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SECOND DIVISION  
ORDER FILED MARCH 15, 2011  
MODIFIED ORDER UPON DENIAL OF REHEARING FILED APRIL 19, 2011

1-08-3583

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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. 04 CR 18747
	)	
EMANUEL RIVERA-MARTINEZ,	)	Honorable
	)	Dennis A. Dernbach,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Karnezis and Connors concurred in the judgment.

**ORDER**

*Held:* The evidence at trial supports a finding by the trial court that the defendant, who was convicted of two counts of first degree murder, was not justified in shooting the victims in self-defense and his convictions should not be reduced to second degree murder.

The defendant, Emanuel Rivera-Martinez, appeals from his conviction by the circuit court of Cook County for the first degree murder of Freddy Hurtado and the first degree murder of Mario Montanez. The defendant received a sentence of natural life imprisonment. He raises two issues on appeal: (1) whether the State proved beyond a reasonable doubt that he was not justified in

shooting the victims in self-defense; and (2) whether this court should reduce his conviction to second degree murder based upon his belief that he needed to use deadly force in self-defense.

For the reasons that follow, the defendant's convictions for first degree murder are affirmed.

### BACKGROUND

The evidence at the defendant's trial in 2008 revealed the following accounts of the events that took place on November 15, 2003, near the intersection of Lawndale and Fullerton Avenues in Chicago, Illinois. Ricardo Gomez testified that on the evening in question at approximately 9:00 p.m., he was picked up by the two victims, Hurtado and Montanez, and Renee Delgado. Gomez stated that all four of them were unarmed. They drove in Delgado's car to the Last Chance bar on the corner of Fullerton and Lawndale Avenues in Chicago, Illinois. After they parked the car on Lawndale Avenue a quarter of a block south of the bar, they started walking east to west in a northerly direction across the street. Gomez noticed two men wearing hoods on the corner across the street from the bar. He did not recognize the men. The men were to Gomez's right and said something to Gomez's group, but the four did not answer and continued walking toward the bar. Gomez testified that the four did not engage the two men in any way or make any movements like they were armed.

They were on the sidewalk when Gomez heard gunshots. Hurtado ran and Montanez fell on top of Gomez. Gomez lowered Montanez to the sidewalk. Gomez saw the defendant, who was on his left, put a gun into his pocket and run away. Gomez saw a female police officer and he pointed in the direction that the defendant was running. The officer ran after the shooter. At the police station, in both a photographic and physical lineup, Gomez identified the defendant as the shooter.

The next witness was Amy Gonzales who was a patron at the Last Chance bar on the night in question. At approximately 10 p.m. she noticed she had missed calls on her cell phone. She stepped outside of the door of the bar onto Lawndale Avenue so she could hear her cell phone. Gonzales noticed two men on the same side of Fullerton Avenue where she stood, but on the other side of Lawndale Avenue. She saw a man, walking in the street with two other men, shoot a gun three times in a northerly direction at the two men on the corner. She only heard three shots. She immediately went back into the bar where music was playing very loudly. She admitted that it would be unlikely that any shots would be heard from there. Gonzales described the coat the shooter was wearing. Later, at the police station and at trial, she identified the defendant in a photograph and in a physical lineup as the shooter. During cross-examination, Gonzales was asked to read the police report of the officer who interviewed her at the scene of the shooting. The report reflected that Gonzales had stated that she saw three males exit a gray vehicle, begin shooting, and then flee southbound.

Detective Cathleen Iser of the Chicago Police Department was riding in a police car in the vicinity with two other police officers at the time of the shooting. Iser testified that after they heard gunfire, she exited the police car, ran towards the sidewalk, jumped over a man who had fallen down, saw a muzzle flash, saw the man who was firing the gun and chased him in a southerly direction on Lawndale Avenue. The shooter turned west into the alley and Iser identified herself as a police officer and yelled for him to stop and drop the gun. The shooter continued running at the T-intersection southward down another alley. Iser saw the shooter throw a gun into the air by a garage. Iser's partners had continued driving the police vehicle and were able to apprehend the

shooter in the alley. In court, Iser identified the defendant as the shooter and she also identified a photograph depicting the garage where the gun was recovered. Iser testified that besides the defendant, she did not see anyone else discharge a weapon. During cross-examination, Iser was questioned about the police report that she signed but did not prepare which failed to mention that she saw the muzzle flash come out of the gun that the defendant was holding.

Another State's witness, Alejandro Vega, testified that he had been convicted in 2001 of possession of a controlled substance with intent to deliver and was charged with two counts of first degree murder as a co-defendant in this case. Vega made an agreement with the Cook County State's Attorney Office that in exchange for his truthful testimony in the defendant's trial, the State would recommend a sentence of 20 years imprisonment for one of the murders and the other count of murder would be dropped. In November 2003 Vega had been a member of the YLO Cobras gang for approximately 11 years. Vega, whose nickname was Scrappy, knew the defendant, whose nickname was Papito, as a fellow gang member.

On November 15, 2003, Vega stated that he had been "chilling" with Eugenio Lasso, known as Scummy, and another man known as Georgie on Shakespeare Avenue in Chicago. At approximately 10:00 p.m., the defendant approached Vega and the other two men and requested a gun. The defendant stated that there were some members of a rival gang, the Imperial Gangsters, on the corner of Fullerton and Lawndale Avenues and the defendant said he wanted to "[g]et rid of them." Vega testified that the defendant asked him to "watch his back." Vega stated that the defendant had been shot at in the past by a member of the Imperial Gangsters.

Scummy went to his Suburban vehicle, retrieved a gun and gave it to the defendant. The four

of them then started walking toward Lawndale and Fullerton Avenues. Vega and Scummy were on the east side of Lawndale Avenue walking north and were planning to “look out for the police.” The defendant was on the west side of Lawndale Avenue near the Last Chance bar. Georgie had stopped at Lawndale and Belden Avenues, south of Fullerton Avenue. Scummy walked all the way to Fullerton Avenue, but Vega only walked to the alley before Fullerton Avenue when he saw some men exit a car and signal a YLO Cobra gang sign directed at him. Vega testified that he did not recognize them and that he did not think they were members of the Cobra gang, and so they were actually “false flagging” the Cobra sign. Vega heard two or three gunshots, saw the defendant firing the gun at the men who had just exited the car, and then he started running southward on Lawndale Avenue. As he was running, Vega heard “a lot” of gunshots and he looked to see a man in all black, someone he could not identify, in the corner of the alley shooting a gun. Vega could feel bullets passing him.

At trial, Vega identified the gun in a photograph as the gun that belonged to the YLO Cobra gang that Scummy had in his vehicle that night. Vega also identified the coat that the defendant was wearing the night of the shooting. Vega admitted that he was going to plead guilty to a possession of a controlled substance with intent to deliver charge and he would receive a six year imprisonment sentence concurrent with his murder sentence. Further, in the past he had been convicted of possession of a stolen motor vehicle and aggravated discharge of a firearm. Vega admitted that in the recorded statement he gave in jail to assistant State’s attorneys he did not mention that there were bullets whizzing by his head or that someone was shooting at him.

The parties stipulated at trial regarding the photographs taken at the scene, the forensics done

on the weapon, the bullets, bullet casings and metal fragments recovered from the area. The gun held 13 bullets, and the gun contained 7 bullets when found. There were 11 shell casings found in the area that night which were identified in the photographs admitted into evidence. A post-mortem examination report stated that a bullet entered and exited the victim Montanez. Also, a bullet recovered from Montanez's body was tested and found to have been fired by the weapon discarded by the defendant on the night in question. Only a calcified bullet was recovered from the victim Hurtado's body from a previous wound, but there was evidence of an entrance and exit bullet which caused his death.

The defendant testified that on November 15, 2003, he was traveling by bus from his mother's apartment to see his girlfriend and newborn son who lived on Lawndale Avenue, two blocks south of Fullerton Avenue. As the defendant was walking south on Lawndale Avenue, he saw two men, one of whom he knew from the streets and later learned was nicknamed Puppet G. Puppet G. yelled out, "Security, bust out that bitch ass nigger G. He a Cobra." The defendant stated that he was in the gang YLO Cobras and Puppet G. was an Imperial Gangster. The defendant took the statement to mean that Puppet G. had asked someone to shoot him. The defendant saw men exit a grey vehicle parked on the corner and they started shooting at him. He took cover behind the second car parked on the street, took out his gun and returned fire northbound on Lawndale Avenue. The defendant testified that he had received the gun from his brother as a gift, and that he had not seen Vega or Lasso at all that day. The defendant stated he had three felony convictions and often carried a gun for protection.

After the defendant noticed the female police officer exiting her car, he started running down

the street into an alley where she pursued him and yelled to him to drop his gun. He threw the gun onto the roof of a garage, kept running and put his hands into the air. He was then apprehended by the police. The defendant stated that he had no intention of killing anyone that day, but was defending himself.

During cross-examination, the defendant stated he did not know how many men exited the grey car before the shooting started. The State verified that the defendant testified he was traveling on a bus from his mother's home that night and that the bus stop was on the southwest corner of Fullerton and Lawndale Avenues, directly in front of the Last Chance bar. The State posited that if the defendant was coming from the address he gave as his mother's, he would have been traveling west on Fullerton Avenue and the bus stop would have been on the north side of Fullerton Avenue, not the south side as the defendant testified it was.

As part of his closing statement, the defendant's counsel argued that the ballistics at the scene show that there must have been another weapon fired that night because there were 11 shell casings found. The defendant's gun only held 13 bullets and 7 were found in the gun, so there must have been at least one other shooter. The defense counsel reiterated that the defendant testified that he was shooting towards the north and a bullet hole found in a store on the northwest corner of Fullerton and Lawndale Avenues would be consistent with the defendant's testimony. The evidence showed someone else must have been shooting because the back window of a car parked on the west side of Lawndale Avenue, south of the bar, was shattered by a bullet. Furthermore, there was an expended bullet from an unknown source recovered from the garage on the corner of the alley and Lawndale Avenue. Defense counsel argued that the State's eyewitnesses who testified that they only

heard two or three shots fired must not be telling the truth. Defense counsel urged the trial court to find the defendant not guilty by reason of self-defense, or in the alternative, guilty of second degree murder.

The State argued in its closing statement that the defendant had lied about his travel on the bus from his mother's house because of the location of the bus stop. Further, there were no expended bullets found that would corroborate the defendant's claim that he was on the sidewalk crouched behind a car and shooting at an angle toward someone in the street. The State acknowledged that there were more shell casings found at the scene than the State's witnesses testified to hearing bullets fired and also that the back window of a car parked on the west side of Lawndale Avenue was shot out. The State admitted that it was possible that a third party sympathetic to some of the individuals, could have fired a gun, but that the defendant was nevertheless guilty of first degree murder based upon the testimony presented at trial.

The trial court found the testimony of Gonzales, Gomez and Iser credible in that their version of the facts suggested that it was the defendant who fired first. Further, the trial court noted, the ballistics showed that one victim was killed with the defendant's bullet and the other victim suffered a through and through bullet wound. The trial court commented that although Vega was not necessarily the most credible of witnesses because of his background, he was credible when he testified that he and the defendant and Lasso were looking for rival gang members to seek retaliation. The trial court admitted that there were some questions raised regarding the number of shell casings found at the scene. The trial court ruled that the State had proven the defendant guilty beyond a reasonable doubt of two counts of first degree murder. 720 ILCS 5/9-1(a)(1) (West 2002). The



defendant was sentenced to natural life imprisonment. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2002). The trial court later denied the defendant's motion for a new trial and the defendant filed a timely notice of appeal. Ill. S. Ct. R. 606(b) (eff. March 20, 2009).

### ANALYSIS

The first issue that the defendant argues on appeal is that the State failed to prove beyond a reasonable doubt that he was not justified in returning fire after a member of a rival gang shot at him.<sup>1</sup> The defendant was charged with two counts of first degree murder, 720 ILCS 5/9-1(a)(1) (West 2002), which is defined as:

“A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: (1) he either intends to kill or do great bodily harm to that individual or another, or know that such acts will cause death to that individual or another; \*\*\*.”

The defendant asserted at trial that he acted in self-defense and that he reasonably believed that the use of force was necessary to prevent his death or great bodily harm to him. In order to establish that a defendant's actions are justified under the theory of self-defense, a defendant must show: (1) there was unlawful force threatened against him; (2) he was not the aggressor; (3) there was an imminent danger of harm to him; (4) the use of force was necessary; (5) he actually believed the danger

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<sup>1</sup>We note that the defendant attempted to include a Google map of the crime scene altered with added references to the evidence. This map, which was not part of the record at trial, was stricken from the defendant's brief by order of our court on August 31, 2010, and we have not considered it in this appeal.

required the use of the force he applied; and (6) those beliefs were objectively reasonable. 720 ILCS 5/7-1(a) (West 2002); *People v. Lee*, 213 Ill. 2d 218, 225, 821 N.E. 2d 307, 311 (2004). Once a defendant has raised the affirmative defense, the State has the burden of proving that the defendant did not act in self-defense, in addition to proving the elements of the crime for which the defendant is charged. *People v. Young*, 347 Ill. App. 3d 909, 920, 807 N.E.2d 1125, 1134 (2004). If the State is able to negate any of the elements of the affirmative defense, then the defendant's claim of self-defense must fail. *Id.*

We note that when a defendant raises the question of the sufficiency of the trial evidence, a reviewing court must examine the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v. Elliott*, 337 Ill. App. 3d 275, 280, 785 N.E.2d 545, 549 (2003). In this case, the trial judge was the trier of fact and was able to judge the credibility of the witnesses and view the evidence presented. We will not retry the defendant, but will defer to the trier of fact as to the reasonable inferences from the evidence and the weight and credibility of the witnesses. *People v. Jones*, 337 Ill. App. 3d 546, 555, 786 N.E.2d 243, 250-51 (2003).

In this case, the only testimony which the defendant presented at trial that he was acting in self-defense when he shot the two victims was his own. Eyewitnesses Gomez, Gonzales, Iser and Vega all testified that they did not hear any shots being fired prior to the ones fired by the defendant. The trial court found that the physical evidence of the bullet casings and fragments found at the crime scene raised some questions. Even if there were questions regarding another shooter, the bullet from the defendant's gun killed at least one victim. The nature of the wound of the second

victim did not lend itself to ballistic examination. However, given the testimony of the witnesses, specifically that the defendant was the only person seen firing a gun, the trier of fact could draw a reasonable inference that the defendant was also the shooter of the second victim. The trial court found the oral testimony of the witnesses other than the defendant to be credible. Further, the fact that there may have been two shooters does not absolve the defendant of guilt in light of the credible testimony of the other witnesses. A review of the record shows that the State presented sufficient evidence to refute the element of self-defense. Thus, we will not disturb the trial court's guilty finding.

The second issue that the defendant raises is that this court should reduce his convictions to two counts of second degree murder. That offense is applicable where a defendant commits the offense of first degree murder but "[a]t the time of the killing, he believes the circumstances to be such that, if they existed, would justify or exonerate the killing \*\*\* but his belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2002). When a defendant argues that an appellate court should reduce his conviction to second degree murder from first degree murder based on the existence of a mitigating factor, the standard of review is whether, after the court reviews the evidence in the light most favorable to the State, any rational trier of fact could have found that the mitigating factor did not exist. *People v. Blackwell*, 171 Ill. 2d 338, 357-58, 665 N.E.2d 782, 790 (1996).

As discussed, the trial court rejected the defendant's version of events based upon the testimony of the witnesses and the evidence presented at trial. After our review of the record in the light most favorable to the State, we find that a rational trier of fact could determine that the mitigating factors to warrant a reduction of the defendant's convictions do not exist. Therefore,

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since the record supports the conclusions made by the trier of fact, we affirm the judgment of the circuit court of Cook County.

Affirmed.