2012 IL App (1st) 102312-U

SECOND DIVISION
May 8, 2012

No. 1-10-2312

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. 09 CR 11653
	)	
IAN VALENCIA,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The State presented sufficient evidence to prove defendant's specific intent to kill beyond a reasonable doubt where defendant admitted to getting into an altercation with victim over gang affiliation and then shooting at victim at least five times from a distance of approximately one-half block from victim. The trial court's judgment finding defendant guilty of attempted first degree murder is affirmed.

¶ 2 Following a bench trial, defendant Ian Valencia was found guilty of two counts of attempted first degree murder and one count of aggravated discharge of a firearm. Defendant was sentenced to 6 years' imprisonment for attempted murder, enhanced by a 20-year term for personally discharging a firearm during the commission of the offense. On appeal, defendant

contends that the State failed to prove him guilty of attempted murder because it failed to prove specific intent to kill beyond a reasonable doubt. We affirm.

¶ 3 At trial, Nelson Villagomez testified that on June 11, 2009, at approximately 4:45 p.m., he and his brother, Freddie Villagomez, began walking home from the bus stop located near their apartment at 4130 North Kimball. As they walked northbound on Kimball, Nelson noticed a gray Oldsmobile with a man, later identified as defendant, in the passenger seat and another man, later identified as Walter Quevedo, in the driver's seat. The car pulled up alongside Nelson and Freddie.

¶ 4 According to Nelson, defendant "started gang banging" to Nelson and Freddie. Specifically, defendant "rolled up next to [them]," said "royal" and "threw up a gang sign." Defendant was looking at Nelson when he threw up the gang sign. In response, Nelson told defendant he did not care and that he was not gang banging. Nelson further told defendant, "I don't give a fuck what you want to do." This encounter lasted approximately 10 seconds. Nelson and Freddie were not carrying any weapons and did not make any motions towards the Oldsmobile. Although Nelson knew that the "royal" street gang existed in that area, Nelson had no connection with the royal gang, or any other gang.

¶ 5 Freddie walked ahead of Nelson as they crossed the street. Freddie was a couple of steps from their front door when Nelson observed the Oldsmobile parked in an alley, about half a block from his home. Nelson testified on cross-examination that defendant was parked a couple hundred feet away. With both arms raised and his palms up, Nelson looked directly at the Oldsmobile and said to defendant, "What you want to do?" As defendant was seated in the passenger seat, Nelson observed defendant's hand come out of the passenger window, saw flames from the gun, and heard approximately six gunshots. Nelson heard two to three gunshots before he dropped to the ground. Defendant was shooting in Nelson's direction.

¶ 6 When the shooting stopped, Nelson got up from the ground, checked to make sure his brother was safe, and then called the police from a cellular phone to report the shooting. The police arrived within a few minutes and took Nelson and Freddie to Wilson Avenue, where defendant and Quevedo were in police custody. They positively identified defendant as the passenger and the shooter, and Quevedo as the driver.

¶ 7 Freddie Villagomez testified that as he and Nelson walked home from the bus stop, defendant and Quevedo pulled alongside them in a gray Oldsmobile. Defendant started "throwing gang signs" at Freddie and Nelson. Freddie did not know what gang sign defendant was representing with his hand gesture and could not remember what defendant yelled as he threw the gang sign. Freddie kept waving his hands and telling defendant he was not a gang banger. Freddie heard his brother saying something to defendant, but could not remember what Nelson said. Nelson then told Freddie to cross the street and Freddie crossed Kimball towards the door of their apartment. At that time, Freddie heard five to six gunshots coming from an alley across the street. He did not turn to see where the gunshots were coming from, but instead ran inside the door of his apartment building. When he did not hear anymore gunshots, Freddie went back outside to check on his brother. Freddie identified defendant and Quevedo at a show-up approximately 10 minutes after the shooting.

¶ 8 Officer John Becker testified that he was working with his partner Officer Valentine and Sergeant Daniels and responded to a radio dispatch of a shooting on North Kimball. Becker, Valentine, and Daniels arrested defendant and Quevedo after receiving confirmation via radio transmission that Nelson and Freddie positively identified defendant as the shooter and Quevedo as the driver of the Oldsmobile. Defendant and Quevedo were arrested and given *Miranda* warnings. Becker then searched the Oldsmobile and found a semiautomatic .380-caliber Kel-Tec

handgun and two .380 caliber bullets in a hidden compartment under the glove compartment on the passenger side.

¶ 9 Becker spoke with defendant in the processing room of the 17th district police station at approximately 7:45 p.m. the night of the shooting. Daniels gave defendant *Miranda* warnings a second time. Becker testified that defendant told him and Daniels that defendant "got in an altercation with two people over a gang territory." Quevedo told defendant that there was a gun underneath the dashboard on the passenger side. Defendant retrieved the gun and "shot at" Nelson and Freddie "until the gun was empty." Defendant and Quevedo then drove away. Defendant told Becker that he did not run when the police stopped him because he did not think the police would be able to find the gun. The conversation with defendant was not written down or recorded.

¶ 10 Amy Campbell, an evidence technician, testified that she found five expended shell casings at the mouth of the alley. She also recovered a fired bullet lodged in the front siding, beneath the second floor window, of the home located at 4126 North Kimball, which is next door to Nelson and Freddie's apartment building. Additionally, Campbell recovered a fired bullet from the flower bed located in front of the brothers' apartment building. Tonia Brubaker, forensic scientist specializing in the field of firearms identification, concluded within a reasonable degree of scientific certainty during her testimony that the five shell casings and the two fired bullets all came from the gun found in the Oldsmobile.

¶ 11 The court found the testimony of the State's witnesses credible, including Becker who testified that defendant admitted he was the shooter. The court concluded that defendant intended to kill Nelson Villagomez and found:

> "One shot could be attempt murder. Might not be. Might be a warning. Might be something else. Two shots, three, four,

> five -- five shots. All in the direction of Nelson Villagomez and all with the intent to kill him. Fortunately, he dove down. He avoided being killed.
>
> The distance doesn't change the intent. The fact that he was less likely to be successful doesn't change the intent to kill. The intent is when you pull a gun and fire it five separate times at an unarmed individual who did nothing more than raise his arms and say he is not in a gang. He doesn't want any part of a gang."

¶ 12 Defendant acknowledges that he shot at the Villagomez brothers, thus conceding that his conviction for aggravated discharge of a firearm should stand. However, on appeal, defendant contends that his attempted murder conviction should be reversed because the State failed to prove beyond a reasonable doubt that he acted with the specific intent to kill.

¶ 13 In a bench trial, the trial judge determines witness credibility, weighs evidence, draws reasonable inferences from the evidence, and resolves conflicts in the evidence. *People v. Slim*, 127 Ill. 2d 302, 306 (1989). When reviewing a challenge to the sufficiency of the evidence, this court views the evidence in the light most favorable to the prosecution, and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Valentin*, 347 Ill. App. 3d 946, 951 (2004). This court will not set aside the trial court's judgment "unless the proof is so unsatisfactory, improbable or implausible as to justify a reasonable doubt as to the defendant's guilt." *Slim*, 127 Ill. 2d at 306.

¶ 14 To sustain a conviction of attempted murder, the State must prove beyond a reasonable doubt that defendant, with the specific intent to kill, committed any act which constitutes a substantial step toward the commission of murder. *Valentin*, 347 Ill. App. 3d at 951; see also 720 ILCS 5/8–4 (West 2010); and 720 ILCS 5/9-1(a)(1) (West 2011). In the case at bar,

defendant only challenges the sufficiency of the evidence with respect to the specific intent to kill element of attempted murder.

¶ 15 Whether defendant had the specific intent to kill Nelson Villagomez is a question of fact to be determined by the trier of fact. *Valentin*, 347 Ill.App.3d at 951. Intent can be inferred from the surrounding circumstances, such as the character of the attack, use of a deadly weapon, and the severity of injury. *Id.* Courts have also considered the number of shots, range, and the general target area in assessing intent. *People v. Bryant*, 123 Ill. App. 3d 266, 274 (1984). "[I]ntent 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. Barnes*, 364 Ill. App. 3d 888, 896 (2006). "To sustain a charge of attempted murder, it is sufficient to discharge a weapon in the direction of another individual, either with malice or total disregard for human life." *Id.* This court has explained that "[t]he very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill." *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001); see also *Barnes*, 364 Ill. App. 3d at 896 (concluding that the defendant's firing several shots at a group of men and striking two of them, was sufficient to support an attempted murder conviction); and *People v. Bailey*, 265 Ill. App. 3d 262, 273 (1994) (holding that shooting down a breezeway in which several people were running is sufficient to prove specific intent to kill beyond a reasonable doubt).

¶ 16 Here, we find sufficient evidence of defendant's intent to kill Nelson. Defendant had an altercation with the Villagomez brothers regarding their gang affiliation or lack thereof. Immediately thereafter defendant positioned himself near the brothers' apartment, and opened fire repeatedly with a handgun. Defendant argues if he intended to kill the Villagomez brothers he would have exited the car and moved closer, or propped his arms against the car to improve his aim. However, poor marksmanship is not a defense to attempted murder, and it was for the trier

of fact to determine whether defendant lacked an intent to kill or was simply unskilled with a handgun. See *People v. Green*, 339 Ill. App. 3d 443, 451-52 (2003).

¶ 17 Defendant contends that *People v. Linton*, Ill. App. 3d 389 (1993), stands for the proposition that distance can be important when assessing whether the State proved attempted murder. However, in *Linton*, this court concluded that it appeared the jury weighed distance as one of *several* factors. *Id.* at 397. This court did not hold that distance was the dispositive factor. Further, it is the trier of fact's responsibility to decide which competing inference to draw from the evidence that defendant was approximately one-half block away from Nelson when defendant opened fire at Nelson and Freddie. *Green*, 339 Ill. App. 3d at 452. The trial court in this case found that defendant's intent was evident from the fact that he pulled a gun and fired it five times at Nelson in response to Nelson challenging defendant. The fact that defendant missed his target does not mean he merely fired warning shots. This court will not reverse the trial court's finding of intent solely because defendant opened fire from a half block away from Nelson, where the surrounding circumstances evince intent. As the trial court explained, the fact that defendant was less likely to be successful does not change his intent to kill.

¶ 18 Moreover, as the court explained in *Ephraim*, "the very fact of firing a gun *at a person*" supports the conclusion that the shooter acted with the intent to kill. (Emphasis added.) *Ephraim*, 323 Ill. App. 3d at 1110. There is no dispute that defendant fired a gun at least five times at Nelson and Freddie. Contrary to defendant's contention, his target area was not so broad as to disprove intent. A fired bullet was found lodged in the front of the next door neighbor's house, beneath the second floor window. Another fired bullet was found lodged in the flower bed in front of Nelson's home. The record reveals that Nelson stood in front of his home when defendant began firing. The fired bullets were recovered in the area where Nelson stood and subsequently dove to the ground. Although the State did not establish exactly how closely any of

the bullets actually came to hitting Nelson, the bullets and defendant's admission of shooting at the Villagomez brothers show that at the very least, defendant fired a gun in their direction with total disregard for their lives. See *Barnes*, 364 Ill. App. 3d at 896.

¶ 19 In light of the strong evidence of intent, we cannot conclude that no rational trier of fact would have found a specific intent to kill beyond a reasonable doubt.

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

¶ 21 Affirmed.