2016 IL App (1st) 132788-U

No. 1-13-2788

FIFTH DIVISION
March 25, 2016
Modified Upon Denial of Rehearing November 4, 2016



---

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. 10 CR 5086 |
| DERANDAL LESTER, | ) | |
| | ) | |
| Defendant-Appellant. | ) | The Honorable |
| | ) | Timothy Joseph Joyce, |
| | ) | Judge Presiding. |

---

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

## ORDER

¶ 1 *HELD*: The trial court abused its discretion in refusing to submit defendant's requested jury instruction on reckless conduct as a lesser-included offense of aggravated battery with a firearm.

¶ 2 Following a jury trial, defendant, DeRandal Lester, was found guilty of aggravated battery with a firearm. Defendant was sentenced to eight years' imprisonment. On appeal, defendant contends: (1) the trial court erred in failing to instruct the jury on reckless conduct as a lesser-included offense; (2) the State made prejudicial comments during opening and closing remarks, as well as during defendant's cross-examination; (3) the trial court improperly assessed a number of fines, fees, and costs; and (4) his mittimus must be corrected to properly represent the spelling of his name and to accurately reflect the number of days received of presentence detention credit. Based on the following, we reverse defendant's conviction and remand this case for a new trial.

¶ 3 BACKGROUND

¶ 4 The evidence adduced at trial demonstrated that defendant and Joshua Ziemer were business partners wherein they bought used cars and car parts and sold them for a profit. The men conducted their business in a rented parking lot located at 450 N. Cicero Avenue in Chicago, Illinois. In late 2009, however, defendant and Ziemer had several disagreements. Then, on February 2, 2010, at approximately 3 p.m., the men were at their business parking lot when they began another disagreement. A physical altercation ensued, but the men were separated. After separating, defendant left the area on foot. Defendant lived approximately one half of a block away from the parking lot. Upon his return a couple of minutes later, defendant removed a handgun from his backpack, pointed the gun in Ziemer's direction, and pulled the trigger. Ziemer was struck by three bullets, two in his leg and one in his stomach. Ziemer, however, was able to run to a car dealership across the street to have the police called. Ziemer told the responding police officer that he had been shot by defendant. Defendant was arrested and provided a statement to the police inculpating himself in the offense.

¶ 5 Ziemer testified at trial that he was 26 years old. He was raised in Naperville, Illinois. Ziemer described himself as 6 feet 2 inches tall and weighing 240 pounds. Ziemer described defendant as 5 feet 9 inches tall and weighing approximately 140 pounds. Ziemer acknowledged his prior convictions for aggravated battery and misdemeanor theft.

¶ 6 According to Ziemer, he and defendant met *vis a vis* a newspaper advertisement a few years prior to the date in question. The pair began conducting their car and car parts resale business on an informal level, sharing expenses and profits equally. Ziemer stated that they also continued to conduct deals independently. Ziemer testified that in late 2009 the pair argued because he crashed defendant's motorcycle and never fixed it and because he sold a car for $50 less than defendant requested for the vehicle.

¶ 7 Ziemer stated that, on the date in question, he, defendant, and defendant's friend were at their business parking lot. Ziemer and defendant began a verbal argument over the sale price of a new vehicle. According to Ziemer, defendant approached him within inches of his face. In response, Ziemer instructed defendant to back away. Defendant, however, shoved Ziemer; Ziemer shoved defendant in return. Ziemer then punched defendant in the face one or two times, but he stated that no one was injured. According to Ziemer, defendant's friend separated the pair and defendant said, "I've got something for you, I'll be back" before leaving on foot.

¶ 8 Ziemer stated that he prepared to leave the parking lot, but, within two minutes, defendant returned in his van. Defendant exited the van wearing the backpack he typically wore to his FedEx job. Defendant was approximately 30 feet from Ziemer when he pulled a handgun from the backpack. Ziemer exclaimed, "what the f***." According to Ziemer, defendant raised and straightened his arm and began shooting directly at Ziemer. Ziemer denied having a handgun on his person at the time. Ziemer approximated that five gunshots were fired. He was

struck by three bullets. In response, Ziemer ran to a car dealership across the street and asked someone to call 911. When the police arrived approximately one minute later, Ziemer told the officers that he had been shot by defendant and provided defendant's address and a description of defendant's car. After speaking to the police, Ziemer was transported to the hospital by ambulance.

¶ 9 On cross-examination, Ziemer denied having previously told the State that defendant said he was going to return to the parking lot with a gun. The parties, however, agreed to stipulate that Ziemer made that statement to the State on February 22, 2013. The parties further agreed to stipulate that Ziemer testified at a preliminary hearing on March 9, 2010, that defendant told him, "he was going to be back and he had something for me."

¶ 10 Efrain Roman testified that he worked as a used car salesman at United Auto Group near 450 N. Cicero Avenue. At approximately 3 p.m. on the date in question, Roman heard someone outside his office yelling for help. When Roman exited the building, he observed Ziemer. Ziemer reported that he had been shot and lifted his shirt to show Roman a bullet hole in his stomach. Roman did not observe a weapon in Ziemer's hands or on his body. Roman called 911 and waited until the authorities arrived.

¶ 11 Officer Kevin Kelly testified that he responded to a call regarding a shooting at the location in question. Officer Kelly spoke to Ziemer and learned he had been shot by defendant. Based on the information Ziemer provided, Officer Kelly proceeded to defendant's address and observed defendant's car parked outside. Defendant was arrested inside the house.

¶ 12 Detective Adam Katz testified that he and Detective Neal McLoughlin interviewed defendant at the police station on February 2, 2010, at approximately 5:50 p.m. During the interview, defendant admitted that he shot Ziemer after an argument. Defendant also revealed

that the handgun used in the shooting was in the attic of his house. Defendant signed a consent-to-search form permitting the detectives to search his house. Detective Katz and two other officers proceeded to defendant's house where defendant's wife completed a second consent-to-search form. Once inside, the officers found a .380 semi-automatic pistol underneath a board in the attic, which was accessible via a door and ladder in the kitchen ceiling. Detective Katz testified that the attic was located within an arm's reach of the rear access door to the house. The recovered weapon was loaded with one bullet in the chamber and four bullets in the magazine. The weapon was capable of holding eight live rounds.

¶ 13 Detective McLoughlin testified that defendant waived his *Miranda* rights and provided the police with three statements, two verbal and one written. In the first statement, defendant stated that he argued with Ziemer regarding a discrepancy over money Ziemer owed defendant. After the argument, defendant walked home and met with Mike, whom he informed about the argument. Mike then gave defendant a pistol. Defendant stated that he took the pistol and returned to the business parking lot where he shot Ziemer. Defendant did not state that Ziemer had a gun or threatened to kill defendant.

¶ 14 According to Detective McLoughlin, in defendant's second statement, he indicated that he invented the individual named Mike. Defendant instead stated that he retrieved the pistol from his house himself, drove his van back to the parking lot, and shot Ziemer. Defendant, however, added that another individual returned the pistol to defendant's house after the shooting, calling defendant to tell him where it was located. Defendant did not state that Ziemer had a gun or threatened to kill him. After the second verbal statement, defendant agreed to provide a written statement.

¶ 15 In his written statement, defendant stated that he lived with his wife and daughter and worked at FedEx. Defendant provided that he and Ziemer had been friends and work partners for several years and had been selling cars together for about one year from a parking lot located at Ferdinand Street and Cicero Avenue. According to the written statement, on February 2, 2010, defendant and Ziemer argued over a $50 price discrepancy in the sale of a car that afternoon. Defendant additionally confronted Ziemer about past discrepancies causing him financial losses. The argument escalated and the pair "got in each other's face." Defendant refused Ziemer's instruction to "get out of [his] face." In response, Ziemer hit defendant in the face. Defendant attempted to retaliate unsuccessfully and Ziemer hit him again in the face. The pair were separated –Jerry, defendant's friend, grabbed defendant and someone else grabbed Ziemer. Defendant asked Jerry for the time and stated that he had to go to his job at FedEx upon learning that it was "three something." Defendant stated that he walked home to get ready for work. While at home, defendant "ran across a gun which he had been holding for somebody" and retrieved it from a drawer in his bedroom. According to defendant's written statement, he knew the gun was loaded. Defendant then realized that he had left his work shirt at the parking lot, so he drove back there in his van.

¶ 16 The written statement continued that, when he arrived, defendant parked his van and exited. He observed Ziemer standing approximately 15 feet away, smoking a cigarette. Defendant and Ziemer "exchanged words." Defendant stated that he then pulled out the gun and pointed it "in [Ziemer's] direction, but not at any specific place on [Ziemer's body], or specifically at [Ziemer]." Ziemer responded, "what the f***." Defendant then pulled the trigger once and heard two shots. He could not recall how many times he pulled the trigger. Defendant stated that Ziemer fled. Someone then took the gun out of defendant's hand and advised him to

go to work. Defendant stated that he retrieved his work shirt, but could not find his identification card so he returned to his home to look for it. While at home, the individual that took his gun called him to say that the gun had been placed in the attic. The police subsequently arrived and arrested defendant.

¶ 17 The parties stipulated that, if called, Officer Thomas Vanhove would testify that he was an evidence technician. Officer Vanhove performed a gunshot residue test on defendant on the date of the shooting. The test detected residue on defendant's right hand. Officer Vanhove additionally would testify that he recovered a .380 automatic expended shell casing from the parking lot located at 450 N. Cicero Avenue.

¶ 18 The parties further stipulated that, if called, Diana Pratt, a forensic scientist, would testify that she received the fired cartridge case, as well as a Beretta .380 caliber semiautomatic pistol. Pratt would testify that, based on a reasonable degree of scientific certainty, the expended cartridge case was fired from the .380 caliber Beretta semiautomatic pistol.

¶ 19 At the close of the State's case-in-chief, defendant made a motion for a directed verdict. The trial court denied defendant's motion.

¶ 20 Defendant testified that he worked part-time at FedEx and sold cars on the side with Ziemer. The pair began working together in 2008. Defendant stated that, at the time of the shooting, he and Ziemer had purchased six cars together. They split the expenses and profits equally, but had disputed financial matters in the past. Defendant stated that, between 2009 and the date in question, defendant observed Ziemer approximately five times per week and "[j]ust about every time I saw him" carrying a gun.

¶ 21 According to defendant, at approximately 1 p.m. on February 2, 2010, he purchased a truck for $700. Defendant and Ziemer then spoke on the telephone. Defendant requested that

Ziemer obtain a bill of sale from another individual. Ziemer agreed to bring the bill of sale to the business parking lot. Defendant proceeded to 450 N. Cicero Avenue to wait for Ziemer. Jerry Miner,[1] Marquel Peete, and Stuart Reed were present at the business parking lot as well. When Ziemer arrived, defendant observed him discussing the sale of the truck defendant had purchased to a customer for $650 instead of $700. Defendant testified that he and Ziemer began arguing. The argument quickly escalated when defendant confronted Ziemer about past incidents involving money discrepancies. Defendant stated that the $50 difference was especially important to him at the time because he needed to repair a car he had wrecked the day prior. Once the argument became physical, Peete and Miner separated the men. Defendant testified that, at some point, Ziemer bent down toward the ground and defendant observed Ziemer's gun sticking out of the rear of his waistband.

¶ 22 Defendant continued that, at that point, the clock showed it was approximately 3 p.m., so he needed to return home to get ready for work at FedEx. According to defendant, Ziemer warned "[d]on't let me see you back down here or I'll kill you." Defendant walked home, but realized that he left his work shirt and identification in one of the cars at the parking lot. Defendant testified that he was concerned about returning to the parking lot because of Ziemer's threat and because he "knew that [Ziemer] had a gun on him." Defendant stated that he retrieved a gun from his house and placed it in his FedEx holster. Defendant then drove back to the parking lot. When he arrived, Ziemer was smoking a cigarette approximately 15 feet away. According to defendant, Ziemer said, "I thought I told you that I didn't want to see you back here or I'll kill you." Defendant observed Ziemer reach behind his back to "where [he] saw the gun at." Defendant then pulled out his gun and shot "maybe" two times "toward the ground but in

[1]This individual's name appears as both Miner and Minor in the record. He did not testify at trial; therefore, we are unaware of the accurate spelling. We will reference the spelling as Miner for consistency.

[Ziemer's] direction." Defendant demonstrated that, when he fired his weapon, his arm was positioned ten degrees down from parallel to the ground. Defendant stated that he wanted to scare Ziemer. Ziemer replied, "what the f***" and ran away. Defendant testified that he did not realize Ziemer had been shot. Miner then grabbed the gun from defendant.

¶ 23 Defendant testified that, after the shooting, he searched for his work shirt and identification, but only found his shirt. As a result, he left for home to search for his identification. While in route, Miner called to report that he hid the gun in defendant's attic. Shortly after defendant returned to his home, the police arrived and arrested him. Defendant stated that he failed to tell the police that Ziemer was armed with a gun during the incident and that he threatened to kill defendant. Defendant further stated that he did not name Miner in his police statement to avoid trouble for Miner, who was on parole.

¶ 24 On cross-examination, defendant testified that, prior to the verbal altercation on the date in question, Ziemer was talking to the purchaser of the truck about past incidences in which he lied to defendant and cheated him out of proceeds. The State inquired why defendant revealed Jerry's identity at trial when he was unwilling to share his name with the police at the time of the incident. Defendant responded "[b]ecause he can't get in trouble now." When the State reminded defendant that felons can never have guns, defendant responded "the statute or something, that's why."

¶ 25 Peete and Reed testified that they were at the parking lot located at 450 N. Cicero Avenue on the date in question during the altercation and shooting. Both men testified to observing Ziemer with a gun in his waistband that day.

¶ 26 Peete testified that he had known defendant since the second grade. He admitted to speaking with defendant about the shooting prior to testifying. According to Peete, Ziemer had

been carrying a gun since October 2009. Peete stated that he and Miner broke up the physical fight between defendant and Ziemer. Peete testified to hearing Ziemer threaten to kill defendant if he returned to the parking lot and hearing Ziemer threaten defendant again when he, in fact, did return to the parking lot. Peete added that he observed Ziemer reach for his gun when defendant returned to the parking lot. Peete finally stated that he observed defendant aim at the ground when he fired his gun toward Ziemer.

¶ 27 Reed testified that he was Peete's friend. Reed drove Peete to the parking lot on the date in question. Although preoccupied by activities he was performing on his car, Reed overheard an argument. Reed also heard Ziemer threaten defendant that if he returned to the parking lot Ziemer would kill him. Defendant left while Reed remained at the parking lot. When defendant returned, Reed heard Ziemer repeat his threat and move his hand behind him. At that point, defendant pulled out a gun and shot toward the ground. Reed stated that defendant pointed the gun lower than a 45 degree angle. Reed heard two shots and defendant immediately left in his van.

¶ 28 The defense additionally presented three character witnesses to testify to defendant's peaceful and law-abiding persona.

¶ 29 During the subsequent jury instruction conference, defendant requested a lesser-included instruction for reckless conduct. Defendant argued that he acted in a reckless manner when he shot the gun at the ground near Ziemer, acting in conscious disregard of a known risk. The trial court denied defendant's requested instruction, finding that there was not "some evidence" of a reckless act but, rather, evidence of a justifiable, purposeful, and intentional act.

¶ 30 The jury ultimately found defendant not guilty of attempted murder, but guilty of aggravated battery with a firearm. Defendant then filed a motion for a new trial, arguing, *inter*

*alia*, the court erred in refusing to provide a reckless conduct jury instruction. The trial court denied the motion. Defendant subsequently was sentenced to eight years' imprisonment.

¶ 31 This timely appeal followed.

¶ 32 ANALYSIS

¶ 33 Reckless Conduct Jury Instruction

¶ 34 Defendant first contends the trial court erred in refusing to submit his requested jury instruction for reckless conduct. Defendant maintains the trial evidence supported the reckless conduct instruction as a lesser-included offense of aggravated battery with a firearm.

¶ 35 Our supreme court has established a two-step approach for determining whether a defendant is entitled to an instruction on a lesser-included offense. *People v. Kidd*, 2014 IL App (1st) 112854, ¶ 45 (citing *People v. Ceja*, 204 Ill. 2d 332, 360 (2003)). The two-step approach provides that:

> "[f]irst, the court must determine whether the charging instrument describes the lesser offense [Citations.] This prong is satisfied where the lesser included offense has a 'broad foundation' in the language of the indictment, such that the indictment 'set[s] out the main outline of the lesser offense proposed by the defendant.' [Citation] It is not fatal that every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred. [Citation.] Second, the court must determine whether the evidence presented at trial would permit the jury to rationally find the defendant guilty of the lesser offense but not guilty of the greater offense. [Citations.]" *Id.*

"Very slight evidence upon a given theory of a case will justify the giving of an instruction." *People v. Jones*, 175 Ill. 2d 126, 132 (1997). The rationale for permitting a lesser-included

instruction is that it gives the jury a third option if the jury believes the defendant is guilty of something, but not the greater offense; thus, it avoids the situation of having the jury acquit rather than convict of the greater offense. *People v Jefferson*, 260 Ill. App. 3d 895, 908 (1994).

¶ 36 A trial court's determination whether the uncharged offense is a lesser-included offense of the charged crime is a question of law subject to *de novo* review. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). However, a trial court's decision not to issue a lesser-included offense instruction after examining the evidence and determining that it does not rationally support a conviction for the lesser offense will not be reversed absent an abuse of the court's discretion. *People v. Jones*, 219 Ill. 2d 1, 31 (2006).

¶ 37 Turning to the first step of the two-step approach, we must determine whether the charging instrument broadly defined reckless conduct. The State charged defendant with aggravated battery with a firearm in that "he, in committing a battery, knowingly caused any injury to Joshua Ziemer by means of the discharging of a firearm, to wit: shot Joshua Ziemer about the body." See 720 ILCS 5/12-4.2(a)(1) (West 2010).[2] The mental state described in defendant's charging instrument was knowledge. In comparison, an individual commits reckless conduct when he or she causes bodily harm to or endangers the bodily safety of an individual or causes great bodily harm or permanent disability or disfigurement by any means if the acts were performed recklessly. 720 ILCS 5/12-5 (West 2010). Notably, however, section 2-9 of the Criminal Code of 2012 provides that an included offense "is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9 (West 2010). Moreover, recklessness has been found to be a less culpable mental state than knowledge. See *People v.*

[2] The aggravated battery statute has since been renumbered to 720 ILCS 5/12-3.05.

*Fornear*, 176 Ill. 2d 523, 531 (1997). In fact, this court expressly has found that "[t]he offense of reckless conduct may be a lesser-included offense of aggravated battery [with a firearm]." *People v. Roberts*, 265 Ill. App. 3d 400, 402 (1994). We, therefore, conclude that defendant's charging instrument did broadly define the offense of reckless conduct. See *People v. Williams*, 293 Ill. App. 3d 276, 281 (1997).

¶ 38 Turning to the second step of the two-step approach, we must determine whether the trial evidence permitted the jury to rationally find defendant guilty of reckless conduct but not guilty of aggravated battery with a firearm. A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence. *Jones*, 175 Ill. 2d at 131-32. Even very slight evidence will support the giving of the instruction. *Id*. at 132.

¶ 39 As defined by the statutes, the difference between reckless conduct and aggravated battery with a firearm is the mental state required for each offense. More specifically, reckless conduct requires that the defendant's actions were committed recklessly (720 ILCS 5/12-5 (West 2010)) while aggravated battery with a firearm requires that the defendant's actions were committed knowingly or intentionally (720 ILCS 5/12-4.2(a)(1) (West 2010)). Recklessness is defined as:

> "when [a person] consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2010).

In comparison, a person knows or acts knowingly or with the knowledge of:

> "(a) The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct

is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.

(b) The result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his [or her] conduct." 720 ILCS 5/4-5 (West 2010).

The state of mind of the defendant rarely can be proven by direct evidence, but it can be shown by the surrounding circumstances, including the character of the defendant's acts and the nature and seriousness of the victim's injuries. *Castillo*, 2012 IL App (1st) 110668, ¶ 52.

¶ 40 We find that there was at least very slight evidence in this case that would have allowed a jury to rationally enter a guilty verdict on the lesser-included offense of reckless conduct. We recognize that our standard of review is abuse of discretion; however, our supreme court has advised that the trial court abuses its direction where it refuses to instruct the jury on the defendant's theory of the case if the defendant provided some foundation for the instruction. *Jones*, 175 Ill. 2d at 131-32. Here, defendant and his two witnesses, Peete and Reed, testified at trial that Ziemer was armed with a weapon on the date in question and threatened to kill defendant following their physical altercation. Moreover, defendant testified that, despite fearing for his safety, he returned to the parking lot because he needed his work shirt and identification for his FedEx job. Defendant stated that he observed Ziemer reach toward his back where his purported gun was located before defendant fired his weapon. Defendant maintained that he discharged his gun toward the ground to scare Ziemer. Peete and Reed additionally testified to observing defendant shoot toward the ground. This evidence constituted some or, at least, very slight evidence that, if believed by the jury, could have demonstrated defendant acted recklessly.

We, therefore, conclude that the trial court abused its discretion in refusing defendant's reckless conduct jury instruction.

¶ 41 We emphasize that this court makes no judgment regarding the jury's likelihood of finding defendant guilty of the lesser-included offense of reckless conduct. We recognize that "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not reckless, regardless of the defendant's assertion that he or she did not intend to kill anyone." *People v. Eason*, 326 Ill. App. 3d 197, 210 (finding that a reckless conduct instruction was not supported by the evidence where the defendant pulled out a gun, pointed it at a group, and fired 7 shots). However, courts also have found that firing a gun at the ground or in the air can be reckless, rather than intentional, conduct. See, *e.g.*, *People v. Banks*, 192 Ill. App. 3d 986, 996 (1989) (where the defendant testified that, while he and the victim were arguing and scuffling over a gun, the defendant fired the gun at the ground three times causing the bullets to ricochet and kill the victim); *People v. Sibley*, 101 Ill. App. 3d 953, 954-56 (1981) (where the "testimony concerning the struggle [over a gun during a fight], if believed by the jury was sufficient to create an issue as to whether defendant acted 'recklessly.' "); *Williams*, 293 Ill. App. 3d at 282 ("[w]hether the defendant's firing of the gun in the air, over the heads of the men with his eyes closed, constitutes firing the gun in the direction of another person is a factual question to be resolved by the finder of fact"); *People v. Upton*, 230 Ill. App. 3d 365, 376 (1992) ("[f]rom the evidence in its entirety, the jury could have concluded that in shooting a gun while running after a moving vehicle occupied by two persons, defendant consciously disregarded the substantial risk that one or both the persons would be struck by the bullets; and that his disregard of this risk constituted a gross deviation from the care which a reasonable person, even one who believed

that his car was being stolen would exercise in the same situation"). Ultimately, the slight evidence in this case presented an issue of fact for the jury.

¶ 42 In sum, we conclude that the trial court abused its discretion in refusing to submit defendant's requested reckless conduct jury instruction. We, therefore, reverse defendant's conviction for aggravated battery with a firearm and remand this case for a new trial. Based on our finding, we need not address defendant's remaining contentions on appeal.

¶ 43 This order originally was issued on March 25, 2016. The State subsequently filed a petition for rehearing, arguing for the first time that reckless conduct was not the appropriate lesser-included offense and that, on the retrial ordered by this court, the jury should be instructed not on reckless conduct, but on the more specific offense of reckless discharge of a firearm. In response, we ordered the parties to engage in additional briefing on the matter. After careful consideration of the additional briefing, we deny the petition for rehearing because the State forfeited this argument by failing to raise it in the original appeal. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument or on petition for rehearing.").

¶ 44 CONCLUSION

¶ 45 We reverse defendant's conviction and remand for a new trial.

¶ 46 Reversed and remanded.