2019 IL App (1st) 170982-U

No. 1-17-0982

Order filed on October 15, 2019.

Second Division

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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. 13 CR 18604
	)	
MARCUS BELL,	)	The Honorable
	)	William H. Hooks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt when the victim testified that he saw defendant's face at the time of the shooting. Because defendant's convictions for attempt first degree murder and aggravated battery with the discharge of a firearm violate the one-act, one-crime rule, we vacate his sentences and remand so that the trial court may impose sentence on the most serious count of attempt first degree murder.

¶ 2 Following a bench trial, defendant Marcus Bell was found guilty of four counts of attempt first degree murder (720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012)),

and one count of aggravated battery with the discharge of a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)). He was sentenced to two 30-year sentences for attempt first degree murder for shooting the victim about the body with a firearm and causing great bodily harm, and two 31-year sentences for attempt first degree murder based on permanent disability and permanent disfigurement. Defendant was also sentenced to 30 years in prison for aggravated battery with the discharge of a firearm. All sentences were to be served concurrently.

¶ 3 On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt when the testimony of the sole eyewitness was unreliable and contradictory. Defendant further contends that pursuant to the one-act, one-crime rule, four of his five convictions should be vacated. We affirm in part, vacate in part, and remand so that the trial court may enter sentence on the most serious attempt first degree murder count.

¶ 4 Defendant was charged by indictment with four counts of attempt first degree murder predicated on shooting the victim about the body with a firearm (count I), and causing great bodily harm (count II), permanent disability (count III), and permanent disfigurement (count IV). Defendant was also charged with one count of aggravated battery with the discharge of a firearm (count V).

¶ 5 Henry Williams testified that on the afternoon of July 18, 2013, he was standing inside the doorway of a flower shop near the intersection of 69th Street and King Drive in Chicago when he heard two gunshots coming from his left. Williams stepped out and saw a figure wearing red clothing, blue jeans, and sporting a "long dread" hairstyle. Initially, he only saw the person's "figure." However, he saw the person's face after the person ran past him. Williams identified defendant in court as this person. As defendant ran toward Williams, defendant shot a

firearm. Although Williams did not know he was "hit," he grabbed his hip and fell to the ground, almost sliding under a white truck. Williams saw a black and brown .357-caliber revolver in defendant's hand that afternoon. During Williams's testimony, the following exchange took place:

> "Q. When you said that you saw the defendant with the gun shoot at you, were you able to see him clearly?
>
> A. Not really.
>
> Q. Well, did you see his face?
>
> A. I saw a figure.
>
> * * *
>
> Q. Okay. When you first saw him, you said it was a figure but there was a point when you saw his face, correct?
>
> A. After he ran past me.
>
> Q. Was there anything obstructing your view after you saw his face[?] Was there anything in the way of seeing his face?
>
> A. No. No."

¶ 6 Williams went into a mini mart to ask for help. He was in "[t]ons" of pain and ultimately fainted. Williams later learned that he was shot six times. He was taken to a hospital where he had three rods and a metal plate affixed to his hip, which he characterized as hip "replacement." He was in the hospital for a week. At the time of trial, Williams still had nightmares about the shooting in which he saw "this dude's face." He could not lift more than five pounds, and was

still in pain. On August 30, 2013, Williams met with detectives and identified defendant as the shooter in a line-up. Williams did not know defendant before the shooting.

¶ 7 During cross-examination, Williams testified that he did not remember speaking to a detective in July 2013, but spoke to a detective in August and when it was "cold outside." Then he testified that he did not remember speaking to a detective in August 2013, but only when it was cold. Williams spoke to Assistant State's Attorney (ASA) Jack Castillo the day he viewed the line-up, but he did not remember whether his statement was reduced to writing. He later acknowledged that the statement was reduced to writing and that he reviewed and corrected it. He testified that in his statement, he stated that the shooter was wearing a red shirt and jeans, and had long dreads.

¶ 8 Chicago police department evidence technician Patrick Doyle testified that he marked and photographed two bullet fragments inside the mini mart. Doyle explained that bullet fragments are the results of a bullet breaking after "it strikes something." He did not recover any shell casings, and this fact led him to believe that the firearm involved in this incident was a revolver. Doyle also went to a hospital and photographed Williams. At trial, Doyle identified photographs showing bullet wounds to Williams's right thigh and left hip. Doyle further testified that Williams "cried out in pain" when he moved.

¶ 9 The State entered a stipulation that defendant was arrested on August 30, 2013, and rested.

¶ 10 The parties then stipulated that Chicago police detective Abner Rodriguez would testify that he was present on August 30, 2013, when Williams gave a statement to ASA Castillo. Rodriguez would further testify that Williams did not state that (1) he almost slid under a white

truck; (2) he saw a .357-caliber black and brown firearm in the shooter's hand; and (3) the shooter was wearing a red shirt and jeans, and had "long dreads."

¶ 11 In finding defendant guilty, the trial court found that Williams stated that he saw defendant's face and identified defendant in court, and that Williams still experienced nightmares where he saw defendant's face. The court noted that Williams testified that initially he only saw the shooter's figure, but then he saw the shooter's face as the shooter moved passed him. In the court's assessment, Williams was credible and "not impeached."

¶ 12 Defendant then filed a motion and amended motion for a new trial. At the hearing on the motion, the defense argued, in pertinent part, that Williams, the sole witness to identify defendant, was not credible in light of the "trauma" of hearing gunshots and his subsequent actions of running and sliding under a vehicle. The defense also noted that Williams testified to "more descriptive things" than were included in his written statement. In denying defendant a new trial, the court noted there was "no formula about how long somebody had to look at another person after having been shot." The court further stated that defense counsel conducted a "very exact cross-examination" of Williams, and that he was not "impeached in a material way whatsoever concerning the situation."

¶ 13 The court then sentenced defendant to two 30-year sentences for attempt first degree murder for shooting the victim about the body with a firearm and causing great bodily harm, (counts I and II), and two 31-year sentences for attempt first degree murder based on permanent disability and permanent disfigurement (counts III and IV). The court also sentenced defendant to 30 years in prison for aggravated battery with the discharge of a firearm (count V). All sentences were to be served concurrently. Defendant's motion to reconsider sentence was denied.

¶ 14 On appeal, defendant first contends that he was not proven guilty beyond a reasonable doubt of either attempt first degree murder or aggravated battery with a firearm when Williams's testimony was unreliable and contradictory.

¶ 15 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, 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. All reasonable inferences from the record must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. It is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Brown*, 2013 IL 114196, ¶ 48. A reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *Id.* A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of his guilt. *Id.*

¶ 16 To prove defendant guilty of attempt first degree murder as charged in this case, the State had to establish, in pertinent part, that defendant, without lawful justification, with intent to kill, shot Williams while armed with a firearm. 720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012). To prove defendant guilty of aggravated battery with the discharge of a firearm, the State had to establish that in committing a battery, defendant knowingly without legal justification discharged a firearm and caused injury to Williams. 720 ILCS 5/12-3.05(e)(1) (West 2012). Here, defendant contests only his identification as the shooter.

¶ 17 After viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant was the shooter when Williams testified that he heard shots, then looked out and saw a figure. Williams further testified that he saw the person's face as the shooter ran past him, and identified defendant as the shooter. Williams later identified defendant in a line-up and in court as the shooter. Additionally, Williams testified that defendant was holding a .357-caliber revolver that Williams saw defendant fire, and Officer Doyle testified that the fact that no shell casings were recovered from the scene led him to conclude that a revolver was used in the offense. Given this evidence, we cannot say that no rational trier of fact could have found that defendant was the shooter. *Brown*, 2013 IL 114196, ¶ 48.

¶ 18 Defendant, however, contends that Williams's testimony was unworthy of belief. Defendant argues that Williams only briefly saw the shooter run past and there was a "long gap in time" between the shooting and the identification. Defendant further argues that Williams initially testified that he could not see the shooter clearly and only "agreed" that he had seen the shooter's face following a "nudge" from the State. Contrary to defendant's argument on appeal, we cannot say that the identification of defendant by Williams was so improbable or unsatisfactory that a reasonable doubt exists as to defendant's guilt.

¶ 19 It is well settled that the testimony of one identification witness, if positive and credible, is sufficient to sustain a conviction. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 15; see also *People v. Slim*, 127 Ill. 2d 302, 307 (1989). When assessing identification testimony, we rely upon the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view

the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

¶ 20 When considering the *Biggers* factors in relation to Williams's testimony identifying defendant as the shooter, we conclude that these factors weigh in the State's favor.

¶ 21 First, the record demonstrates that Williams had the opportunity to view the shooter at the time of the shooting. Williams testified that the shooting took place in the afternoon and that as he stepped out of a doorway and looked around, he saw a figure wearing red clothing and blue jeans, and sporting a "long dread" hairstyle. Williams admitted that he first only saw a "figure," but then testified that he saw the shooter's face as the shooter ran past him. We are not persuaded by defendant's argument that the brief nature of the encounter was fatal to Williams's identification of defendant as the shooter. See *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006) ("an encounter as abbreviated as 'five to ten seconds' *** [is] sufficient to support a conviction" (quoting *People v. Parks*, 50 Ill. App. 3d 929, 930 (1977))). Although defendant is correct that Williams initially testified that he only saw a figure and later testified that he was able to see the shooter's face, "it is for the trier of fact to judge how flaws in part of [a witness's] testimony affect the credibility of the whole," and the trier of fact may accept or reject all or part of a witness's testimony. *People v. Cunningham*, 212 Ill. 2d 274, 283-84 (2004). Thus, the first *Biggers* factor weighs in favor of Williams's identification of defendant as the shooter.

¶ 22 The second factor, Williams's degree of attention, also weighs in favor of a reliable identification. Williams testified that he stepped out of the doorway after hearing gunshots to his

left. These facts support an inference that Williams was paying attention in order to determine where the shots were coming from, and to avoid the shooter. To the extent that defendant argues that research has "consistently shown" that the presence of a firearm means that a witness's identification is less reliable due to focus on the firearm rather than the offender, and that the "high levels of stress" caused by violence have a negative impact on a witness's identification, we note that this research was not presented to the trial court. See *People v. Heaton*, 266 Ill. App 3d 469, 477 (1994) ("Judicial notice cannot be extended to permit the introduction of new factual evidence not presented to the trial court"); *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993) (citations to research studies on appeal constituted "an attempt to interject expert-opinion evidence into the record" that was not subject to cross-examination by the State or considered by the trial court). Rather, the record establishes that Williams was cross-examined regarding his recollection of the details of the shooting, and his interaction with police following the shooting. Williams acknowledged that he initially only saw a figure, but later testified that he was able to see the shooter's face as the shooter ran past him, and that he continued to see "this dude's face" in his nightmares.

¶ 23 Third, the accuracy of Williams's prior description of the offender also supports the reliability of the identification of defendant as the shooter. Here, Williams identified defendant in a physical line-up and in court as the shooter. While defendant is correct that Williams's written statement did not include a description of the shooter's outfit and hairstyle, but his trial testimony did, the fact that these details were not contained in the written statement was for the trier of fact to consider. *Brown*, 2013 IL 114196, ¶ 48 (it is the responsibility of the trier of fact to weigh the

evidence presented and to draw reasonable inferences from the facts). It was not unreasonable for the trial court to find Williams's consistent identification of defendant credible.

¶ 24 Finally, the last two *Biggers* factors, the level of certainty demonstrated by Williams at the identification confrontation and the length of time between the crime and the identification confrontation, further support the reliability of Williams's identification of defendant as the shooter. Here, the shooting occurred on July 18, 2013, and Williams identified defendant in a line-up on August 30, 2013. This court has found that significantly greater lengths of time have not rendered identifications unreliable. See *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (16-month delay between crime and positive identification).

¶ 25 Defendant is correct that Williams met with Officer Doyle on July 18, 2013, and could, theoretically, have made a statement on that date. However, Doyle testified that when he photographed Williams at the hospital, Williams was "in pain." Additionally, Williams consistently identified defendant as the shooter. See *People v. Magee*, 374 Ill. App. 3d 1024, 1032-33 (2007) (a witness's identification was reliable when, in pertinent part, it was made without hesitation). Accordingly, we cannot say that Williams's identification of defendant as the shooter was so unreliable that there exists a reasonable doubt as to defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 26 Defendant next contends that, pursuant to the one-act, one-crime rule, he should only have been convicted of one count of attempt first degree murder. The State concedes that because all five of defendant's convictions are based upon the same physical act of shooting Williams, three of defendant's convictions for attempt first degree murder and his conviction for aggravated battery must be vacated.

¶ 27 Defendant acknowledges that he did not raise this issue before the trial court, but asks this court to review it pursuant to the plain error doctrine. The plain error doctrine allows a reviewing court to address unpreserved error when either (1) a clear or obvious error occurred and the evidence was so closely balanced that this error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error was so serious that it affected the fairness of the defendant's trial regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Our supreme court has held that an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 28 Pursuant to the one-act, one-crime doctrine, "convictions for multiple offenses that are based on precisely the same physical act" are prohibited. *People v. Smith*, 2019 IL 123901, ¶ 13 (Sept. 19, 2019). When a challenge is raised under the one-act, one-crime doctrine, the court first determines whether the defendant's conduct consisted of a single physical act or separate acts. *People v. Coats*, 2018 IL 121926, ¶ 12. If only one physical act was undertaken, then multiple convictions are improper, and a reviewing court should vacate the sentence imposed on the less serious offenses. *People v. Artis*, 232 Ill. 2d 156, 165, 170 (2009). Whether the one-act, one-crime doctrine has been violated is reviewed *de novo*. *Smith*, 2019 IL 123901, ¶ 15.

¶ 29 Here, we agree with the parties that all five of defendant's convictions are based upon the same physical act of shooting Williams and, therefore, multiple convictions are improper. We further note that aggravated battery with the discharge of a firearm is a lesser-included offense of attempt first degree murder, and therefore, defendant's sentence for aggravated battery must be

vacated. See *People v. Temple*, 2014 IL App (1st) 111653, ¶ 93 (citing *People v. Stuckey*, 231 Ill. App. 3d 550, 569 (1992) (finding that aggravated battery is a lesser included offense of attempt murder)).

¶ 30 Although the parties agree that defendant should only be sentenced on one count of attempt first degree murder, they differ as to the remedy. Defendant contends that his mittimus must be corrected to reflect a conviction for attempt first degree murder under count III, as that was the "most culpable and most aggravating" count. The State, however, contends that remand is warranted for the trial court to determine which attempt first degree murder conviction will be retained.

¶ 31 Here, defendant was charged with four counts of attempt first degree murder, which is sentenced as a Class X offense. The sentencing range for a Class X offense is between 6 and 30 years in prison. See 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 32 Count I alleged that defendant, without lawful justification and with intent to kill, shot Williams about the body while armed with a firearm, which constituted a substantial step toward the commission of first degree murder. 720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012). "[A]n attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1)(C) (West 2012). Counts II, III, and IV alleged that defendant, without lawful justification and with intent to kill, shot Williams about the body while armed with a firearm, which constituted a substantial step toward the commission of first degree murder, and during the commission of the offense, defendant discharged a firearm that proximately cause great bodily harm, permanent disability, and permanent disfigurement to

defendant. 720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1(a)(1) (West 2012). "[A]n attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1)(D) (West 2012).

¶ 33 Thus, counts II, III, and IV are the more serious offenses. See *Artis*, 232 Ill. 2d at 170 (when "determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense," as greater punishment is mandated for the more serious offense). However, counts II, III, and IV have the same sentencing enhancement, and defendant cites no authority for the position that count III alleging "permanent disability" is the "most aggravating offense." When, as here, "it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination." *Id.* at 177. Therefore, we vacate defendant's sentences for attempt first degree murder, and remand for the trial court to resentence defendant.

¶ 34 For the foregoing reasons, we vacate defendant's sentences, and remand to the trial court for resentencing on the most serious attempt first degree murder count. In all other aspects, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed in part; vacated in part; remanded with instructions.