

THIRD DIVISION
February 18, 2015

No. 1-13-0142

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).

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. 11 CR 9763
)	
ANDRE ALTMAN,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Evidence sufficient to convict defendant of aggravated discharge of a firearm. Defendant is subject to sentence credit of no more than 4.5 days per month of his prison sentence. Mittimus corrected regarding pre-sentencing detention credit.
- ¶ 2 Following a bench trial, defendant Andre Altman was convicted of aggravated discharge of a firearm and sentenced to eight and one-half years' imprisonment. On appeal, defendant contends that the evidence was insufficient to convict him beyond a reasonable doubt. He also contends that there is a conflict, which should be resolved in his favor, in the statutes governing

sentence credit for aggravated discharge of a weapon. The parties agree that the mittimus should be corrected to properly reflect his pre-sentencing detention credit.

¶ 3 Defendant was charged with attempted first degree murder and aggravated discharge of a firearm for personally discharging a firearm in the direction of Constancio Benitez on December 23, 2010. He was also charged with armed robbery for, on the same day, taking currency from Benitez by force or threat of imminent use of force and while personally discharging a firearm.

¶ 4 At trial, Priscilla Lopez testified that, as of December 2010, she worked as a secretary of a tire shop and Benitez was a fellow employee. At about 5:30 p.m. on December 23, she was working in her office, with a window overlooking the shop floor, when customers began running into her office. When she looked out, she saw a black man pointing a gun at Benitez; they were near each other and about four car lengths away from Lopez. Except that the man was holding a gun in his extended hand, she could give "no details" on the man nor describe the gun beyond that it was a handgun. Lopez looked away, heard a gunshot, then saw someone fleeing. On cross-examination, Lopez was asked if she saw "two guys or did you see one?" and replied "I saw one." She did not see anyone fighting. Lopez was interviewed by police on December 23 but denied going to the police station on a later date. When asked if the man was wearing a mask, she replied that he was.

¶ 5 Constancio Benitez testified (through an interpreter) that he worked as a tire installer in December 2010. At about 5:35 p.m. on December 23, he was servicing a customer's car when defendant and another man entered the shop. Defendant asked Benitez for a particular kind of tire, and the other man entered about two minutes later and sat down. Benitez's customer had paid him \$25 cash (a \$20 and 5 \$1 bills), which he put in his jacket pocket, and he was opening

the door so the customer could leave when the other man approached Benitez from behind, "put something on my back," and demanded the money. While this was occurring, defendant was "walking around the shop." The other man struck Benitez and tried to put his hand in Benitez's pocket, which resulted in an argument between the two of them. Defendant came to the other man's aid. Defendant was wearing a mask covering his lower face, and Benitez struck him and removed the mask. Defendant produced a small handgun from his pocket and pointed it at a female coworker of Benitez who was coming to his aid. The other man took \$21 from Benitez's pocket. When defendant and the other man heard that the police had been called, defendant stepped back and fired a single shot before he and the other man fled the shop. When the police arrived, Benitez gave them the mask.

¶ 6 On cross-examination, Benitez testified that the coworker defendant pointed his gun at was a man and not a woman. Defendant had previously sold tires to the shop. Benitez denied that he and defendant had a dispute as of December 2010, and particularly denied that he had bought tires from defendant with marijuana and that defendant complained about its quality. Benitez denied that, when he gave his initial account to police, he described the masked man as the one who took the money from his pocket, the man who pointed the gun at him as not wearing a mask, or that the mask fell off the first man. In the earlier account, he described defendant's gun as a chrome revolver with a black grip.

¶ 7 Police officer Hector Ocon testified that he and a partner responded to the report of an armed robbery. On their arrival, there were customers in the shop but Officer Ocon did not see Lopez. Officer Ocon interviewed Benitez, who gave him a mask. By Benitez's account, the first offender who took the money from him was masked but his mask fell off, and Benitez

recognized him as a customer, while the second offender fired a revolver once in his direction. Officer Ocon submitted the mask for forensic testing. When Officer Ocon searched the shop for a bullet or spent cartridge, he did not find any.

¶ 8 The parties stipulated to the effect that defendant's DNA was found on the mask recovered by Officer Ocon.

¶ 9 Detective Patrick Finucane testified that he interviewed defendant in June 2011 following his arrest. When Detective Finucane then interviewed Benitez, he gave essentially the account he gave at trial: that defendant entered the shop wearing a mask and asked him questions, another man entered the shop and sat down, the second man demanded the money from him and they struggled, defendant intervened and tried to take the money from Benitez but the other man actually removed the money, Benitez struck defendant and knocked off his mask, he recognized defendant as a previous customer, defendant produced a chrome revolver with black grip and fired a single shot towards Benitez, and defendant and the other man fled. Benitez mentioned Lopez as a potential witness, and Detective Finucane noted in his report that she had not been previously mentioned as a witness.

¶ 10 On this evidence, following the arguments of the parties, the court found defendant guilty of aggravated discharge of a firearm. The court found that defendant's DNA on the mask placed him at the scene so that the issue is whether he did there what Benitez and Lopez described. The court noted that Benitez's account to Officer Ocon "flip-flopped" the roles of defendant and the other man but was otherwise consistent, and that his account to Detective Finucane was consistent with his trial testimony. The court found Lopez credible, though noting that she was "a little late in the game," and that she mainly corroborates that a gunshot was fired. As to whether

defendant and the other man were acting in concert, the court found that it had "very strong suspicion that the two of them were actively involved in an armed robbery" but not enough evidence to convict defendant of armed robbery beyond a reasonable doubt. However, the court found that it was proven beyond a reasonable doubt that a firearm was indeed discharged and that defendant did it. The court attributed the absence of gunshot evidence to the fact that "I have never been in a clean tire shop in my life."

¶ 11 In his post-trial motion, defendant argued insufficiency of the evidence. The court denied the motion, noting that there were inconsistencies in the testimony of the State witnesses but reiterating that they were generally credible.

¶ 12 Following evidence and arguments in aggravation and mitigation, the court sentenced defendant to eight years and six months of imprisonment. The mittimus reflected 534 days of pre-sentencing detention credit. Defendant timely but unsuccessfully moved for reconsideration of his sentence, and this appeal timely followed.

¶ 13 On appeal, defendant first contends that the evidence was insufficient to convict him of aggravated discharge of a firearm beyond a reasonable doubt.

¶ 14 On a claim of insufficiency of the evidence, this court must determine whether, after taking 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. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence. *Id.* The weight of the evidence and credibility of witnesses are matters for the trier of fact, who may accept or reject as much or little of a witness's testimony as it chooses. *People v. Rouse*, 2014 IL App (1st) 121462,

¶¶ 43, 46. This court does not retry the defendant – that is, we do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses – and we accept all reasonable inferences from the record in favor of the State. *Brown*, 2013 IL 114196, ¶ 48. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Brown*, 2013 IL 114196, ¶ 48.

¶ 15 On this record, taking the evidence in the light most favorable to the State as we must, we cannot conclude that no reasonable finder of fact would convict defendant of aggravated discharge of a firearm. The mask places defendant squarely at the scene, which generally corroborates Benitez's trial identification of defendant. Benitez testified firmly that defendant produced a gun and fired a single shot towards him, and Lopez corroborated hearing a gunshot. While there were discrepancies in the testimony of Benitez and Lopez, and no physical corroboration of the gunshot, it is not unreasonable or improbable for the trial court to find their accounts generally credible.

¶ 16 Defendant also contends there is a conflict in the statutes governing sentence credit for aggravated discharge of a weapon and that said conflict should be resolved in his favor.

¶ 17 Defendant acknowledges that he did not raise this issue in the trial court but argues that we can consider the claim as a matter of plain error. The plain error doctrine allows this court to consider an otherwise-forfeited claim where there is a clear or obvious error and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Eppinger*, 2013 IL 114121, ¶ 18. The State correctly notes that the first step in plain error analysis is determining whether an error occurred at all. *Id.*, ¶ 19. For the reasons stated below, we find no error and thus no plain error.

¶ 18 Section 3-6-3 of the Code of Corrections (730 ILCS 5/3-6-3 (West 2012)) governs sentence credit, formerly known as good conduct credit. Now and in December 2010, section 3-6-3 provided and provides in relevant part:

"(iii) that a prisoner serving a sentence for home invasion, armed robbery, aggravated vehicular hijacking, aggravated discharge of a firearm, or armed violence with a category I weapon or category II weapon, *when the court has made and entered a finding *** that the conduct leading to conviction for the enumerated offense resulted in great bodily harm to a victim*, shall receive no more than 4.5 days of sentence credit for each month of his or her sentence of imprisonment;

"(iv) that a prisoner serving a sentence for aggravated discharge of a firearm, *whether or not the conduct leading to conviction for the offense resulted in great bodily harm to the victim*, shall receive no more than 4.5 days of sentence credit

for each month of his or her sentence of imprisonment." (Emphasis added.) 730

ILCS 5/3-6-3(a)(2)(iii), (iv) (West 2012).

Paragraph (iii) became effective June 19, 1998, while paragraph (iv) became effective June 23, 2005. 730 ILCS 5/3-6-3(a)(2) (West 2012). Absent these provisions, a defendant "shall receive one day of sentence credit for each day of his or her sentence of imprisonment." 730 ILCS 5/3-6-3(a)(2.1) (West 2012).

¶ 19 We agree with defendant that both paragraphs (iii) and (iv) were in effect at the time of his offense in December 2010 and that the trial court here made no finding of great bodily harm. However, defendant's contention that paragraph (iii) should apply to him, so that the lack of such a finding results in day-for-day sentence credit, rests upon lenity. The rule of lenity is that *ambiguous* criminal statutes will generally be construed in a defendant's favor, with the proviso that "the rule of lenity is subordinate to our obligation to determine legislative intent, and the rule of lenity will not be construed so rigidly as to defeat legislative intent." *People v. Gutman*, 2011 IL 110338, ¶ 12. "[W]hen the meaning of a statute becomes clear through normal rules of statutory interpretation, resort to the rule of lenity is not required." *Id.*, ¶ 33.

¶ 20 We find no ambiguity in section 3-6-3 when interpreted according to three axioms of statutory construction: the more specific statute controls over the general statute when they conflict, the more recently-enacted statute supersedes the older statute when they conflict, and we should if possible avoid rendering any portion of a statute superfluous. *People v. Chenoweth*, 2015 IL 116898, ¶ 21; *Wells Fargo Bank Minnesota, N.A. v. Envirobusiness, Inc.*, 2014 IL App (1st) 133575, ¶ 30. Paragraph (iv) took effect later than paragraph (iii), and paragraph (iv) concerns aggravated discharge of a firearm alone while paragraph (iii) concerns various offenses

including aggravated discharge of a firearm. Most importantly, defendant's interpretation would render paragraph (iv) superfluous in its entirety, while applying paragraph (iv) would not render paragraph (iii) superfluous as it still applies to all offenses listed therein except aggravated discharge of a firearm. We conclude that section 3-6-3(a)(2)(iv) governs sentence credit for aggravated discharge of a firearm and provides that defendant shall receive no more than 4.5 days of sentence credit for each month of his prison sentence.

¶ 21 Lastly, the parties agree that defendant's mittimus should be corrected to properly reflect his pre-sentencing detention credit. The parties are correct: 567 days passed from defendant's arrest on May 26, 2011, to his sentencing on December 13, 2012, rather than the 534 days stated on the mittimus.

¶ 22 Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the mittimus to reflect 567 days' credit for pre-sentencing detention. The judgment of the circuit court is otherwise affirmed.

¶ 23 Affirmed; mittimus corrected.