detective Shefcik approached the door, knocked and announced his presence, this merely shows that defendant was aware of the presence of one officer. Defendant does not claim otherwise. This evidence does not show defendant was aware of the other officer, Officer Tomlinson, who was standing in the foyer doorway. Only speculation supports the inference that defendant was aware of the presence of Officer Tomlinson within firing range when he shot at Detective Shefcik. The State failed to show otherwise.

¶28 Accordingly, we vacate defendant's conviction for the attempt murder of peace officer Alan Tomlinson, and affirm defendant's conviction and sentence in all other respects.

¶29 Due to our disposition here, we will not address defendant's remaining argument as to his sentence.

¶30 III. CONCLUSION

¶31 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed in part and vacated in part.

¶32 Affirmed in part; vacated in part.