2013 IL App (4th) 120551-U

NO. 4-12-0551

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 19, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TRIBBEUNA D. CROSS, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Vermilion County No. 10CF619 Honorable Claudia S. Anderson, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Despite the victim's change in testimony during cross-examination about what he saw before he was shot, the State's evidence was still sufficient to prove defendant guilty beyond a reasonable doubt.

¶ 2 Where the State did not apportion the two charges among the multiple gunshots, defendant's mob-action conviction must be vacated under the one-act, one crime rule.

¶ 3 Where numerous errors existed in the imposition of fines and fees and the proper award of monetary credit against them, remand is necessary for the trial court to properly address them.

¶ 4 In November 2010, the State charged defendant, Tribbeuna D. Cross, by information with one count of mob action (720 ILCS 5/25-1(a)(1) (West 2010)), one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)), and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)). On the State's motion, the

Vermilion County circuit court dismissed the aggravated-discharge-of-a-firearm charge. After an October 2011 trial, a jury found defendant guilty of both mob action and aggravated battery with a firearm. Defendant filed a motion for judgment of acquittal, dismissal, or, in the alternative, a new trial, which the court denied. In May 2012, the court sentenced defendant to consecutive prison terms of 3 years for mob action and 16 years for aggravated battery with a firearm. Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 5 Defendant appeals, asserting (1) the State failed to prove him guilty beyond a reasonable doubt of aggravated battery with a firearm and mob action; (2) his conviction for mob action violates the one-act, one-crime rule; (3) his consecutive sentences were improper under *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (4) errors occurred in the imposition and calculation of his fines; and (5) he is entitled to monetary credit for his state police operations fine. We affirm in part, vacate in part, and remand the cause with directions.

¶ 6 I. BACKGROUND

¶ 7 The November 2010 mob-action charge alleged that, on October 23, 2010, defendant and Terrance Johnson, "being two or more persons acting together and without authority of law, used force or violence disturbing the public peace." The aggravated-battery-with-a-firearm charge asserted that, on October 23, 2010, "in committing a Battery, knowingly by means of discharging a firearm caused injury to Charles M. Eaton." Johnson was tried separately on the mob-action charge.

¶ 8 In October 2011, the trial court held a jury trial on the charges against defendant. The State presented the testimony of the following: (1) Cliff Hegg, a Danville police officer; (2) Tanesha Johnson, an acquaintance of Eaton who helped him after he was shot; (3) Jane

McFadden, a Danville police officer; (4) Eaton, the victim; (5) James Smutz, a Danville police officer; and (6) Steve Miller, a nurse at Provena hospital in Danville. In his case, defendant recalled Officer Hegg. The evidence relevant to the issues on appeal follows.

¶ 9 Officers Hegg and McFadden testified the call of the shooting came in around 7:26 a.m. on October 23, 2010. Tanesha testified she did not see the shooting but heard three to four gunshots shortly before she saw "C-Mitch" (Eaton's nickname) coming toward her with a gunshot wound. Eaton testified he did not remember what time of day it was when he was shot but remembered it was dark and stated "it was probably like four o'clock." He was walking through Fair Oaks in Danville, Illinois, when he saw "Trel" and "Tug." Eaton had known them about five years and saw them around Danville. Tug said something like "what's your kind doing out here?" Trel said nothing. Eaton said nothing, turned around, and started walking away. Eaton then turned around to face Trel and Tug and was shot. On direct examination, Eaton testified Trel had a black handgun in his hand. Eaton saw the gun pointed at him and then it "went off." Trel was the only one Eaton saw with the gun. On redirect, Eaton again testified defendant was the person who shot him. On cross-examination, Eaton testified he did not see anybody with a gun and, on re-cross, stated he did not see defendant with a gun. Eaton further testified the gun fired three to four times, and it was the first shot that hit him in the lower right stomach. Eaton was knocked to the ground by the shot. He got up and started running. Eaton ran until his legs gave out and remembered seeing Tanesha. He also remembered the ambulance but did not remember anything at the hospital in Danville. Specifically, Eaton did not recall talking to a police officer at the hospital in Danville. Eaton just recalled waking up at Carle Hospital in Urbana, Illinois.

¶ 10 Moreover, Eaton remembered talking to Officer Smutz while Eaton was in the hospital in Urbana. Officer Smutz presented him with a photographic lineup that contained six photographs. The lineup was admitted into evidence as the State's exhibit No. 4. The exhibit had photographs B and F circled. Eaton believed Officer Smutz had circled them. Written next to photograph B was "Trel gun shot me, " and next to photograph F was "Tug." Eaton testified the handwriting next to the two photographs was his. In court, Eaton identified defendant as Trel. Eaton also testified that, while no personal issues existed between defendant and Eaton, Eaton had got into a fight two or three months earlier with a person that hung out with defendant.

¶ 11 Officer Smutz testified about the photographic lineup he presented to Eaton at the hospital in Urbana. Defendant identified photograph B as being "Trel" and the person who shot him. Defendant further identified photograph F as being "Tug" and the person who talked to him before the shooting. Officer Smutz testified Trel was defendant, and Tug was Terrance. He further testified he asked Eaton to circle the two photographs he had selected.

¶ 12 Miller testified he cared for Eaton at the hospital in Danville. Eaton had suffered a gunshot wound to the right groin. Eaton was stabilized and transferred to Carle. While at the hospital in Danville, Eaton was given Dilaudid for pain. Dilaudid can cause drowsiness, and if a person is allergic to it, Dilaudid can cause delusions or hallucinations. Eaton did not seem allergic or delusional.

¶ 13 In defendant's case, Officer Hegg testified he spoke with Eaton about 30 minutes after the shooting at the hospital in Danville. Eaton told Officer Hegg he was walking in the Fair Oaks area and was shot by a male that he did not know. Eaton described the shooter as a "new face." According to Officer Hegg, Eaton was alert and conscious when he made the statements

about the shooting.

¶ 14 At the conclusion of the trial, the jury found defendant guilty of both mob action and aggravated battery with a firearm.

¶ 15 In November 2011, defendant filed a posttrial motion, asserting (1) he was not proved guilty beyond a reasonable doubt, (2) the trial court erred by not admitting Eaton's spontaneous declaration shortly after the shooting, (3) the court erred by instructing the jury on accountability, and (4) the court erred by denying defendant's pretrial motion for discharge. The court denied the motion in January 2012. Thereafter, defendant filed a *pro se* motion arguing defense counsel rendered ineffective assistance of counsel. While the court did not find defense counsel ineffective, it appointed defendant new counsel.

¶ 16 On May 29, 2012, the trial court held a sentencing hearing. The matter of whether mob action merged into the aggravated-battery-with-a-firearm conviction under the one-act, one crime rule was addressed. Citing *People v. Jimerson*, 404 Ill. App. 3d 621, 936 N.E.2d 749 (2010), the court found the one-act, one-crime rule did not apply to the mob-action conviction. The court also found defendant was subject to consecutive sentencing under section 5-8-4(d)(1) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(d)(1) (West 2010) (text of section effective until July 1, 2011)) because he "inflicted severe bodily injury." The court then sentenced defendant to prison terms of 3 years for mob action and 16 years for aggravated battery with a firearm. On June 12, 2012, defendant filed a motion to reconsider his sentence, which the court denied on June 14, 2012.

¶ 17 On June 15, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdic-

tion under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 18 II. ANALYSIS

¶ 19 A. Sufficiency of the Evidence

¶ 20 Defendant first asserts the State failed to prove beyond a reasonable doubt he committed mob action and aggravated battery with a firearm because Eaton was unbelievable and the evidence did not demonstrate defendant was accountable for Terrance's actions. The State contends that, despite the inconsistencies in Eaton's testimony, its evidence was sufficient to identify defendant as the shooter.

¶ 21 When presented with a challenge to the sufficiency of the evidence, a reviewing court's function is not to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we consider " '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.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, a reviewing court must draw all reasonable inferences from the record in the prosecution's favor. *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553. Further, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484. Last, we note the United States Supreme Court has declared "[s]ufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced *at trial* could support any rational determination of guilt beyond a reasonable doubt." (Emphasis added.) *United States v. Powell*, 469 U.S. 57, 67 (1984). Thus, we will not consider

evidence that was not before the jury.

¶ 22 Here, defendant argues the testimony of Eaton, the victim, was not believable. Defendant then sets forth inconsistencies in Eaton's testimony as well as conflicts with the testimony of other witnesses. He first notes that, at trial, Officer Hegg testified that, around 8 a.m. on October 23, 2010, at the hospital in Danville, Eaton told Officer Hegg the person who shot him was someone he had never seen before. At trial, Eaton testified he had known defendant for years. Eaton also testified he did not recall anything after he got to the emergency room at the hospital in Danville. Specifically, Eaton did not recall talking to a police officer at the hospital in Danville. Miller, a nurse at the hospital in Danville, testified Eaton was given Dilaudid for pain, which causes drowsiness. Officer Hegg testified Eaton was conscious and alert when he talked to him. The jury could have reasonably found Eaton did not make the statement to Officer Hegg or did so under the influence of pain medication. Defendant also notes the inconsistency between Eaton's testimony he ran into defendant and Terrance around 4 a.m. and the testimony of other witnesses that the shooting happened at 7:30 a.m. Eaton had testified he did not remember what time of day the shooting had occurred but thought it was dark. The jury could have viewed that inconsistency as a very minor one.

¶ 23 Moreover, Officer Smutz testified he spoke with Eaton on October 29, 2010, at Carle Hospital. Officer Smutz presented defendant with a photographic lineup. Defendant identified photograph B as being "Trel" and the person who shot him. Defendant further identified photograph F as being "Tug" and the person who talked to him before the shooting. The photograph lineup was admitted into evidence at trial. Next to photograph B is "Trel gun shot me, " and next to photograph F is "Tug." Eaton testified the handwriting next to the two

photographs was his. In court, Eaton identified defendant as Trel. Photographs B and F were also circled. Eaton testified he thought the detective had circled the two photographs. Officer Smutz testified he had asked Eaton to circle the two photographs he had selected. We fail to see any significance as to the inconsistency as to who circled the two photographs as the evidence was uncontradicted that defendant identified those two photographs as being of the two men that confronted him on October 23, 2010.

¶ 24 Last, during direct examination, Eaton testified he saw a black handgun in Trel's hand right before the gun fired. Eaton further stated he saw the gun pointed at him. On cross-examination, Eaton testified he did not really see anyone with the gun and did not know which one of the two fired the shots. On redirect, Eaton confirmed he saw Trel shot him with the handgun. On re-cross, Eaton again testified he did not see Trel with the gun. Thus, Eaton changed his story depending on what party was asking him the questions.

¶ 25 Our supreme court has held the testimony of a single witness (here, the victim), if it is positive and the witness credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). While the determination of a witness's credibility rests within the jury's province and the jury's finding on that matter receives great weight, the jury's determination is not conclusive. *Smith*, 185 Ill. 2d at 542, 708 N.E.2d at 370. A reviewing court will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Smith*, 185 Ill. 2d at 542, 708 N.E.2d at 370.

¶ 26 Additionally, Illinois courts have found that, even when corroborative evidence does not exist, a recanted prior inconsistent statement admitted under section 115-10.1 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/115-10.1 (West 2010)) can

support a conviction. *People v. Armstrong*, 2013 IL App (3d) 110388, ¶ 23, 987 N.E.2d 1040; *People v. Craig*, 334 Ill. App. 3d 426, 440, 778 N.E.2d 192, 204 (2002); *People v. Morrow*, 303 Ill. App. 3d 671, 677, 708 N.E.2d 430, 436 (1999). Once a jury returns a guilty verdict based on a prior inconsistent statement, "a reviewing court not only is under no obligation to determine whether the declarant's testimony was substantially corroborated or clear and convincing, but it may *not* engage in any such analysis." (Emphasis in original.) (Internal quotations marks omitted.) *Morrow*, 303 Ill. App. 3d at 677, 708 N.E.2d at 436 (quoting *People v. Curtis*, 296 Ill. App. 3d 991, 999, 696 N.E.2d 372, 378 (1998)). Specifically, the trier of fact has the duty to weigh the statement, weigh the disavowal, and then determine which one is to be believed. *Armstrong*, 2013 IL App (3d) 110388, ¶ 27, 987 N.E.2d 1040.

¶ 27 In this case, Eaton made the inconsistent statements during defendant's trial so the jury was able to observe Eaton's demeanor when he made the inconsistent statements. Thus, the jury in this case was in a better position to determine which statement was the more believable one compared to where the statement was made outside of court and admitted under section 115-10.1. "The rule in this State and generally is that the contradictory testimony of a witness does not *per se* destroy the credibility of the witness or the probative value of his testimony, and it remains for the trier of fact to decide when, if at all, he testified truthfully." *Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491, 498-99, 322 N.E.2d 5, 9 (1974). The jury as the trier of fact has the responsibility to assess the witnesses' credibility, weigh evidence presented, resolve conflicts in evidence, and draw reasonable inferences from the evidence, and those determinations are entitled to great deference. *People v. Moss*, 205 Ill. 2d 139, 164-65, 792 N.E.2d 1217, 1232 (2001).

¶ 28 This case is distinguishable from *People v. Dawson*, 22 Ill. 2d 260, 174 N.E.2d 817 (1961), cited by defendant. The testimony found insufficient in *Dawson* was incredible and contrary to human experience. *Dawson*, 22 Ill. 2d at 265, 174 N.E.2d at 819-20. This case involves inconsistent statements, not incredible ones. Here, the jury chose to believe Eaton's testimony on direct examination, which was not unreasonable, improbable, or incredible.

¶ 29 Accordingly, we find the evidence in this case was sufficient to prove defendant was the shooter beyond a reasonable doubt. Since the evidence was sufficient to prove defendant guilty of mob action and aggravated battery with a firearm as the principal, we need not address defendant's argument regarding accountability.

¶ 30 B. One-Act, One Criminal Rule

¶ 31 Defendant next asserts his mob-action conviction must be vacated under the one-act, one-crime rule. The State concedes the conviction must be vacated under the one-act, one-crime rule, noting this case is distinguishable from *Jimerson*, 404 Ill. App. 3d at 636-37, 936 N.E.2d at 762-63, because the State made no effort in the trial court to apportion the charged crimes to separate discharges of the firearm. After reviewing the matter, we agree with the parties.

¶ 32 Our supreme court has explained review of this issue as follows:

> "The application of the one-act, one-crime rule is a question of law, which we review *de novo*. [Citation.] Under the rule, a defendant may not be convicted of multiple offenses that are based upon precisely the same single physical act. [Citations.] Thus, if a defendant is convicted of two offenses based upon the same single

> physical act, the conviction for the less serious offense must be vacated." *People v. Johnson*, 237 Ill. 2d 81, 97, 927 N.E.2d 1179, 1189 (2010).

In interpreting the definition of an "act," our supreme court has held separate blows, although closely related, constituted separate acts that could properly support multiple convictions with concurrent sentences. *People v. Dixon*, 91 Ill. 2d 346, 355-56, 438 N.E.2d 180, 185 (1982). Later, in *People v. Crespo*, 203 Ill. 2d 335, 345, 788 N.E.2d 1117, 1122-23 (2001), the supreme court clarified that, for multiple convictions to be sustained under *Dixon*, the State must apportion the charges among the separate acts in the trial court and not for the first time on appeal. In *Jimerson*, 404 Ill. App. 3d at 636, 936 N.E.2d at 762, the reviewing court found *Dixon* applicable because, unlike in *Crespo*, the State had not tried to change course on appeal.

¶ 33 Here, the mob-action charge asserted defendant "used force or violence" to disturb the peace, and the aggravated-battery-with-a-firearm charged alleged defendant injured Eaton "by means of discharging a firearm." During closing arguments, the prosecutor addressed the evidence supporting the mob-action charge and argued the victim was shot, which constitutes force or violence. The prosecutor did not mention the other gunshots that were fired. Thus, as in *Crespo*, the State did not apportion the two charges at issue here among the separate shots. Accordingly, we vacate defendant's mob-action conviction and sentence under the one-act, one-crime rule.

¶ 34 C. Consecutive Sentences

¶ 35 Defendant further asserts that, if this court disagrees with his one-act, one-crime rule argument, his consecutive sentences applied under section 5-8-4(d)(1) of the Unified Code

(730 ILCS 5/5-8-4(d)(1) (West 2010) (text of section effective until July 1, 2011)) should be vacated because the trial court imposed them in violation of *Apprendi*. Specifically, he argues the finding defendant had "inflicted severe bodily injury" required by section 5-8-4(d)(1) should have been made by a jury and found beyond a reasonable doubt under *Apprendi* as it was recently applied in *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151 (2013).

¶ 36 In the prior section of this order, we agreed with defendant's one-act, one-crime rule argument and vacated his mob-action sentence. The State asserts we should still address this issue because it is not moot due to collateral consequences. Defendant did not respond to the aforementioned argument in his reply brief. Here, defendant clearly sought to raise the *Apprendi* issue only if his mob-action sentence was not vacated. We have vacated the mob-action sentence and thus decline to address defendant's *Apprendi* argument.

¶ 37 D. Fines and Credit

¶ 38 Last, defendant asserts (1) the "Violent Crime" fine imposed under the Violent Crime Victims Assistance Act (Victims Assistance Act) (725 ILCS 240/10 (West 2010)) was improperly calculated, (2) the $2 "Anti-Crime Fund" fine is not applicable to him since he was not placed on probation, and (3) he is entitled to monetary credit against his "State Police Ops" fine. The State concedes the "Violent Crime" fine was improperly calculated, the $2 "Anti-Crime Fund" fine should be vacated, and defendant is entitled to credit against his fines. It also argues additional mandatory fines should be imposed.

¶ 39 After reviewing the matter, we accept the State's concession, vacate the $2 "Anti-Crime Fund" fine, and remand the cause to the trial court for it to remove the fine from the court's record of defendant's financial obligations in this case. See *People v. O'Laughlin*, 2012 IL

App (4th) 110018, ¶ 16, 979 N.E.2d 1023 (noting the "$10 'Anti-Crime Fund' fine" does not apply to defendants sentenced to prison). Moreover, on remand, the trial court should enter a supplemental order imposing the other mandatory fines and fees applicable to defendant's case and to ensure the circuit clerk's record of defendant's financial obligations in this case is consistent with the trial court's orders. We point out that, when the trial court has imposed other fines as in this case, section 10(b) of the Victims Assistance Act (725 ILCS 240/10(b) (West 2010)) requires the court to order an additional fine of $4 for every $40 of other fines, or fraction thereof, imposed. After the fines and fees are properly imposed, defendant then should receive credit under section 110-14(a) of the Procedure Code (725 ILCS 5/110-14(a) (West 2010)) against his fines that allow such credit. See *People v. Williams*, 2013 IL App (4th) 120313, 991 N.E.2d 914 (containing an appendix that notes what fines can receive credit under section 110-14(a)). Finally, we note the fine matter is best handled by the trial court because some fines are approved by county board's, some fines are calculated based on the total amount of other fines, and the computer printout of defendant's financial obligations in this case may contain data-entry errors.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we vacate defendant's conviction and sentence for mob action and the $2 "Anti-Crime Fund" fine, affirm the judgment in all other respects, and remand the cause to the Vermilion County circuit court for an amended sentencing judgment consistent with this disposition. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed in part and vacated in part; cause remanded with directions.