2018 IL App (1st) 160266-U

No. 1-16-0266

Order filed September 11, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 10632
	)	
DENNIS TUBBS,	)	Honorable
	)	Clayton Jay Crane,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Defendant's conviction for attempted first degree murder affirmed over his contentions that the State failed to disprove his self-defense theory and trial counsel was ineffective.

¶ 2 Following a bench trial, defendant Dennis Tubbs was convicted of attempted first degree murder (720 ILCS 5/8-4(a) (West 2014); 720 ILCS 5/9-1(a)(1) (West 2014)) and sentenced to 34 years' imprisonment. On appeal, defendant contends (1) the evidence was insufficient because State failed to disprove he acted in self-defense, and (2) trial counsel was ineffective for failing

to lay an adequate foundation to admit the victim's cell phone records and failing to object to a police officer's testimony that defendant had prior arrests. For the following reasons, we affirm.

¶ 3 Defendant was charged with four counts of attempted first degree murder, aggravated battery, and two counts of aggravated discharge of a firearm for a shooting incident on June 7, 2014. At trial, his theory of the defense was that he acted in self-defense.

¶ 4 The victim, Michael Mitchell, testified that he had two daughters, M.M., a six-year-old, and K.M., a five-year-old. He knew defendant, whom he identified in court, through K.M.'s mother, Kewonah Logan. Logan and defendant were dating on June 7, 2014. On that date, Mitchell's daughter M.M. was having a graduation party at Independence Park. Mitchell arrived at the park at approximately 2:45 p.m., and noticed defendant and a passenger in a gray Mitsubishi Gallant driving slowly near the park, "basically like scoping out the area." He knew that car belonged to Logan and defendant, and was concerned because defendant had threatened him over the phone the day before. Defendant had said that, if Mitchell wanted to talk to him, Mitchell had "better clip up," which meant he should "have a gun."

¶ 5 While at the park, defendant again threatened Mitchell over the phone, stating that he would "shoot that b*** up." Mitchell took this as a threat to himself and the other party-goers. He had his uncle, Jerrith Riley, drive him to his car. After seeing defendant, Mitchell wanted to get out of the area because he did not "want no kids or innocent people getting injured for [him]." Mitchell intended to go to the police station to file a report regarding defendant's threats.

¶ 6 Mitchell drove down Harrison Street to Homan Avenue toward the police station. On Homan, he met Riley, who pulled up to the driver's side of Mitchell's vehicle. Mitchell and Riley spoke through their windows and Riley attempted to convince Mitchell to go to a relative's

house to "de-escalate the situation." While they were speaking, Mitchell noticed defendant's gray vehicle driving nearby. Mitchell pulled forward and defendant swerved around Riley's vehicle to pull up next to Mitchell's driver's side. Mitchell said to defendant, "what's up man, you looking for me?" Defendant stated, "you know what's up," and began shooting at Mitchell. Defendant had aimed the gun toward Mitchell's driver's side window.

¶ 7 Mitchell initially ducked for cover and heard a bullet hit the top of his car. A bullet subsequently hit him under his left armpit and traveled across to his right shoulder. "[U]pon being hit," Mitchell turned right to drive to the police station. He flagged down a police vehicle and told the officers that he had been shot in a confrontation with his daughter's mother's boyfriend. He informed the officers that he had a registered gun locked in his glove box and gave the officers a key to recover the weapon. Mitchell had a valid firearm owner's identification (FOID) card. Although the firearm in his vehicle was loaded, he denied having the weapon out at any time during his encounter with defendant.

¶ 8 Mitchell had a collapsed lung and pierced esophagus as a result of the gunshot. He could still feel the bullet in his clavicle.

¶ 9 On cross-examination, Mitchell testified that he knew defendant was likely armed with a gun. He put his gun in his car for purposes of protection on the day of the shooting, but did not pull it out and did not show it to defendant. Prior to June 6, 2014, he asked Logan for defendant's phone number. On June 6, 2014, defendant left Mitchell a voicemail confirming that Mitchell could contact him. Defendant called Mitchell again on June 7, 2014, before and during the party in the park. Mitchell wanted to discuss in person K.M.'s allegation that defendant sexually assaulted her. Mitchell had called the police about the allegation, and the Department of Child

and Family Services investigated it. The investigation had concluded prior to the shooting, and Mitchell planned to "appeal" the result.

¶ 10 Mitchell did not recollect calling defendant at 2:00 and 2:02 p.m. on the day of the shooting. He acknowledged that he called defendant at 3:05 and 3:08 p.m., but he did not remember calling defendant a third time. He further did not remember whether he called defendant at 4:07 or 4:16 p.m. Defendant called him back, but Mitchell did not recall what time that occurred.

¶ 11 When defense counsel attempted to show Mitchell his phone records, the following discussion occurred:

> "[DEFENSE COUNSEL]: Judge, could I approach him with what I'll call Defendant's Exhibit 2 for Identification?
>
> [STATE]: Here's the problem, your Honor. Opposing counsel has phone records that have blacked out portions and do no[t] match up with what I know to be this witness' authentic phone records.
>
> [DEFENSE COUNSEL]: We got authentic phone records I'm willing to show him.
>
> [THE COURT]: Let him finish.
>
> [STATE]: I have not introduced any phone records. I have not subpoenaed any keeper of records from any phone company because I don't think that these phone records are necessary to the State proving it's [*sic*] case. And I know that opposing counsel doesn't have any keeper of records from any cell phone company sitting in the

wing either. So what opposing counsel is trying to do is show this witness' inadmissible hearsay.

[THE COURT]: How are you going to get those in?

[DEFENSE COUNSEL]: He's the one that produced these for the State.

[STATE]: That doesn't make it admissible evidence.

[DEFENSE COUNSEL]: For impeachment, Judge.

[THE COURT]: There is no foundation.

[DEFENSE COUNSEL]: He's the one brought the records down. He download -- the State's Attorney's Office told -- the State's Attorney's Office said these are his records. That is the foundation.

[THE COURT]: That's not foundation for the phone records.

[DEFENSE COUNSEL]: We brought them down here.

[THE COURT]: He can bring his car down here. It still does not indicate the ownership of that vehicle. It still doesn't authenticate the ownership of the vehicle."

¶ 12 Mitchell's uncle, Jerrith Riley, testified that, on June 7, 2014, he saw Mitchell at the park and drove him to his vehicle. Shortly thereafter, he called Mitchell to see where he was going because Mitchell "was all heated about the situation that was going on." Riley met Mitchell on Homan and pulled over next to his vehicle to speak with him. As they were talking, a gray Mitsubishi pulled up and eventually drove in front of Riley's car and next to Mitchell's vehicle. He heard Mitchell say to the person in the Mitsubishi, "You looking for me? Here I go right here." Riley could not hear the other person speak, but he saw sparks and heard gunshots coming

from the Mitsubishi. After the gunshots started, Mitchell's car turned right, and the Mitsubishi drove straight. Riley started following the Mitsubishi, but it turned down an alley.

¶ 13 Riley did not get a license plate number for the Mitsubishi. He did not see Mitchell with a gun that day, and did not see Mitchell unlock his glove box. Riley only saw gunshots come from the Mitsubishi.

¶ 14 Chicago police officer Ruggiero testified that on June 7, 2014, he was on duty. At around 4:25 p.m., a man, later identified as Mitchell, flagged Ruggiero down from a Dodge Charger on Flournoy Street and Kedzie Avenue. Mitchell was injured, and the Charger had what appeared to be bullet holes at the rear of the vehicle. After speaking with Mitchell, he recovered a handgun loaded with 13 bullets from the locked glove box of the vehicle. Mitchell was thereafter transported to a hospital for treatment.

¶ 15 Based on his conversation with Mitchell, Ruggiero sent out a "flash message" containing a description of the gray Mitsubishi Gallant and defendant's name. He also called an evidence technician to preserve the evidentiary value of the Charger. Ruggiero testified that, in order to locate defendant, "[w]hile investigating prior arrest history his three addresses, we located [an address] on Van Buren as being one of the prior arrest addresses and we relocated to that address." At the residence on Van Buren, Ruggiero spoke with defendant's mother. Defendant later arrived at the residence and Ruggiero arrested him at 6:41 p.m. on the day of the shooting.

¶ 16 The parties stipulated that evidence technician Carol Harrigan, if called, would identify defendant in court and testify that she performed a gunshot residue (GSR) test on him on June 7, 2014, at approximately 7:20 p.m. Harrigan additionally photographed a black Dodge Charger that had bullet damage and a crime scene at the intersection of South Homan Avenue and West

Van Buren Street. She recovered four spent cartridge cases from the scene, all of which were .40 caliber Smith & Wesson.[1]

¶ 17 The parties further stipulated that forensic scientist Robert Burke, if called, would testify as an expert in forensic science trace chemistry. Burke tested the GSR kit that had been administered to defendant and concluded defendant had discharged a firearm, contacted a primer GSR related item, or had his right hand in the environment of a discharged firearm.

¶ 18 Finally, the parties stipulated that trauma surgeon Richard Benson, if called, would testify as an expert in emergency medicine. Benson treated Mitchell from June 7 to June 9, 2014, for a gunshot wound to the left side of his chest. The gunshot caused the collapse of his left lung and extensive lung contusions, as well as a left rib fracture. A bullet fragment remained in Mitchell's neck.

¶ 19 The State thereafter introduced into evidence a certified document from the Illinois Secretary of State's office, showing that Logan was the registered owner of a 2004 gray Mitsubishi Gallant.

¶ 20 Defendant testified that he was living with Logan on June 7, 2014. Mitchell left him a voicemail on June 6, 2014, and said that he would be in contact with defendant. Prior to the phone call, there was discord between defendant and Mitchell over Mitchell's allegations that defendant had sexually assaulted his daughter. An investigation into the allegation had been

[1] The transcript reads "47 spent cartridge cases," but later reads that "those four spent cartridge casings" were depicted in photographic exhibits. The parties refer to four spent shell casings recovered in the briefs. The photographic exhibits show four spent bullet casings, and the impounding order reflects four .40 Smith and Wesson expended cartridge cases were inventoried. Thus, we presume there were only four casings recovered.

initiated and concluded two weeks prior to the June 6, 2014, phone call. Defendant did not attempt to contact Mitchell and did not respond to his voicemail.

¶ 21 Mitchell called defendant three times on Saturday, June 7, 2014, between 2:00 and 2:15 p.m. Mitchell wanted to discuss the sexual assault allegations and defendant did not want to speak with Mitchell. Defendant hung up on Mitchell, and Mitchell called back to say it was "best that [defendant] get up with [Mitchell]." Mitchell called again and said that he was in front of defendant's mother's house. Defendant drove to his mother's house but Mitchell was not there.

¶ 22 Mitchell called three more times and told defendant that he was in front of defendant's house. When defendant drove home, Mitchell was not there. Defendant denied going to the park where Mitchell's daughter's party was held. Defendant called off work that day and told them there "was a situation going on involving [his] safety." Mitchell called again and told defendant to meet him on Homan and Flournoy. There were six calls between defendant and Mitchell after 4 p.m. They each made three calls.

¶ 23 When defendant arrived at that intersection around 4 p.m., Mitchell was not there, so defendant started to drive home. Defendant was stopped at the intersection of Homan and Harrison and observed a black Dodge Charger with a hand out the window signaling him to pull up alongside it. He could not see who was in the vehicle, but when he drove next to it, he saw Mitchell. Mitchell was pointing a weapon at defendant. Both vehicles were driving northbound near Van Buren. When he saw Mitchell had a gun pointed at him, defendant discharged his firearm. The firearm was loaded and beside him in his car. He later went to his mother's house where he was arrested.

¶ 24 On cross-examination, defendant testified he shot his gun twice, although he could not tell where the bullets hit. The gun was loaded with seven bullets and was positioned in his car with the handle up so he could grab it. There was already a bullet in the chamber and the safety was off. Defendant's window was down and he aimed toward Mitchell and pulled the trigger. Both vehicles were moving when defendant started shooting. Defendant drew his gun to avoid getting shot.

¶ 25 Mitchell did not fire his weapon. Defendant observed a gun pointed out of Mitchell's car when he drove next to him. Defendant acknowledged that he did not speed up when he observed Mitchell's gun pointed at him. He further acknowledged that he maintained the same speed as Mitchell's vehicle in order to accurately shoot at him. After firing two shots, defendant "floored" his vehicle and did not look back at Mitchell's vehicle because he was afraid Mitchell was going to shoot him.

¶ 26 Defendant denied being *Mirandized* by police officers after he was arrested. The detectives did not ask whether he fired a gun. Defendant told them that he knew Mitchell as his girlfriend's "baby daddy."

¶ 27 In rebuttal, Chicago police detective John Hillman testified that he interviewed defendant on June 7, 2014, pursuant to this case. He advised defendant of his *Miranda* rights from a preprinted book, and defendant stated that he understood the warnings. After an evidence technician performed the GSR test, Hillman and his partner questioned defendant. Defendant denied being involved in a shooting that day. He also denied handling or firing a firearm. When Hillman informed defendant that Mitchell identified him as the shooter, defendant stated that

Mitchell was his girlfriend's former boyfriend. Defendant did not say that Mitchell tried to kill him earlier that day.

¶ 28 On cross-examination, Hillman acknowledged that his report did not indicate that defendant denied being involved in the shooting. He was informed that Mitchell had a firearm in his vehicle that day, but Hillman did not have Mitchell submit to GSR testing.

¶ 29 During closing arguments, defense counsel argued that defendant acted in self-defense when he shot Mitchell, and the only reason Mitchell did not shoot his gun was because defendant fired first. Counsel argued Mitchell instigated the shooting by repeatedly calling defendant and telling him he was outside of defendant's mother's house. Counsel further argued Mitchell's testimony was incredible because, when he thought defendant threatened to shoot up the children's party, he did not immediately call the police or drive directly to the police station.

¶ 30 The court found defendant guilty of all counts, stating,

> "[T]his case really does come down to credibility of the witnesses and who testified in this case. And I will tell you that I had little or no difficulty with the complaining witnesses' testimony in the case. And a great, great difficult [*sic*] with the defendant's explanation of what occurred on that day."

¶ 31 The court denied defendant's motion for a new trial and, after merging the counts, sentenced defendant to 34 years' imprisonment for attempted first degree murder.

¶ 32 On appeal, defendant first asserts that the State failed to disprove he acted in self-defense when Mitchell pointed a gun at him.

¶ 33 The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). When reviewing a challenge to the sufficiency of the

evidence, we inquire " '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.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In evaluating such a claim, we draw all reasonable inferences in favor of the State. *Davison*, 233 Ill. 2d at 43. On appeal, a conviction will be affirmed "unless the evidence is so improbable, unsatisfactory, or unconvincing as to raise a reasonable doubt of defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 34 To sustain a conviction for attempted murder, the State was required to prove beyond a reasonable doubt that defendant, with the specific intent to kill, performed an act that constituted a substantial step toward the commission of murder. 720 ILCS 5/8-4 (West 2014).

¶ 35 To raise a claim of self-defense, defendant was required to provide some evidence that: (1) unlawful force was threatened against him; (2) he was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was necessary; (5) defendant actually and subjectively believed a danger existed that required the use of the force applied; and (6) his beliefs were objectively reasonable. 720 ILCS 5/7-1 (West 2014); see also *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Once defendant has met his burden, the burden of proof shifts to the State to prove beyond a reasonable doubt that the defendant did not act in self-defense in addition to proving the elements of the charged offense. *People v. Gray*, 2017 IL 120958, ¶ 50. If the State negates any one element, the claim of self-defense fails. *Id.* Further, a defendant is justified in the use of force which is intended or likely to cause death or great bodily harm only if: (1) he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or (2) the commission of a forcible felony. 720 ILCS 5/7-1 (West 2014); *People v.*

Nolan, 214 Ill. App. 3d 488, 495 (1991). Whether defendant acted in self-defense is a question for the trier of fact. *People v. Goliday,* 222 Ill. App. 3d 815, 822 (1991).

¶ 36 Here, the evidence established that defendant and Mitchell exchanged several phone calls. As a result of the phone calls, both men believed that there would be some form of confrontation between them when they eventually met face to face. Mitchell testified that defendant told him to "clip up," which meant to have a gun, and later drove by his child's party in the park "basically like scoping out the area," and defendant threatened to "shoot the b*** up." Mitchell further testified that he saw defendant while they were both driving on Homan, and defendant drove next to Mitchell's car and fired several shots, one of which entered Mitchell's side and lodged in his clavicle, resulting in a pierced esophagus and a collapsed lung. Photographs entered into evidence depicted Mitchell's vehicle with various bullet holes. Mitchell's uncle, Jerrith Riley, testified that he observed shots fired from the gray Mitsubishi that defendant acknowledged he was driving toward Mitchell's vehicle. Defendant's hands tested positive for GSR, indicating he discharged or handled a firearm, or was in the environment of a discharged firearm.

¶ 37 Defendant testified that Mitchell repeatedly attempted to call him and meet with defendant in person to speak about a sexual assault allegation that Mitchell's daughter made against defendant. When defendant eventually saw Mitchell on Homan, Mitchell was pointing a gun at defendant. Defendant fired his gun twice to prevent Mitchell from shooting at him. Defendant's gun had a bullet in the chamber and its safety was off at the time he drove alongside Mitchell. We find this evidence was sufficient for a rational trier of fact to conclude beyond a

reasonable doubt that defendant, with the specific intent to kill, performed an act that constituted a substantial step toward the commission of murder. See 720 ILCS 5/8-4 (West 2014).

¶ 38 While defendant argues that his evidence establishes that he acted in self-defense, his own testimony negated his self-defense claim. He testified that he maintained the same speed as Mitchell's vehicle so that he could accurately shoot at him. Further, he testified that after he shot twice at Mitchell, he "floored" his vehicle and sped away. This testimony undermined defendant's claim of self-defense and demonstrated that the use of force was not necessary because defendant had the option throughout the confrontation to drive away without shooting.

¶ 39 Moreover, defendant's testimony was contradicted by Mitchell and the forensic evidence. Defendant testified that he shot twice at Mitchell, but the forensic evidence showed there were at least four bullet casings at the scene. Further, Mitchell denied pointing a gun at defendant, and Officer Ruggiero testified that he retrieved Mitchell's gun from his locked glove box.

¶ 40 Defendant contends that Mitchell had a motive to lie and falsely accuse him because he was angry that the sexual assault investigation against defendant had concluded, and Mitchell's testimony was incredible, contradictory, and failed to prove defendant was not acting in self-defense. However, it is the trier of fact's function to assess the credibility of the witnesses and the weight to be given their testimony by resolving any conflicts or inconsistencies in the evidence. *People v. Tenney,* 205 Ill. 2d 411, 428 (2002). The trial court, as trier of fact, is "not obligated to accept a defendant's claim of self-defense," but instead must consider the probability or improbability of the testimony, the surrounding circumstances, and the testimony of other witnesses. *People v. Rodriguez,* 336 Ill. App. 3d 1, 15 (2002).

¶ 41 When faced with conflicting versions of the shooting, the trial court explicitly found that Mitchell's testimony was credible and defendant's version of events was not. The court, therefore, did not accept defendant's claim of self-defense. Although defendant argues that certain evidence, such as the presence of a loaded handgun in Mitchell's glove box, corroborated his version of events, the trier of fact is not required to accept any possible explanation compatible with defendant's innocence and elevate it to the status of reasonable doubt. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). Further, it is not the function of a reviewing court to reweigh the evidence or substitute our judgment on these matters for that of the trier of fact. *Tenney*, 205 Ill. 2d at 428. Here we cannot say that the evidence was so improbable or unsatisfactory as to create a reasonable doubt as to defendant's guilt. *Givens*, 237 Ill. 2d at 334.

¶ 42 Next, defendant contends that he received ineffective assistance of trial counsel when counsel failed to (1) lay a foundation to admit Mitchell's phone records, and (2) object to Officer Ruggiero's testimony regarding defendant's prior arrests. Specifically, defendant alleges that the records supported the self-defense theory advanced at trial and would have diminished Mitchell's credibility by establishing that Mitchell repeatedly called defendant in the hours leading up to the shooting. He also argues that Ruggiero's testimony regarding his unrelated prior arrests was inadmissible, and he was prejudiced because that testimony undermined his credibility, which was essential to his defense.

¶ 43 To demonstrate ineffective assistance of counsel, defendant must show that (1) his attorney's performance was deficient, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*

v. Washington, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 44 On these facts, we conclude that defendant has not demonstrated he was prejudiced by either of the alleged deficiencies. Critically, the evidence against defendant, as detailed above, was overwhelming. The evidence clearly established defendant shot at Mitchell, and the trial court explicitly found defendant's version of events not credible, thereby rejecting his self-defense theory.

¶ 45 With respect to the phone records, although Mitchell could not recall whether he called defendant at various times, he acknowledged that multiple calls were exchanged between them on the day in question. Defense counsel extensively cross-examined Mitchell on the timing of various phone calls. Therefore, the court knew that there were some back and forth phone calls between defendant and Mitchell. We do not find that the phone records would have resulted in any substantial change in the evidence presented or the outcome of the trial.

¶ 46 Similarly, counsel's failure to object to Ruggiero's testimony did not result in prejudice to defendant such that there was a reasonable probability that outcome of his trial would have been different. Ruggiero testified he looked up defendant's arrest history in order to obtain an address for defendant. The testimony was brief and there were no details pertaining to the arrests given. Because we find defendant suffered no prejudice as a result of the alleged deficiencies, we need not address whether counsel's performance was deficient. See *Strickland*, 466 U.S. at 697 (where a defendant fails to satisfy the prejudice prong, a reviewing court need not determine

whether counsel's performance was deficient). Accordingly, defendant has failed to demonstrate defense counsel was ineffective.

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

¶ 48 Affirmed.