

2013 IL App (1st) 111072-U

SIXTH DIVISION  
June 7, 2013

No. 1-11-1072

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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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. 07 CR 25180
	)	
KIRK HORSHAW,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Gordon concurred in the judgment.

**ORDER**

¶ 1 *Held:* The evidence, viewed in the light most favorable to the prosecution, was sufficient to sustain defendant's conviction for attempted first degree murder.

¶ 2 Following a bench trial, defendant Kirk Horshaw was convicted of first degree murder and attempted first degree murder and was sentenced to consecutive terms of 40 and 26 years in prison, respectively. On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt of attempted first degree murder where the evidence of that crime came almost

exclusively from the alleged victim's own prior statements, which he disavowed on the stand, and which conflicted with the testimony of the State's other witnesses.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of May 7, 2002. On that date, Aaron Crawford was shot and killed. According to the State's theory of the case, Daniel Wesley was also shot at during the same time frame. In contrast, under defendant's theory, no shots were fired at Wesley. Defendant and Chancellor Aaron were charged with murdering Crawford and attempting to murder Wesley. Aaron was convicted of Crawford's murder several years before defendant went to trial; the State dismissed the charge of attempted murder during Aaron's trial. Aaron is not party to the instant appeal.

¶ 5 At defendant's trial, Jamaine Williams testified at the time of the shooting, the Black Disciples and Gangster Disciples were at war. He, Crawford, and Wesley were Black Disciples, while defendant and Aaron were Gangster Disciples. Around 8:30 or 9 p.m. on the day in question, Williams was walking along 71st Street when he saw Crawford on one side of the street and defendant, Aaron, and a third man standing in the vacant lot across the street. Defendant and Aaron had on black jogging suits. Wesley was also "right there," within 15 feet of Crawford. Crawford was arguing with the group across the street. Among other things, Williams heard Crawford say, "You all going to shoot, shoot." Williams started jogging toward Crawford. When he was about 15 feet from Crawford and right by Wesley, defendant and Aaron pulled out guns and started shooting. He heard at least 10 to 20 shots fired. Williams testified that defendant had a gun with a long clip, either a Tech 9 or a .45, while Aaron either had a 9 millimeter with a long clip or a .45.

¶ 6 Williams testified that Crawford ran in one direction, while he and Wesley ran in another. Williams and Wesley took shelter in a building. When Williams peeked out, he saw Crawford

lying on the ground. Defendant and Aaron had fled from the area. Williams went to Crawford, who was crying and said he could not feel his legs. Shortly thereafter, a woman pulled up in a car, he and Wesley lifted Crawford into the back seat, and they drove to the emergency room.

¶ 7 Williams testified that he talked to the police later that night and went to the police station the next day. He told the police that defendant and Aaron shot Crawford, and identified defendant and Aaron in a photo array.

¶ 8 On cross-examination, Williams acknowledged that the shooting itself took only about two minutes. When asked whether his observation of the shooters was also that short, he stated, "Basically. Meaning I seen, I know who was shooting at me, too." When asked whether he saw anyone come out of a nearby laundromat, he answered, "I ain't paying no attention to that when somebody shooting at you."

¶ 9 Donnell Russell testified that in 2004, he was arrested for possession of cannabis. At the police station, he told officers that he had information about the May 7, 2002, shooting. Eventually, he spoke with some detectives. Russell told the detectives that on September 6, 2002, he and defendant were driving around, looking to buy marijuana. Russell had not seen defendant for a while and asked him where he had been. In response, defendant said he had been "laying low" because he and Aaron had been involved in a shooting. Defendant related to Russell that he "caught somebody who shot at him earlier. And when, you know, him and his friend, they seen the guy, he looked at them, they start shooting."

¶ 10 Tiffany Vining<sup>1</sup> testified that at the time of the shooting, she was "on drugs, hanging on the street." She did not remember whether she witnessed the shooting or whether she spoke with the police about it. However, she acknowledged her signature on a written statement dated July

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<sup>1</sup>This witness testified that she is also known as Tiffany Morgan; both names appear in the record.

2002. In the statement, which was admitted substantively under section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2010), Vining stated that around 9 p.m. on the night in question, she saw Crawford arguing with defendant, Aaron, and a third man she did not know. Aaron pulled out a gun and acted like he was going to shoot Crawford. Then defendant, Aaron, and the third man walked across the street toward a vacant lot. Once across the street, defendant also pulled out a gun, and he and Aaron started shooting at Crawford. Vining ran into the nearby laundromat, waited to be sure there was no more shooting, and then fled the scene. About two days after the shooting, defendant's brother approached her and asked her whether she had told the police what she saw. Vining told him she had not. About a week later, defendant's brother approached her son before school and told him Vining was "going to get harmed and [get] him killed because she was a witness to the shooting."

¶ 11 Daniel Wesley, the attempted murder victim, testified that he was currently incarcerated in Minnesota for aggravated robbery and that he had two prior convictions in Illinois for unlawful use of a weapon. Wesley stated that on the day of the shooting, he had been drinking and smoking marijuana. About 9 p.m. that night, he was outside the laundromat on 71st Street when he heard shots. He saw Crawford on the ground and ran. According to Wesley, Williams did not run with him. Wesley sheltered in a gangway until the shooting stopped and then returned to Crawford. When Crawford's girlfriend arrived in a car, Wesley and Williams lifted him into it and accompanied him to the hospital. After leaving the hospital, Wesley and Williams went to a restaurant back near the scene of the shooting. While Wesley was ordering food, some police detectives arrived, saw the blood on Williams' shirt, and started asking questions. Wesley testified that he told the detectives he did not know anything, and the detectives thereafter took him to the police station.

¶ 12 According to Wesley's testimony, the detectives, who were African-American, put him and Williams in different rooms and forced him to identify shooters photographs from an array. Wesley acknowledged that he identified defendant and Aaron, but explained, "Yeah, I identified, but it was script." Wesley stated, "I mean they really was doing trying to pick my brain for something that I didn't know. When you are getting shot at, you don't really, who is that shooting? You are trying to get away. You are not really trying to see who is shooting at you, man." Wesley stated that at the time he spoke to the detectives, he was drunk and high, did not know what he was saying, and was just trying to get out of the police station.

¶ 13 Wesley acknowledged his signature on a written statement dated April 12, 2003, about a year after the shooting. In the written statement, which was admitted substantively under section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2010), Wesley related that at the time of the shooting, he, Crawford, and Williams were members of the Black Disciples, while defendant and Aaron were members of the Gangster Disciples. According to Wesley, the gangs were rivals and were "at war" at the time. Around 9 p.m. on the night in question, Wesley was on 71st Street, not far from Crawford and Williams, when he heard Crawford say, "Check it out." Wesley turned and saw three men standing in a vacant lot across the street from Crawford: defendant, Aaron, and a third man he did not recognize and could not see well, as he was standing back from the other two. Defendant, who was dressed in black, pulled a gun with a long clip from his waistband. Aaron, also in black, pulled a gun as well.

¶ 14 Wesley related in his written statement that when he saw the guns, he yelled to Crawford to run. Wesley ran toward an entrance to a building. As he ran, he saw defendant point his gun at Crawford and start shooting. He also saw Aaron "pointing his gun and shooting at him as he ran toward the entrance to the building." Wesley went into the building and heard 10 to 15 shots.

When the shooting stopped, Williams came into the building. Then the two men went back outside and found Crawford lying on the sidewalk. Shortly thereafter, Crawford's girlfriend pulled up in her car. Wesley and Williams put Crawford into the car and rode with him to the hospital.

¶ 15 At trial, Wesley testified that detectives or a State's Attorney forced him to make the above written statement, explaining as follows:

"Yeah. I mean, yeah I told them from what -- they was trying to make me say that I seen who it was.

I was telling them what I just told you about me getting shot at and running up the block. They was saying trying to force me with this same pictures that you just showed me the lineup saying that they had caught these two right here and trying to, basically, make me say that them was the people -- make me say that I seen them.

And after a while of going through that, I got tired of going through it. You know what I'm saying."

Wesley denied saying much of what was included in the statement. Among other things, he denied saying that he saw Aaron pointing a gun and shooting at him as he ran toward the entrance of a building.

¶ 16 Wesley acknowledged that he testified in front of a grand jury on May 1, 2003, less than a month after he made the above written statement, but stated that he did not remember the substance of his testimony. A transcript of the grand jury testimony was admitted substantively under section 115-10.1 of the Code. 725 ILCS 5/115-10.1 (West 2010). The transcript reveals that before the grand jury, Wesley testified that on the night in question, he was on 71st Street

when Crawford called to him and told him to look across the street. There, in a vacant lot, Wesley saw defendant and Aaron, who were both dressed in black, pulling guns from their waistbands. Wesley testified, "As I seen them pulling the gun, I get to running. And then the shots took place and they get to shooting at us." As Wesley ran into a building, he glanced back and saw both defendant and Aaron shooting. All together, Wesley heard about 15 or 20 shots. When the shots ended, Williams, who had been at a nearby restaurant, joined Wesley. Wesley peeked out and saw Crawford lying on the ground. He and Williams went back to Crawford. When Crawford's girlfriend arrived in a car, they lifted him into the car and rode with him to the hospital. Wesley further testified before the grand jury that he had given a written statement on April 12, 2003. He identified the statement and testified that he signed it because everything written in it was true.

¶ 17 At defendant's trial, Wesley further acknowledged that he testified at Aaron's trial on September 7, 2006. He admitted that his testimony at Aaron's trial differed from his current testimony, and asserted that his earlier testimony was "all a script" and that he had lied under oath. The transcript of Wesley's testimony at Aaron's trial was admitted substantively under section 115-10.1 of the Code. 725 ILCS 5/115-10.1 (West 2010). The transcript reveals that Wesley testified he, Crawford, and Williams were Black Disciples, while defendant and Aaron were Gangster Disciples, and that at the time, there was "tension in the air" between the two gangs. Wesley related that on the day of the shooting, he had been drinking and smoking marijuana. That night, he was down the street from Crawford when he heard Crawford call his name. Wesley looked up and saw two men dressed in black -- defendant and Aaron -- directly across the street, and a third man a little farther away. Crawford started arguing with defendant, who pulled a gun from his waistband. Wesley testified that when he saw the gun, he started running. He saw both defendant and Aaron shooting guns. Wesley ran into a building, and

Williams ran in right behind him. After about 10 or 11 shots, the shooting stopped, Wesley came out of the hallway, and saw Crawford lying on the ground. Crawford's girlfriend pulled up in a car. Wesley and Williams lifted Crawford into the back seat and rode with him to the hospital. After dropping Crawford off, Crawford's girlfriend drove Wesley and Williams back to a restaurant near where the shooting had taken place. The police arrived and took Wesley to the station. There, he told the police what had happened. Wesley also stated that he gave the police a written statement in April 2003 and testified before a grand jury in May 2003.

¶ 18 At Aaron's trial, Wesley testified that on December 11, 2004, Aaron's brother approached him in a car and told Wesley that he needed to talk with Aaron's lawyer. At the brother's direction, Wesley got in the car and went to the lawyer's office. There, Wesley told the lawyer that Aaron was not one of the shooters. Wesley explained, "[T]his was what his brother wanted me to say in his defense, so that he can beat the case. And I didn't want to not cooperate with, even though he wasn't even in the room, because I got a ride back with him back to get dropped off. So, I cooperated just so I could be out of harm's way." Wesley identified a typed statement that he had signed at the lawyer's office. He testified that although the statement indicated Aaron was not one of the shooters, that statement was not the truth.

¶ 19 Finally, Wesley testified at defendant's trial that he gave a statement to Aaron's attorneys on December 11, 2004. Wesley acknowledged telling Aaron's attorneys that he could not identify the shooters. He also told the attorneys that he was forced to give a written statement and grand jury testimony. In a written statement provided to the attorneys, Wesley stated that just before the shooting, Crawford called his name. Wesley turned and saw two men. In the written statement, Wesley related, "Both men began to fire guns in our direction. I turned and ran." According to Wesley's statement, he saw the shooters' faces, but neither of the shooters was Aaron.



¶ 20 Chicago police detective John Fassl testified that on the night of the shooting, he and his partner interviewed Wesley and Williams at the police station. Neither of the detectives was African-American. Wesley related that he had been standing on 71st Street with Williams and Crawford when he noticed defendant, Aaron, and a third man on the other side of the street, and that "those offenders" opened fire in their direction. Wesley thereafter identified defendant and Aaron in a photo array. Detective Fassl denied that Wesley was given a script, directed what to say, or told whom to identify.

¶ 21 Chicago police officer Ware testified that the day after the shooting, he and his partner received a call reporting a car that may have been involved in the crime. Officer Ware and his partner went to the reported location, saw the car, and attempted to pull it over. During a chase, defendant and Aaron jumped from the car, which then crashed into a tree. After the crash, the driver, identified as Ricardo Martin, got out of the car as well. Officer Ware and his partner chased Martin, who discarded a loaded Tech 9 millimeter handgun as he fled. Martin was apprehended by assisting officers.

¶ 22 Defendant presented four alibi witnesses who testified that he was in Georgia on the day of the shooting and served as a pallbearer at a funeral that took place the following day. The defense introduced into evidence a program from the funeral, listing the date and naming defendant as a pallbearer.

¶ 23 The trial court convicted defendant of the first degree murder of Crawford and the attempted first degree murder of Wesley. Subsequently, the trial court sentenced defendant to consecutive terms of 40 and 26 years in prison, respectively.

¶ 24 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of the attempted first degree murder of Wesley where the evidence of that crime came almost exclusively from Wesley's prior statements, which he disavowed on the stand, and

which conflicted with the testimony of the State's other witnesses. Defendant argues that the testimony of the other witnesses -- Williams, Vining, and Russell -- established that the shooting arose from an argument between the shooters and Crawford, that Crawford was the shooters' sole target, and that Wesley was 15 feet away from Crawford when Crawford was shot. He asserts that there was no indication that anyone ever shot at Wesley. Defendant maintains that Wesley had no credibility as a witness due to recanting his prior statements, telling Aaron's attorneys that he could not identify the shooters, and admitting to having been drinking and smoking marijuana before the shooting.

¶ 25 When reviewing the sufficiency of the evidence, the relevant inquiry 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). These standards apply even where a defendant has been convicted on the basis of a recanted prior inconsistent statement. *People v. Zizzo*, 301 Ill. App. 3d 481, 489 (1998).

¶ 26 In the instant case, we find that the evidence was sufficient to convict defendant of attempted murder. Wesley made several statements that indicated someone fired shots at him, not just at Crawford. First, in his written statement, Wesley stated that he saw Aaron "pointing his gun and shooting at him as he ran toward the entrance to the building." Second, at defendant's trial, he explained that when he made the written statement, "I was telling them what

I just told you about me getting shot at and running up the block." Third, in his grand jury testimony, Wesley stated, "As I seen them pulling the gun, I get to running. And then the shots took place and they get to shooting at us." Fourth, in the written statement he gave to Aaron's attorneys, Wesley stated, "Both men began to fire guns in our direction." And finally, at defendant's trial, Wesley testified, "When you are getting shot at, you don't really, who is that shooting? You are trying to get away. You are not really trying to see who is shooting at you, man."

¶ 27 In addition, Wesley's statements were partially corroborated by Williams. At defendant's trial, Williams stated that he and Wesley fled together when the shooting started. When Williams was asked about his opportunity to observe the shooters, he said, "I seen, I know who was shooting at me, too." Then, when asked whether he saw anyone come out of the laundromat, he answered, "I ain't paying no attention to that when somebody shooting at you." Thus, Williams' testimony indicated that some shots were aimed not just at Crawford, but also in the direction of Williams and Wesley.

¶ 28 Here, the trial court apparently found Wesley's statements that shots were fired in his direction to be credible. We will not substitute our judgment for the trial court's on such a credibility determination. See *Brooks*, 187 Ill. 2d at 131. Wesley's statements, especially when combined with Williams', were sufficient to sustain defendant's conviction for attempted murder. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

¶ 29 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.