

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Stephenson County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-262
)	
MICHAEL D. NORSWORTHY,)	Honorable
)	William A. Kelly,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The defendant was convicted beyond a reasonable doubt of attempted murder and (2) the defendant's convictions for aggravated battery with a firearm and aggravated discharge of a firearm were vacated because they violated the one act-one crime doctrine.
- ¶ 2 Following a jury trial, the defendant, Michael Norsworthy, was convicted of attempted first degree murder (720 ILCS 5/8-4(a) (West 2008)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2008)). He was sentenced to a total of 31 years' imprisonment. On appeal, the defendant argues that (1) he was not convicted beyond a reasonable doubt of attempted murder; and (2) his convictions

for aggravated battery with a firearm and aggravated discharge of a firearm must be vacated because they violate the one act-one crime doctrine.¹ We affirm in part and vacate in part.

¶ 3

BACKGROUND

¶ 4 On November 17, 2009, the defendant was charged by information with the attempted first-degree murder (720 ILCS 5/8-4(a) (West 2008)) of Tyrane Allen, as well as aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2008)).² The charges alleged that, on October 20, 2009, the defendant shot Tyrane with the intent to kill him. Between October 25 and October 29, 2010, the trial court conducted a jury trial on the charges against the defendant.

¶ 5 At trial, the State's evidence established that, on the evening of October 29, 2009, several people including the defendant were playing cards at LaShanda Williams' house in Freeport. Tyrane entered the house, saw the defendant, and then directed several profanities towards him. (At that time, the defendant was dating the mother of Tyrane's four children). Tyrane; the defendant; Tyrane's brother Tyrone; and several other people then left the house. The defendant began to chase Tyrane and Tyrone chased the defendant. During the chase, Tyrane was shot in both of his calves

¹ In his appellate brief, the defendant raised a third issue, that being that the trial court erred in admitting the recorded statements of LaShanda Williams, LaShonda Green, and Shatyra Crider as impeachment evidence where their trial testimony did not affirmatively damage the State's case. However, in his reply brief, the defendant expressly withdrew this issue. We therefore do not consider that issue on appeal.

² The defendant was also charged with the attempted first-degree murder of Tyrone Allen (Tyrane's brother). He was acquitted of that charge.

and one of his arms. None of Tyrane's wounds were life-threatening. The State argued that the defendant had shot Tyrane. The defendant's theory was that Tyrane had been shot by Tyrone. The evidence relevant to this question is summarized below.

¶ 6 Williams gave a statement to Detective Christopher Shenberger of the Freeport police department shortly after the shooting in which she stated that the defendant "shot like four times" and that she ran when he began shooting. At trial, she testified that Tyrone and Tyrane were her uncles. She noticed that the defendant had a gun in his pants when he was inside the house playing cards. She testified that she saw the defendant shoot a gun. However, on cross-examination, although she reiterated that she heard gunshots, she did not "remember if I seen them or if I didn't see them."

¶ 7 LaShonda Green gave a statement to the police shortly after the shooting. She told Detective Kurt Mills of the Freeport police department that the shots came from the defendant "for sure." The defendant had been standing in the street near her house when he shot the gun. When the shooting occurred, Green ran into her house.

¶ 8 At trial, Green testified that when she observed the defendant outside arguing with Tyrane, the defendant was trying to leave. After the defendant left the yard, she went back inside the house. She did not see anyone with a gun, and she was in the house when she heard shots fired. She did not recall telling Detective Mills shortly after the incident that she saw the defendant shoot a gun. She stated that she was intoxicated when she gave Detective Mills her statement.

¶ 9 Shatyra Crider told the police a few hours after the shooting that the defendant had a gun and she saw him with a gun in the street. She observed him arguing with Tyrane and Tyrone. Tyrane

told the defendant to put down the gun, but Tyrone said if he wanted to fight, they could do so. She saw the defendant point his gun and shoot it four or five times.

¶ 10 At trial, Crider testified that she could not remember many details from the night in question because she was “rather intoxicated,” and because “that night is kind of a blur to me.” She remembered that there was an altercation between the defendant and Tyrane and that someone had a gun, but she did not remember who had the gun. She heard gunshots, but she was too far away to see who had the gun, and she did not see anyone shoot the gun. She testified that she was “pretty sure” she told Detective Mills that she saw the defendant with a gun; however, she explained she was “pretty intoxicated” when she made that statement.

¶ 11 Melissa English testified that she had been Tyrone’s girlfriend for three years at the time of the incident and continued to date him as of the time of trial. She observed a struggle between the defendant, Tyrone, and another individual. When she heard someone say, “he has a gun,” she ran towards her truck. A couple of minutes later, she heard three or four gunshots, followed by a pause, and then two or three additional shots. She did not see the defendant with a gun that night.

¶ 12 Lashaun Thompson testified that he and Tyrane were cousins. He saw Tyrane and the defendant arguing outside of Williams’ house. He saw the defendant wave a gun and yell something. However, he did not hear a gunshot until after he had left the house and turned the corner. He never saw the defendant shoot a gun.

¶ 13 Shannon Thomas gave a statement to the police in which he indicated that he had bumped into the defendant and felt what he believed to be a holster under the defendant’s arm. At trial, he testified that he saw the defendant and Tyrane arguing. He heard a shot and saw people leaving the

house. Thomas could not determine the origin of the shot, but he walked away to separate himself from the situation. After walking across the street, he heard a “ruckus,” followed by gunfire.

¶ 14 Tyrone testified that while he was playing cards with the group, the defendant got up from the table to use the bathroom. Tyrone saw that the defendant had a gun either in his pocket or in the right side of his waistband. Tyrone additionally testified that after Tyrone arrived and insulted the defendant, both Tyrone and the defendant went outside. After waiting “a good couple minutes,” Tyrone also went outside. He observed the defendant waving a gun and saying that he was going to “kill this bitch.” Tyrone then confronted the defendant, and they pushed and yelled at each other. Tyrone then approached them, and the defendant pointed the gun towards Tyrone, and Tyrone ran toward the church located down the street. The defendant followed Tyrone, and Tyrone followed the defendant.

¶ 15 As they ran, the defendant began shooting the gun, and Tyrone yelled that he had been hit. When they all arrived at a field across from the church, the defendant turned and shot Tyrone in the chest. Tyrone’s cousin, Lee Dockery, arrived shortly thereafter. Tyrone, Dockery, and the defendant all struggled for the gun. Dockery was able to get the gun, and he tossed it into the field. The defendant then ran away, and Tyrone and Tyrone returned to Williams’ house.

¶ 16 Tyrone testified that his brother Tyrone had invited him over to Williams’ house to play cards. When he arrived, he saw the defendant and stated, “I’m not playing cards with this bitch motherf*****.” He then turned around, and left the house. He explained that the words he directed towards the defendant were just “a greeting,” and he did not know why the defendant reacted the way he did. He also stated that he had no history of disagreements with the defendant.

¶ 17 Upon leaving the house, he turned around and saw the defendant on the porch pulling out a gun. Tyrane started running. Upon hearing shots, he looked back and saw the defendant shooting at him. After being shot three times, he fell to the ground. He denied seeing any confrontation outside the house between the defendant and Tyrane.

¶ 18 Detective Christopher Shenberger testified that, on the morning of the incident, he went to 923 South Galena to assist officers who were attempting to locate the defendant. After finding the defendant, the police took the defendant to the police station. He did not observe any bruises or injuries on the defendant. After the defendant was given his *Miranda* rights, the defendant stated that he had been at the Galena address all night and he had three witnesses to corroborate his claim: his sister Jazmon Norsworthy, his girlfriend Chandra Pearson, and Bryan Simon.

¶ 19 A few days later, the defendant contacted Detective Mills and said he wanted to provide his side of the story. The defendant then gave his version of what had happened to Detectives Shenberger and Mills. The defendant stated that Tyrane was mad at him because of his relationship with Tyrane's ex-girlfriend and Tyrane's children. Tyrane had also threatened him earlier in the day. At the card game, he observed Tyrane get up from the table to go to the bathroom. He could see through Tyrane's t-shirt that Tyrane had a gun in the waistband of his pants. After Tyrane arrived at Williams' house and insulted him, the defendant left the house. Tyrane then approached him, followed by Tyrane. The defendant and Tyrane exchanged words, which led to a physical confrontation. Tyrane then fired one shot into the ground. As the defendant chased Tyrane, Tyrane fired three shots. The defendant then attempted to remove the gun from Tyrane. As they wrestled for the gun, it discharged. Tyrane then came over and punched the defendant in the face five or six times. He was also pistol whipped in the face by Tyrane. The defendant ran away and heard more

shots fired. The defendant eventually got away and went to Bryan Simon's house at 923 South Galena.

¶ 20 After the State rested, Jerry Mitchell testified on behalf of the defense. He testified that he saw Tyrane and the defendant fighting. Tyrane tried to hit the defendant in the head with a bottle, but he hit the brim of the defendant's hat instead. The defendant then began chasing Tyrane. As Mitchell turned to leave, he heard a couple shots and saw a flash coming from behind the defendant. He never saw the defendant with a gun.

¶ 21 Jazmon Norsworthy testified that she dated Tyrane in 2008. During that time, Tyrane and Tyrone would often talk negatively about the defendant. Earlier in the day of the incident, Jazmon and the defendant went for a ride and Tyrane pulled behind them and tailed them. Tyrane pulled next to the defendant, yelled at him, and cut him off.

¶ 22 The defendant testified generally consistently with the statement that he had given Detectives Mills and Shenberger in the second interview. The defendant additionally testified that, several hours before the incident, while he and his sister Jazmon were in their parked car in a store parking lot, Tyrane pulled behind them and said something to him. Although the defendant could not understand what Tyrane had said, he knew the comment was directed at him. Jazmon told the defendant to ignore him, so they left without going into the store. Tyrane followed them out of the parking lot and eventually pulled next to them. Someone in the front passenger seat of Tyrane's car rolled down the window and gestured that he had a gun. At that point, Tyrane yelled at the defendant, and the defendant drove away.

¶ 23 When he was chasing Tyrane, he heard shots coming from behind him. He turned and saw Tyrone chasing him. The defendant continued to run and also “duck” while Tyrone continued to shoot.

¶ 24 Unlike in his earlier statement to the police, the defendant did not indicate that Tyrane hit him in the face or that Tyrone pistol whipped him. Rather, the defendant testified that Tyrane hit the brim of his cap, and Tyrone hit him on the top of the head with the gun.

¶ 25 At the close of the trial, the jury found the defendant guilty of the attempted murder of Tyrane. The jury also found that the defendant had personally discharged a firearm. Following the denial of his motion for a new trial, the trial court imposed the minimum sentence of 31 years for the attempted murder conviction (6 years plus a mandatory additional 25 years for using a firearm during the crime), and concurrent sentences of 6 years for aggravated battery with a firearm and 4 years for the aggravated discharge of a firearm. The defendant thereafter filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 The defendant’s first contention on appeal is that he was not convicted beyond a reasonable doubt of trying to kill Tyrane. The defendant insists that the testimony of the State’s two main witnesses—Tyrone and Tyrane—was so contradictory and inconsistent that it could not have been believed by any rational trier of fact. The defendant further argues that the testimony of the other witnesses was so inconsistent that it too could not have supported the defendant’s convictions.

¶ 28 It is not the province of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant question is “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.’ ” (Emphasis in original.) *Collins*, 106 Ill. 2d at 261, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The sufficiency of the evidence and the relative weight and credibility to be given the testimony of the witnesses are considerations within the exclusive jurisdiction of the fact finder. *People v. Jimerson*, 166 Ill. 2d 211, 214 (1995). The evaluation of the testimony and the resolution of any conflicts or inconsistencies which may appear are also wholly within the province of the finder of fact. *Collins*, 106 Ill. 2d at 261-62.

¶ 29 The offense of attempted murder is shown when the State proves, beyond a reasonable doubt, that the defendant, with the specific intent to kill, commits any act which constitutes a substantial step toward the commission of murder. 720 ILCS 5/8-4 (West 2008). The question of a defendant’s intent is one of fact to be determined by the trier of fact, and can be inferred from the surrounding circumstances such as the character of the attack, use of a deadly weapon, and the severity of injury. *People v. Valentin*, 347 Ill. App. 3d 946, 951 (2004).

¶ 30 Considering the evidence in the light most favorable to the State, we believe it was sufficient to convict the defendant of attempted first degree murder. Several witnesses saw the defendant with a gun. Williams, Green, Crider, Tyrone, Tyrane all indicated that they saw the defendant shooting at Tyrane. The defendant’s shooting of Tyrane was a substantial step towards the murder of Tyrane. Further, based on the defendant’s statement prior to shooting Tyrane that he was going to “kill” Tyrane, the jury could conclude that the defendant did intend to kill Tyrane.

¶ 31 In so ruling, we note that some of the witnesses’ accounts of what occurred were inconsistent. Green and Crider told the police after the shooting that they had seen the defendant shoot at Tyrane. However, at trial, neither Green or Crider recalled seeing the defendant shoot at Tyrane. It was within the purview of the jury to determine that Green and Crider were telling the truth in their out-

of-court statements, which they were impeached with at trial, rather than what they actually testified to at trial.³ *People v. Curtis*, 296 Ill. App. 3d 991, 996-97 (1998).

¶ 32 We also agree with the defendant that the record reflects that Tyrane bore him some animosity. The defendant also points to his sister's testimony to demonstrate that Tyrone did not like him either. Based on this animosity, the defendant asserts that Tyrane's statement that he did not have a "disagreement" with him was not credible. He further asserts that Tyrane's credibility was undermined when he said he gave the defendant "just a greeting" when he entered Williams' house, something that was contradicted by almost all of the other witnesses at trial.

¶ 33 The points that the defendant raises regarding Tyrane and Tyrone's credibility were ultimately a matter for the jury to resolve. See *Collins*, 106 Ill. 2d at 261-62. Further in considering the evidence presented at trial, the jury could also consider that the defendant's statements to the police and his testimony at trial at times strained credulity. In his initial statement to the police, the defendant stated that he was not near Williams' house on the night in question. Such a false exculpatory statement allows for an inference of consciousness of guilt. *People v. Milka*, 211 Ill. 2d 150, 181 (2004). In his second statement to the police, the defendant indicated that Tyrane had punched him five or six times. Tyrone had pistol-whipped him in the face. However, upon seeing the defendant a few hours after his altercation with Tyrane, Detective Shenberger testified that he did not observe any cuts or bruises on the defendant. At trial, the defendant changed his account of the events and did not testify that Tyrane had punched him or that Tyrone had pistol whipped him. Moreover, and significantly, the defendant testified that Tyrone was chasing him and shooting at him

³ As noted earlier, the defendant acknowledged in his reply brief that the out-of-court statements were properly admitted as substantive evidence.

at the same time that the defendant was chasing Tyrone. When the defendant realized that Tyrone was shooting at him, he “ducked.” The defendant is 6’ 5” and weighs 246 pounds. See Illinois Department of Corrections, Inmate Search, Michael D. Norsworthy, <http://www.idoc.state.il.us> (last visited Nov. 21, 2013). Tyrone was shot in his calf muscles. Thus, for the defendant’s version of the events to be true, the defendant must have been able to “duck” his large frame so low, while still running, that the shots that Tyrone fired went above him and struck Tyrone in his lower leg muscles instead. The jury was free to reject the defendant’s version of what happened and place greater weight on the State’s evidence, and we will not disturb the jury’s verdict. See *Jimerson*, 166 Ill. 2d at 214.

¶ 34 We also reject the defendant’s argument that this case is analogous to *People v. Henry*, 3 Ill. App. 3d 235 (1971). The defendant argues that *Henry* stands for the proposition that “the firing of a gun does not establish intent to kill beyond a reasonable doubt when other circumstances suggest that the shooter was trying to escape danger, and did not cause injuries that he would likely have been able to cause if he had intended to kill.” In *Henry*, the court found that the evidence did not support a finding of attempted murder. There, the evidence showed that the defendant, who was an ex-marine with an expert rating in marksmanship, fired a handgun as an unmarked police car approached. *Id.* at 239. The court found that the evidence was not clear as to whether the defendant actually shot at the police car, and the court believed that it was unlikely that the defendant would have missed the car had he aimed at it. *Id.* Accordingly, the court reversed the conviction.

¶ 35 In *Henry*, there was no direct evidence that the defendant intended to kill anyone. Conversely, in this case, according to Tyrone, shortly before the shooting, the defendant stated that he wanted to kill Tyrone. Even if Tyrone’s testimony were discounted, unlike in *Henry*, there is no

evidence here that defendant had special training as marksman and necessarily would have hit his target if he intended to. Thus, the fact that Tyrane's wounds were not-life threatening supports two competing inferences: (1) that the defendant did not intend to kill Tyrane; or (2) the defendant was not accurate with his shooting. See *People v. Green*, 339 Ill App. 3d 443, 451-52 (2003) (discussing two competing inferences when defendant shot at police officers but did not hit them and stating that poor marksmanship was not a defense to attempted murder). It was for jury to determine which inference should be drawn, and we cannot say that no rational jury could have found that the defendant did not act with the intent to kill. See *id.*

¶ 36 The defendant's second contention on appeal is that his convictions and sentences for aggravated battery with a firearm and aggravated discharge of a firearm must be vacated because they are based on the same conduct used to support the convictions for attempted murder. The State confesses error on this point.

¶ 37 We agree that the trial court erred when it convicted and sentenced the defendant for aggravated battery with a firearm and aggravated discharge of a firearm. Those convictions were based on the same physical act that provided the basis for his attempted murder conviction, *i.e.*, the gunshots which injured Tyrane. The defendant may only be convicted and sentenced on the most serious offense where multiple charges arise out of the same act. See *People v. King*, 66 Ill. 2d 551, 566 (1997). We therefore vacate the defendant's convictions and sentences for aggravated battery with a firearm and aggravated discharge of a firearm.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Stephenson County is affirmed in part and vacated in part.

¶ 40 Affirmed in part and vacated in part.