2016 IL App (4th) 140520-U

NO. 4-14-0520

FILED
July 28, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MARSHALL D. SMITH	)	No. 12CF820
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's convictions and sentences, finding (1) the evidence was sufficient to support defendant's convictions for aggravated battery with a firearm and aggravated discharge of a firearm; (2) his convictions do not violate the one-act, one-crime rule; (3) the trial court did not abuse its discretion in sentencing defendant to a cumulative 30-year prison term; and (4) the assessment of sheriff's fees was not error.

¶ 2 Following a November 2013 bench trial, the trial court found defendant, Marshall D. Smith, guilty of aggravated battery with a firearm and aggravated discharge of a firearm and sentenced him to consecutive terms of 20 years and 10 years in prison, respectively. Defendant appeals, arguing (1) the evidence was insufficient to prove his guilt beyond a reasonable doubt; (2) his convictions violate the one-act, one-crime rule; (3) his cumulative 30-year prison sentence is excessive; and (4) duplicate assessments for sheriff's fees must be vacated. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 24, 2012, defendant was charged by information with aggravated discharge of a firearm within 1,000 feet of a school, a Class X felony (720 ILCS 5/24-1.2(a)(1), (b) (West 2010)) and aggravated battery with a firearm, a Class X felony (720 ILCS 5/12-3.05(e)(1), (h) (West 2010)). On September 5, 2012, a grand jury returned superseding indictments on both counts. The indictment for aggravated battery with a firearm alleged that on August 18, 2012, defendant, while committing a battery, knowingly discharged a firearm, striking Whitney Motton in the upper right buttocks and pelvis. The indictment for aggravated discharge of a firearm alleged that defendant, while standing outside an apartment building located within 1,000 feet of Illinois State University (ISU) property, knowingly discharged a handgun at the building with knowledge that the apartment building was occupied.

¶ 5 On November 4, 2013, defendant's bench trial commenced. Whitney Motton testified first for the State. In August 2012, she was a nursing student attending ISU. In the early morning hours of August 18, 2012, Motton was at the residence of her then-boyfriend, Percy Thomas, for a birthday celebration. Thomas's apartment was located on North Adelaide Street in Normal. Motton estimated more than 30 people were at the party, most of whom she did not know. According to Motton, she was standing in the kitchen, talking to her friends Jordy Warren, Ebony Green, and Cameron Wilson, when she heard gunshots. She did not see the shooter. Immediately, Motton realized she had been shot in her "right hip area in [her] back side." She was carried outside and was taken by ambulance to the hospital, where she had surgery to remove the bullet. Motton identified a photograph of the apartment building and pointed out the area of the kitchen where she had been standing when she was shot. She also identified the kitchen window to the left of the front door in the photograph.

¶ 6 Percy Thomas testified between 50 and 60 people were at the party. Thomas was in the living room when he heard gunshots. He did not see the shooter.

¶ 7 Ebony Green testified she went to the party with Motton. According to Green, they did not know many people at the party so they went into the kitchen. Green testified that approximately 15 to 20 minutes later, she heard gunshots and Motton yelling, "get down." She then saw Motton lying on the ground in a pool of blood.

¶ 8 Cameron Wilson testified he was at the party on August 18, 2012. According to Wilson, "at least a hundred people" were at the party. While Wilson was in the kitchen talking to Motton, Green, and Warren, he heard gunshots which "sounded pretty close." Shortly thereafter, he heard Motton say she had been shot. Wilson did not see the shooter.

¶ 9 Terrico Parnell testified he had been at a bar in downtown Bloomington the night of August 17, 2012, and into the early morning hours of August 18, 2012, but he had not been drinking. As he was leaving the bar, he ran into some friends who invited him to a party in Woodridge (the party on North Adelaide Street). He told his friends he would meet them at the party. Once at the party, Parnell's friends went inside while he stayed outside. According to Parnell, he did not know whose party it was or the people who were there, so he decided to stay outside on the apartment's front stoop until he felt comfortable. Parnell saw a crowd of approximately 8 to 10 people walking toward the apartment. Parnell felt uncomfortable, so he moved to the neighbor's porch. He testified two people in the group then moved forward, apart from the rest of the group. Parnell recognized one of the men as "Nate's friend." Parnell explained that he played basketball with Nate but did not know Nate's last name. However, Parnell stated he often saw the man he identified as "Nate's friend" with Nate. Parnell was standing 15 feet away and could clearly see the man's face in the light of the front porch lights.

Parnell testified that Nate's friend spoke to a man at the door and asked, "[w]here he at?" Parnell stated the man at the door responded that he was not going to get "him," went inside, and closed the door behind him. According to Parnell, Nate's friend then "pull[ed] out a gun and started shooting." Parnell testified Nate's friend first shot at the door and then through the kitchen window. After the first three shots, Parnell moved from his position on the neighbor's front porch and hid behind a car as the shots continued. While hiding behind the car, Parnell saw another person with a gun moving toward the apartment. He later heard more shots but did not see who was shooting.

¶ 10 After the shooting, Parnell left in his car. Shortly thereafter, he was stopped by the police. At that time, he told the police that a man he knew as "Nate's friend" was the shooter. Three days later, Parnell participated in a photo lineup at the police station and was asked to identify the shooter on the porch. Parnell identified "Nate's friend" in a photograph and stated he was the shooter. He also identified Nate in a photograph. Parnell identified defendant in open court as the person he had referred to as Nate's friend. Parnell testified he was "85 to 90[%]" sure defendant was the shooter.

¶ 11 Samira Thornton testified that she was socializing with friends during the weekend of August 17 and 18, 2012. Her friends included defendant, whose nickname is "Coppo," Nate, whose last name she did not know, John, Foheem, and Choo Choo (last names not given), and several other people whom she did not know. Thornton testified that at approximately 2 a.m. on August 18, 2012, defendant received a telephone call regarding a party on ISU's campus. The group decided to go to the party and she, defendant, and "somebody else" got into defendant's white car. They, along with two other carloads of people, then drove to the party. Upon arriving at the party, defendant backed his car into a parking space. Thornton then

saw defendant and the other person in the car "pull[] out guns." Thornton, who testified she did not know much about guns, described the gun defendant held as a black semiautomatic gun with a clip. Upon seeing the guns, Thornton asked to be taken home, but defendant and the other person got out of the car and walked toward the party. Thornton, who was participating in drug court at the time, stayed in the car. Thornton testified that she heard gunshots a few minutes later and then saw people running. Defendant and "another" man then ran back to defendant's car and they drove away. (The record is unclear whether the man who returned with defendant was the same man who had ridden to the party with defendant and Thornton.)

¶ 12 At the time of defendant's trial, Thornton was serving a prison sentence for delivery of a controlled substance.

¶ 13 Sergeant Robert Cherry and patrol officer Ronald Stoll, both with the Normal police department, were dispatched to the Woodridge apartment complex on North Adelaide Street in the early morning hours of August 18, 2012, in response to a reported shooting. When they arrived, they observed at least 30 to 40 people running around yelling and screaming. A man carried a female, who had been shot, out of the apartment. Once the woman was taken away by ambulance, Sergeant Cherry questioned individuals, but no one would provide information about the shooting. Sergeant Cherry observed a car in the parking lot of the apartment complex which appeared to have a bullet hole through the front passenger-side window. Officer Stoll located six .45-caliber shell casings in the grass, three .22-caliber shell casings on the front stoop of the apartment near the door, and one .22-caliber shell casing on the floor inside the doorway to the apartment. He also located bullet fragments on the front stoop and bullet holes in the apartment's door, the window to the left of the door, and in the bricks between the door and the window.

¶ 14 Steven Koscielak, a patrol officer and evidence technician for the Normal police department, testified he took photographs of the scene and collected evidence, which included a spent .45-caliber bullet found inside the front door, a bullet fragment collected from the shattered sliding glass door located in the living room, one .22-caliber shell casing from the hallway of the apartment directly inside the front door, three .22-caliber casings from the front stoop of the apartment, and six spent .45-caliber shell casings from the front yard.

¶ 15 Bloomington police detective John Atteberry testified that in an unrelated police investigation, an individual named Style Gray was arrested on December 13, 2012, during the execution of a search warrant at his residence. At the time of his arrest, Gray was in possession of a chrome .45-caliber handgun, which was admitted into evidence as People's exhibit No. 7. Apparently Gray did not know defendant. Gray testified he bought the gun from an individual known as "Dika," at the end of August or the beginning of September 2012. Dika was later identified as Ladika Tolise by Detective Atteberry.

¶ 16 Mark Geever, a special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) testified that he had been investigating several shooting incidents in Bloomington and Normal in the summer and fall of 2012, including the August 18, 2012, shooting at issue here. He assisted in the execution of the search warrant at Gray's residence. The day after the search, Geever sent People's exhibit No. 7 to the ATF lab to be examined in conjunction with evidence collected from the shootings he had been investigating. He also sent several shell casings and bullet fragments collected from the August 18, 2012, shooting to the lab, including the bullet fragment recovered from Motton's body during surgery.

¶ 17 The parties entered into a stipulation regarding the findings of an ATF firearms and tool mark examiner, Jennifer Owens. According to the stipulation, Owens would testify that

she was unable to identify or eliminate the .45-caliber handgun she received from Special Agent Geever (People's exhibit No. 7) as the gun that fired the bullet recovered from Motton's body. However, she would testify that the six .45-caliber bullet casings found at the crime scene were fired from the .45-caliber handgun identified as People's exhibit No. 7.

¶ 18 After the State rested, defendant moved for a directed verdict, arguing (1) the evidence did not establish a connection between him and the handgun identified as People's exhibit No. 7; (2) People's exhibit No. 7 was a chrome-plated handgun, but Thornton testified she saw defendant with a black gun; and (3) Parnell was not certain that defendant was the shooter. The trial court denied the motion. The defense did not present any evidence. Following closing arguments, the trial court found defendant guilty on both counts. However, with respect to the offense of aggravated discharge of a firearm, the court found defendant guilty of the lesser-included Class 1 offense (see 720 ILCS 5/24-1.2(b) (West 2010)), rather than the Class X offense, having found that the State failed to prove beyond a reasonable doubt the firearm was discharged within 1,000 feet of a school.

¶ 19 At the sentencing hearing, defense counsel argued that the two counts should merge or, alternatively, be considered under the one-act, one-crime rule because the offenses stemmed from the same physical act. Regarding the one-act, one-crime argument, the court stated as follows:

> "[E]very time the trigger was pulled, in my estimation, that was a separate physical act. So I do believe there was more than one physical act involved here. I do believe that Count [I] refers to the shot that was fired through the window that struck Ms. Motton, and Count [II] refers to shots that were fired through the

doorway. They are separate physical acts in the [c]ourt's view. And therefore, the [c]ourt believes that it is appropriate to enter sentences on both counts."

The court then sentenced defendant to consecutive prison terms of 20 years for aggravated battery with a firearm and 10 years for aggravated discharge of a firearm.

¶ 20 Defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues (1) the evidence was insufficient to prove his guilt beyond a reasonable doubt; (2) his convictions violate the one-act, one-crime rule; (3) his cumulative 30-year prison sentence is excessive; and (4) duplicate assessments for sheriff's fees must be vacated.

¶ 24 A. Sufficiency of the Evidence

¶ 25 Defendant first argues the evidence was insufficient to prove him guilty beyond a reasonable doubt of either charge. Specifically, he asserts (1) no evidence connected him to the .45-caliber semiautomatic firearm (People's exhibit No. 7) and (2) the testimony of both Parnell and Thornton was "unreliable, contradictory, and implausible."

¶ 26 " 'When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when 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.' " *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). "The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences

from that evidence." *Id*. The testimony of a single witness, if positive and credible, is sufficient to convict a defendant. *People v. Smith*, 185 Ill. 2d 532, 545, 708 N.E.2d 365, 371 (1999). The credibility of a witness is within the province of the trier of fact, whose credibility determination is entitled to great weight. *Id*. at 542, 708 N.E.2d at 370. "A court of review will not overturn the verdict of the fact finder 'unless the evidence is so unreasonable, improbable[,] or unsatisfactory that it raises a reasonable doubt of defendant's guilt.' " S*ingleton*, 367 Ill. App. 3d at 187-88, 854 N.E.2d at 331 (quoting *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004)).

¶ 27 To prove defendant committed the offense of aggravated battery with a firearm, the State was required to show defendant knowingly discharged a firearm and caused injury to Whitney Motton. 720 ILCS 5/12-3.05(e)(1) (West 2010). To prove defendant committed the offense of aggravated discharge of a firearm, the State was required to show defendant knowingly discharged a firearm at or into a building which he knew or reasonably should have known was occupied. 720 ILCS 5/24-1.2(a)(1)(West 2010). Defendant contends that the State failed to prove him guilty of aggravated battery with a firearm because (1) the bullet recovered from Motton could not be connected to the .45-caliber handgun identified as People's exhibit No. 7 and (2) the handgun identified as People's exhibit No. 7 had not been linked to defendant. Defendant further asserts that the State failed to prove him guilty of either charge because the testimony of Parnell and Thornton was contradictory, implausible, and insufficient to prove he was the shooter. After reviewing the record, we find the evidence was sufficient to support defendant's convictions.

¶ 28 The record shows that the .45-caliber handgun identified as People's exhibit No. 7 was established as having been used in the shooting at issue here. In particular, the six spent .45-

caliber shell casings recovered from the front yard of the crime scene were identified as having been fired by the .45-caliber handgun identified as People's exhibit No. 7. Although, due to its distorted condition, the .45-caliber bullet fragment recovered from Motton's body could not be positively identified as having been fired by People's exhibit No. 7, neither could that possibility be excluded. Other evidence recovered from the crime scene included a spent .45-caliber bullet fragment found directly inside the front door and several .22-caliber shell casings located on the front stoop and directly inside the front door of the apartment. We note, in his reply brief, defendant asserts "[i]t is also a reasonable inference that the .22[-]caliber firearm was responsible for [Motton's] injury." However, at trial, the parties stipulated the bullet fragment recovered from Motton's body was from a .45-caliber handgun.

¶ 29 Defendant next takes issue with the State's failure to present any evidence showing how the .45-caliber handgun used in the shooting came to be in the possession of either Ladika Tolise or Style Gray. According to defendant, the State's failure to present such evidence undermined Parnell's identification of him as the shooter and begs the question of whether Tolise was actually the shooter. Further, defendant contends Parnell's and Thornton's testimony was contradictory, implausible, and insufficient to prove he was the shooter. Defendant cites *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 319 (1989) for the proposition that "[a]n identification will not be deemed sufficient to support a conviction if it is vague or doubtful."

¶ 30 Courts evaluate the risk of a witness's misidentification by looking at the following factors: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness; (5) the time elapsed between the crime and the confrontation; and (6) the witness's acquaintance with the suspect prior to the

crime, if any. See *Manson v. Brathwaite*, 432 U.S. 98, 114-15 (1977); *People. v. McTush*, 81 Ill. 2d 513, 521, 410 N.E.2d 861, 865 (1980). According to defendant, applying the above factors to Parnell's identification of him illustrates Parnell's identification was unreliable. We note the trial court examined these factors and found Parnell to be "a very independent witness" who possessed no interest, bias, or motive in the case.

¶ 31 The evidence reflects that Parnell's attention was focused on the large group of people as they approached the party. Feeling uncomfortable, Parnell moved to the neighbor's front stoop; however, his attention remained on the group. Parnell observed defendant in a lit area from a distance of no more than 15 feet and he recognized defendant as "Nate's friend" because he had seen him with Nate on many prior occasions throughout that summer. See *People v. Reed*, 80 Ill. App. 3d 771, 778, 400 N.E.2d 688, 693 (1980) (witness's identification of the defendant was sufficient to support the defendant's conviction where the witness observed defendant for approximately 10 seconds in sufficient lighting and had seen the defendant in the neighborhood before). Parnell then watched defendant pull out a gun and begin shooting, first at the apartment's front door and then at the kitchen window, before Parnell turned and ran to hide behind a car. The night of the shooting, Parnell told police a man he knew as "Nate's friend" was the shooter, and upon being shown a photo array three days after the shooting, he immediately identified the man he knew as "Nate's friend" and indicated he was the shooter. While at trial, Parnell testified he was only 85% to 90% positive of his identification of defendant as the shooter, he was certain of his identification of defendant on the night of, and three days after, the shooting. We find the factors enunciated in *Brathwaite* and *McTush* support Parnell's identification of defendant as the shooter.

¶ 32 Defendant also attacks the credibility of both Parnell and Thornton by pointing to what he considers inconsistencies in their testimony. Defendant argues that their testimony is implausible, and he asserts Thornton had a motive to lie due to her status as a drug-court participant. The trial court, which had the opportunity to observe the demeanor of both witnesses, specifically found Parnell's and Thornton's identification of defendant to be credible. In particular, the court acknowledged Thornton was a convicted felon who had been consuming alcohol prior to the shooting, but it found no evidence that Thornton's initial statement to the police was induced in any way by the promise of a deal. In fact, the court noted Thornton gave her statement to police prior to being arrested and charged with the offense for which she was incarcerated at the time of defendant's trial. Further, the court found Parnell to be "a very independent witness" with no evidence of any interest, bias, or motive to lie. We find the record supports the court's assessment regarding the reliability of Parnell's and Thornton's identification of defendant.

¶ 33 Last, we reject defendant's contention that Parnell's identification of him as the shooter is somehow undermined by the State's failure to present evidence explaining how the firearm identified as People's exhibit No. 7 came to be in the possession of Tolise or Gray. According to Gray's testimony, he bought the firearm identified as People's exhibit No. 7 from Tolise at the end of August or the beginning of September 2012. Although no evidence was presented to show how Tolise came to possess the firearm, the evidence clearly shows that the firearm was used in the shooting at issue here and defendant was positively identified as the shooter by Parnell, who had seen defendant many times before.

¶ 34 In summary, the evidence clearly places defendant outside the apartment where Motton was shot with a gun in his hand, shooting multiple times at the apartment's door, as well

as at the kitchen window. Based on the above, we find the evidence sufficient to support defendant's convictions for aggravated battery with a firearm and aggravated discharge of a firearm.

¶ 35 B. One-Act, One-Crime Doctrine

¶ 36 Defendant next asserts that his convictions violate the one-act, one-crime rule. He maintains both convictions cannot stand as "the State failed to apportion the conduct into separate acts and argued there was one continuous shooting."

¶ 37 The one-act, one-crime rule prohibits multiple convictions and sentences for offenses carved from the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010) (quoting *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844-45 (1977)). An "act" is defined as " 'any overt or outward manifestation which will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306 (1996) (quoting *King*, 66 Ill. 2d at 566, 363 N.E.2d at 844-45). An analysis under the one-act, one-crime rule involves the following two-step process:

> "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *Miller*, 238 Ill. 2d at 165, 938 N.E.2d at 501.

Whether a violation of the one-act, one-crime rule has occurred is subject to *de novo* review. *People v. Gillespie*, 2014 IL App (4th) 121146, ¶ 10, 23 N.E.3d 641.

¶ 38 Initially, we reject the State's contention that defendant has forfeited review of this issue by failing to make the specific objection he now makes on appeal, *i.e.*, both convictions cannot stand due to the failure of the charging instrument to apportion the gunshots into separate acts, before the trial court. The record shows defendant's objections at sentencing related to his contention that the two convictions should merge under the one-act, one-crime rule because they involved the same act. The record further demonstrates the trial court understood defendant's argument pertained to the allegations in the charging instrument. The court found it appropriate to enter sentences on both convictions since "more than one physical act" occurred, concluding "that Count [I] refer[red] to the shot that was fired through the window that struck Ms. Motton, and Count [II] refer[red] to shots that were fired through the doorway." See *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008) ("Where the trial court clearly had an opportunity to review the same essential claim that was later raised on appeal, [the supreme court] has held that there was no forfeiture."). Accordingly, we find defendant has properly preserved this issue for appeal.

¶ 39 As noted, on appeal, defendant argues that both of his convictions cannot stand because "the State failed to apportion the conduct into separate acts and argued there was one continuous shooting." In support of his contention, defendant cites *People v. Crespo*, 203 Ill. 2d 335, 788 N.E.2d 1117 (2001), for the proposition that "in order for multiple acts which occurred during a single altercation to support separate criminal convictions, the State must apportion the various acts among the related charging instruments."

¶ 40 In *Crespo*, the defendant was convicted and sentenced for armed violence and aggravated battery, all in connection with the stabbing of a single victim. *Id*. at 337, 788 N.E.2d at 1118. Evidence at the defendant's trial showed he stabbed the victim "three times in rapid

succession, once in the right arm, and twice in the left thigh." *Id*. at 338, 788 N.E.2d at 1119. On appeal to the supreme court, the defendant argued his aggravated battery conviction had to be vacated since the same physical act formed the basis for both the aggravated battery conviction and the armed violence conviction. *Id*. at 340, 788 N.E.2d at 1120. According to the defendant, the three stab wounds to the victim were not "different offenses" such that multiple convictions could be sustained. *Id*. In contrast, the State asserted that each of the three stab wounds to the victim constituted separate offenses, each capable of independently sustaining a criminal conviction. *Id*. Ultimately, the court agreed that both convictions could not stand and reversed the defendant's aggravated battery conviction. *Id*. at 346, 788 N.E.2d at 1123.

¶ 41 In finding that the defendant's aggravated battery conviction could not stand, the supreme court looked to the indictment and to the State's theory of the case at the defendant's trial. Specifically, the court noted "the counts charging defendant with armed violence and aggravated battery d[id] not differentiate between the separate stab wounds. Rather, these counts charge[d] defendant with the same conduct under different theories of criminal culpability." *Id*. at 342, 788 N.E.2d at 1121. The court continued, "[n]owhere in these charges d[id] the State attempt to apportion these offenses among the various stab wounds." *Id*. at 343, 788 N.E.2d at 1121. Additionally, the court looked to the State's closing argument, finding "the State's theory at trial, as shown by its argument to the jury, amply support[ed] the conclusion that the intent of the prosecution was to portray [the] defendant's conduct as a single attack." *Id*. at 343-44, 788 N.E.2d at 1122. The court stressed that "the State *could have*, under our case law, charged the crime that way, and *could have* argued the case to the jury that way[, but it] chose not to do so." (Emphases in original.) *Id*. at 344, 788 N.E.2d at 1122. According to the court, "to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair."

Id. at 343, 788 N.E.2d at 1122. Finally, the court concluded, "[t]oday's decision merely holds that in cases such as the one at bar, the indictment must indicate that the State intended to treat the conduct of defendant as multiple acts in order for multiple convictions to be sustained." *Id*. at 345, 788 N.E.2d at 1123.

¶ 42 Defendant also cites *In re Rodney S.*, 402 Ill. App. 3d 272, 932 N.E.2d 588 (2010); *People v. Tabb*, 374 Ill. App. 3d 680, 870 N.E.2d 914 (2007), and *People v. James*, 362 Ill. App. 3d 250, 839 N.E.2d 1135 (2005), in support of his contention. In *Rodney S.*, this court found one of the respondent's adjudications for aggravated battery had to be vacated because the delinquency petition charged the respondent with the "exact same conduct" under two different theories of criminal culpability, *i.e.*, one count alleged battery against a victim which occurred on public property and the other count alleged the battery took place against the same victim who was an employee of a local school district. *Rodney S.*, 402 Ill. App. 3d at 284, 932 N.E.2d at 599. In *Tabb*, the defendant, who shot at the victim three times after the victim refused to get out of his truck, was convicted of attempt first degree murder, aggravated battery with a firearm, and aggravated vehicular hijacking. *Tabb*, 374 Ill. App. 3d at 681-82, 870 N.E.2d at 917-18. On appeal, the appellate court agreed with the defendant that his conviction for aggravated battery with a firearm, *i.e.*, the less serious offense, had to be vacated where the parties did not dispute the multiple shots fired by the defendant constituted one act. *Id*. at 695, 870 N.E.2d at 928. Last, in *James*, the defendant was charged by indictment with, and later convicted of, first degree murder and aggravated domestic battery. *James*, 362 Ill. App. 3d at 251, 839 N.E.2d at 1136. The indictments for both charges alleged that defendant "repeatedly stabbed [the victim] with a knife." *Id*. at 252, 839 N.E.2d at 1137. On appeal, this court found that defendant's conviction and sentence for aggravated domestic battery had to be vacated under the one-act, one-crime

rule. *Id*. at 256, 839 N.E.2d at 1140. In so finding, we noted that as in *Crespo*, the defendant had committed a series of closely related but separate acts when he stabbed the victim, but because the State failed to use language in the indictment treating each stab as a separate crime, defendant's aggravated battery conviction could not stand. *Id*.

¶ 43 We find the above cases distinguishable. As noted by the State, the rule enunciated in *Crespo* applies only where multiple offenses arise from a series of closely related acts committed against the *same victim*. In cases such as those, the charging instrument must put the defendant on notice that he is being charged with multiple offenses arising from the closely related acts based on different theories of liability so that he may properly defend himself against the charges. Here, however, as the State points out in its brief, defendant was not charged separately for the same conduct against the same victim under different theories of criminal liability. As stated, the indictment for aggravated battery with a firearm alleged that "defendant knowingly discharged a firearm and thereby caused injury to Whitney L. Motton" while the indictment for aggravated discharge of a firearm alleged that "defendant, while standing outside the [apartment building], and with knowledge that the apartment building was occupied, knowingly discharged a .45[-]cal[iber] handgun at that building."

¶ 44 Although cited by neither party, we find *People v. Banks*, 260 Ill. App. 3d 464, 632 N.E.2d 257 (1994), instructive. In that case, the defendant was convicted of multiple offenses, including three counts of aggravated battery with a firearm for shooting three victims, and three counts of aggravated discharge of a firearm for shooting in the direction of the same three victims who were part of a crowd of approximately a dozen people. The issue on appeal was whether the three convictions for aggravated discharge of a firearm should stand as separate acts or be vacated as offenses having been carved from the same physical act which supported

the convictions for aggravated battery with a firearm. *Id*. at 470, 632 N.E.2d at 262. The First District concluded the offenses, as charged in the indictments, were distinct offenses. *Id*. at 472, 332 N.E.2d at 263. Specifically, the court noted as follows:

> "Defendant's acts which caused injuries to the victims constitute deeds distinct from his acts of firing in the direction of a crowd of unarmed people assembled outside an apartment building. To find otherwise would result in the absurd conclusion that the convictions obtainable, given the facts of this case, rest only with the marksmanship skills of defendant. The evidence reveals that numerous shots, no less than 15, were fired into a crowd of approximately a dozen unarmed people. *** Defendant would have us count only the shots that hit the victims and disregard the stray shots, hardly just target practice." *Id*.

¶ 45 Similar to *Banks*, the evidence here showed defendant fired as many as six shots into a crowed apartment, first in the direction of the front door and then at the kitchen window—a point argued by the State during its closing argument. While the charge for aggravated battery with a firearm arose out of one shot that hit Motton while she was standing in the kitchen, the charge for aggravated discharge of a firearm arose out of defendant's act of knowingly shooting multiple times into the crowded apartment in blatant disregard for the lives of the people located inside. Thus, we find defendant's convictions were based on multiple acts. Further, although defendant does not argue this point in his brief, we find the offense of aggravated discharge of a firearm as charged here is not a lesser-included offense of aggravated battery with a firearm. See *People v. Nunez*, 236 Ill. 2d 488, 494, 925 N.E.2d 1083, 1086 (2010) (noting once a court

determines a defendant has committed multiple acts, it then must determine whether any of the offenses are lesser-included offenses, and if they are, multiple convictions are improper). In sum, we find defendant's multiple convictions do not violate the one-act, one-crime rule.

¶ 46 C. Propriety of Defendant's Sentence

¶ 47 Next, defendant argues the trial court erred in sentencing him to a cumulative 30-year prison term. According to defendant, the court failed to consider his rehabilitative potential and improperly considered gun violence in the community in aggravation.

¶ 48 The Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. In fashioning a sentence, the trial court must balance the retributive and rehabilitative purposes of punishment and carefully consider all aggravating and mitigating factors, basing the sentence on the particular circumstances of each case. *People v. Daly*, 2014 IL App (4th) 140624, ¶ 26, 21 N.E.3d 810. "Because of the trial court's opportunity to assess a defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age, deference is afforded its sentencing judgment." *Id*. We review a trial court's sentencing decision for an abuse of discretion. *Id*.

¶ 49 Defendant first asserts that the trial court failed to consider his rehabilitative potential. Specifically, defendant argues the "court did not refer to rehabilitation and did not consider that: [he] attended [General Education Development (GED)] classes while awaiting trial; his prior employer commended his work and would rehire him; and that he had an infant daughter and a supportive family." The record rebuts this contention. The presentence investigation report—which the court considered—indicated that defendant had an infant daughter whom he provided for, had been employed with a carpet cleaning service until March

2012, and had attended four weeks of GED classes. Further, the court considered letters written by defendant's sister and soon-to-be sister-in-law addressing his devotion to his infant daughter as well as a letter by his employer noting his work ethic and indicating a desire to continue employing defendant. In addition, the court specifically referred to defendant's attorney's emphasis on defendant's ability to be rehabilitated, defendant's "lack of any prior record," and his "good solid upbringing by a good family." Despite these factors in mitigation, however, the court determined that "the seriousness of the crime itself, the harm it caused, and the need for deterrence" required a "significant sentence." At the hearing on defendant's motion to reconsider his sentence, the court again considered the above factors, including the "highly mitigating" fact of defendant's lack of a criminal history and the hardship a long sentence would cause to defendant's infant daughter. Thus, the record shows the court considered defendant's rehabilitative potential on two occasions, but nonetheless, it remained "absolutely convinced that a significant sentence ha[d] to be imposed" considering the violent nature of defendant's act of "firing a weapon into a crowd of innocent people."

¶ 50 Defendant next contends the trial court improperly considered gun violence in the community as an aggravating factor, which he asserts was not based on evidence in the record. In his reply brief, defendant concedes he failed to preserve this issue for appeal but asserts second-prong plain-error review is appropriate because the "error affected the fundamental fairness of his sentencing hearing and his substantial rights to liberty."

¶ 51 As noted, under the second prong of the plain-error doctrine, a reviewing court may review unpreserved error when "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189,

940 N.E.2d 1045, 1058 (2010). To obtain relief under the plain-error rule, a defendant must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). The burden of persuasion rests with the defendant. *People v. Curry*, 2013 IL App (4th) 120724, ¶ 62, 990 N.E.2d 1269. If clear or obvious error is established, we then consider whether the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059.

¶ 52 Here, defendant takes issue with the following comment made by the trial court during sentencing:

> "You cannot open a newspaper, read something on the internet about local news, listen to the news broadcast, without hearing about gun violence. It's a tragic and terrible commentary on our society. And when gun violence occurs in this community, it is particularly disturbing, because we tend to think of ourselves as a community that doesn't have that kind of an issue. But unfortunately, like every community in the nation, we are one that has these problems."

Defendant also points to comments made by the State, including the following comment during the hearing on his motion to reconsider his sentence: "And as this court is well aware, during *** 2012, 2011, we had a number of shootings going on in this community" and "in the last year or so we haven't had the type of shooting and activity that we've had in those previous, previous years." According to defendant, the above statement by the court, and the court's consideration of the State's argument at the hearing on his motion to reconsider his sentence, indicates the court

"improperly relied upon [its] personal beliefs about the rise of gun violence in the local community." We disagree.

¶ 53 First, we note the above comments by both the State and the trial court were made in the context of considering the need for deterrence—a factor the court was required to consider in fashioning an appropriate sentence. See 730 ILCS 5/5-5-3.2(a)(7) (West 2012) (in imposing sentence, the court shall consider whether a more severe sentence is necessary to deter others from committing the same offense). Second, the record refutes defendant's contention that there was no evidence presented regarding gun violence in the community. At defendant's trial, special agent Mark Geever testified he had been investigating several shooting incidents in Bloomington and Normal in the summer and fall of 2012, including the shooting at issue here. Further, during his police interview—which was audio- and video-recorded and admitted into evidence—defendant stated he was aware of shootings between two rival gangs that began in the summer of 2012. Accordingly we find the trial court did not commit error by commenting on or considering gun violence in the community during its sentencing of defendant. As we find no error, there can be no plain error.

¶ 54 Because we find the trial court did not err in its consideration of the factors in aggravation and mitigation, we need not address defendant's final argument regarding the cumulative effect of the claimed sentencing errors.

¶ 55 D. Sheriff's Fees

¶ 56 Finally, defendant asserts that the circuit clerk assessed duplicate sheriff's fees against him which must be vacated. Specifically, defendant takes issue with sheriff's fees assessed for the service of four subpoenas on two potential witnesses.

¶ 57 Pursuant to a county ordinance, McLean County assesses a $50 fee for the service of a subpoena, $14 for the return of the subpoena, plus sheriff's mileage at the rate of $0.50 per mile, round trip. McLean County, Ill. Code § 205-20 (adopted September 15, 1992); see also 55 ILCS 5/4-5001 (West 2012) (authorizing sheriff's fees).

¶ 58 On July 30, 2013, Antoine Smith was served at the McLean County jail with a subpoena to appear at defendant's trial on August 12, 2013. On August 8, 2013, the trial court entered an order continuing all subpoenas until September 16, 2013. On August 28, 2013, Smith was served at the jail with a subpoena to appear at defendant's trial on September 16, 2013. Defendant was charged $64 for the service of each subpoena, for a total of $128. Also on August 28, 2013, London Hayes was served at the jail with a subpoena to appear at defendant's trial on September 16, 2013. On September 16, 2013, the court entered an order continuing all subpoenas to November 4, 2013. On October 21, 2013, Hayes was served at the jail with a subpoena to appear at defendant's trial on November 4, 2013. Defendant was charged $64 for the service of each subpoena upon Hayes, for a total of $128. According to defendant, he should not have been charged sheriff's fees for the service of the second subpoenas, which he claims were unnecessary since the court had continued the original subpoenas.

¶ 59 While defendant concedes he did not preserve this issue for appeal, he urges this court to vacate the duplicate fees as a matter of the orderly administration of justice, or alternatively, under the doctrine of plain error.

¶ 60 At the outset, we reject defendant's "orderly administration of justice" argument. Defendant quotes *People v. Cabellero*, 228 Ill. 2d 79, 88, 855 N.E.2d 1044, 1049 (2008) (quoting *People v. Woodward*, 175 Ill. 2d 435, 456-57, 677 N.E.2d 935, 945 (1997), quoting *People v. Scott*, 277 Ill. App. 3d 565, 566, 660 N.E.2d 1316, 1316-17 (1996)), in support

of his contention that vacating duplicate sheriff's fees " 'is a simple ministerial act that will promote judicial economy by ending any further proceedings over the matter.' " We find *Cabellero* does not serve as a vehicle for defendant's request here. The issue in *Cabellero* was whether a court of review could grant the defendant's statutory right to monetary credit under section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2002)), when the defendant's first request for credit was on appeal from the dismissal of his postconviction petition. *Cabellero*, 228 Ill. 2d at 81, 855 N.E.2d at 1048. The court concluded it could grant defendant's request for credit because the statute did not impose a limitation on when a defendant must request credit, and it provided only for a $5 *per diem* credit to be applied "upon application of the defendant." *Id*. at 88, 885 N.E.2d at 1049. Here, however, no corresponding statutory right exists regarding the right to request at any time credit for alleged duplicate sheriff's fees.

¶ 61 Alternatively, defendant urges this court to review the fee assessments under the second prong of the plain-error doctrine, asserting the "error affect[ed] the integrity of the judicial process by usurping the validity of a court order and assessing unnecessary costs against [him]."

¶ 62 To obtain relief under the plain-error rule, defendant must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. Only if clear or obvious error is established, will we consider whether the plain-error doctrine has been satisfied. See *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Whether defendant was properly assessed sheriff's fees in this case requires us to examine the McLean County ordinance and the statute authorizing the fees. Our review is *de novo*. See *People v. Marshall*, 242 Ill. 2d 285, 292, 950 N.E.2d 668, 673 (2011).

¶ 63 Section 4-5001 of the Counties Code (55 ILCS 5/4-5001 (West 2012)) authorizes counties to increase, by city ordinance, what would otherwise be a $10 sheriff's fee for serving a subpoena and a $5 return fee. In turn, the McLean County ordinance provides that the sheriff shall charge $50 for the service of a subpoena, $14 for the return of the subpoena, plus $0.50 per mile, round trip. McLean County, Ill. Code § 205-20 (adopted September 15, 1992). The record shows that McLean County assessed defendant $64 each for serving and returning the four subpoenas at issue.

¶ 64 As stated, defendant's contention is that the second subpoenas served upon Smith and Hayes were not necessary, and as such, he should not be responsible for the fees unnecessarily incurred by the State in serving the second subpoenas. For support, defendant cites *People v. Blakely*, 357 Ill. App. 3d 477, 829 N.E.2d 430 (2005). We find *Blakely* distinguishable.

¶ 65 The issue in *Blakely* was whether duplicate mileage charges could be assessed for the sheriff's one trip to Colorado to serve two arrest warrants on defendant and bring him back to Illinois. *Id*. at 478-79, 829 N.E.2d at 431-32. In that case, this court interpreted the statute as allowing reimbursement only "for the actual mileage costs incurred." *Id*. at 479, 829 N.E.2d at 432; see 55 ILCS 5/4-5001 (West 2012). Thus, we found the defendant was only required to pay the actual costs incurred based on the actual mileage driven. *Blakely*, 357 Ill. App. 3d at 480, 829 N.E.2d at 433.

¶ 66 Unlike the sheriff in *Blakely*, however, the sheriff in this case actually served all four subpoenas. Nothing in the statute authorizing sheriff's fees, or in the McLean County ordinance establishing an increased charge for such fees, limits the number of subpoenas which may be served on an individual. Based on the above, we find defendant has not met his burden

of proving clear or obvious error. As we find no clear or obvious error, we need not proceed further in our plain-error analysis.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 69 Affirmed.