

No. 1-08-2596

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIRST DIVISION
May 23, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 93 CR 18000
)	
ANDRES RUBIO,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: Defendant was properly convicted of first degree murder pursuant to a theory of accountability when he agreed to take part in a bar fight and, during the incident, his friend shot and killed the victim.

After a bench trial, defendant Andres Rubio was found guilty, *in absentia*, of first degree murder on a theory of accountability, and sentenced to 25 years in prison. On appeal

he contends that even accepting the State's version of events, he was not proven guilty beyond a reasonable doubt because the State failed to establish that he shared the intent of the shooter or that the victim's death was part of a common criminal plan. In the alternative, he contends that the evidence at trial was too inconsistent and unsatisfactory to prove him accountable beyond a reasonable doubt for the victim's death. We affirm.

Defendant and codefendants Pedro Joya, Ricardo Joya, and Jose Flores were charged with, *inter alia*, first degree murder after the victim Armando Gomez was fatally shot. Although eyewitness Felipe Gomez and defendant's statement to the police indicated that Pedro was the shooter, the State's theory at trial was that defendant, Ricardo and Flores were also accountable for the victim's death.

The three men were tried in simultaneous, but severed, trials. After several days of testimony, defendant failed to appear. When defendant did not attend court on two consecutive dates, the trial continued without him. He was subsequently found guilty and sentenced *in absentia*.

At trial, Felipe Gomez, the victim's brother, testified that on the night in question, he, the victim, their brother Jose, and Arturo Rodriguez Ramirez had dinner and drinks at Mi Tenampa restaurant. When Felipe and the victim left the bar, he saw defendant, Flores, Ricardo, and Pedro outside. Flores asked

Felipe what he was looking at, and Felipe asked what it was to Flores. Felipe further stated that he could look wherever he wanted, and called Flores a "f*** fool." Flores then asked if Felipe was looking for trouble, tried to push him, and "swung" at him. Flores missed. Felipe then swung at Flores and also missed. Flores then said Felipe and the victim were "going to die."

As Felipe and the victim walked away, the four men followed. When Felipe was not able to open the bar door, he turned around. Pedro fired a gun at him, but Felipe was unharmed. At the same time, defendant, Ricardo, and Flores were beating the victim. Felipe then tried to open a different door. When he next looked back, he saw Pedro shoot the victim. Defendant then pulled Felipe's chain off his neck and left. The victim died as a result of the gunshot.

Although Felipe remembered speaking to officers immediately following the shooting, he did not remember telling the officers that two individuals attacked him and the victim or describing the men. He gave descriptions of Pedro and Ricardo to the police, and ultimately identified all four men in lineups. At trial, Felipe did not recall telling police that Ricardo grabbed his chain, that Pedro threatened him, or whether he had identified defendant as the man who took his chain.

Arturo Rodriguez Ramirez testified that when he left the bar to get fresh air, he saw Ricardo, Pedro, Flores, and defendant. Later, Ricardo, whom he did not know, walked up and hit him in the nose. Arturo first testified that defendant and Flores were with Ricardo, then that only defendant was there. He later testified that Pedro was also present and had a gun.

Juan Ramirez, the bar owner, testified that Ricardo was alone when he punched Arturo, but that defendant and another man then came to Ricardo's side.

Detective Phil Mannion testified that during his interview with Felipe, Felipe was able to describe two of the four attackers in greater detail. He did not remember Felipe telling him that several of the men were holding the victim immediately before the shooting. His report indicated that the person who had threatened Felipe was the shooter. At trial, Mannion clarified that because of the interpreter, he had initially believed that the shooter was the person who threatened Felipe, which was not true.

Officer Hector Ortiz testified that he was a native Spanish speaker and had been called upon to interpret "hundreds of times" by fellow officers. Ortiz admitted that he had never taken any courses to be certified as a court interpreter, but indicated that "Spanish is Spanish."

In the instant case, he interpreted a conversation between Assistant State's Attorney (ASA) Solita Pandit and defendant. ASA Pandit spoke in English, Ortiz would translate into Spanish, defendant would answer in Spanish, and then Ortiz would translate defendant's response back into English. Defendant ultimately agreed to make a handwritten statement. ASA Pandit wrote the statement in English and Ortiz read it back to defendant, in Spanish, line-by-line. He asked if defendant understood and defendant answered in the affirmative.

When the State moved to publish defendant's statement, defendant objected, arguing that Ortiz was not a qualified interpreter. After questioning Ortiz as to his experience, the court determined that his 25-year history of translating demonstrated "sufficient practical" experience. The statement was then published.

In his statement, defendant indicated that he and his friends were very angry that they were asked to leave the bar after Ricardo punched a man in the nose. Once outside, defendant saw Pedro place his handgun under a nearby car. The group decided to wait and then beat that man when he exited the bar. A short time later, two men exited the restaurant. One of the men was the man that Ricardo had punched.

After Flores bumped into one of the men and told them they were dead, the two men started running away. Defendant and his

friends ran after them. Defendant then heard Ricardo tell Pedro to get the gun. After Pedro got the gun, defendant knew that Pedro was going to use it. Pedro raised the gun and fired twice. One man continued to run, but the other froze. Pedro shot that man. Defendant and Flores then ran to Flores's house.

Corey Ramirez, defendant's friend and fellow bar patron, testified that she saw defendant and Flores walk away from the restaurant while Pedro and Ricardo got into a "commotion."

When defendant did not appear on two consecutive dates, the trial continued without him. In finding defendant guilty, *in absentia*, of first degree murder premised on accountability, the court acknowledged that although defendant appeared to be "less culpable," he was "smack dab in the middle" of the events surrounding the victim's death. Defendant was sentenced to 25 years in prison.

In 2008, defendant was taken into custody, retained private counsel, and filed motions to reduce sentence and for a new sentencing hearing. The trial court denied him relief.

On appeal, defendant first contends that even if this court accepts the State's version of events, the State failed to prove him guilty beyond a reasonable doubt of murder on a theory of accountability because he did not share Pedro's intent to shoot the victim and he only agreed to a fight, not a shooting.

In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272. A conviction will be reversed only when the evidence was so unreasonable or unsatisfactory that reasonable doubt remains as to whether the defendant was guilty. *Ross*, 229 Ill. 2d at 272.

In the case at bar, defendant was found guilty of first degree murder under an accountability theory. A person is legally accountable for the conduct of another when, either before or during the commission of the offense, and with the intent to promote or facilitate such a commission, he solicits, aids, abets, agrees, or attempts to aid another person in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 1992). Mere presence at, or knowledge of, an offense is insufficient under a theory of accountability; rather a person must intentionally aid or encourage the commission of an offense. *People v. Perez*, 189 Ill. 2d 254, 268 (2000).

To prove that a defendant had the intent to promote or facilitate the crime, the State must establish either that the defendant shared the criminal intent of the principal or there was a common criminal design. *Perez*, 189 Ill. 2d at 266. Intent may be inferred from the character of a defendant's acts, as well as from the surrounding circumstances. *Perez*, 198 Ill. 2d at 266. The common design rule provides that when two or more individuals engage in a common criminal design or agreement, any act in furtherance of that common design, which is committed by one person, is considered to be the act of all parties to the agreement and all are equally responsible for any consequences of these further acts. *Perez*, 189 Ill. 2d at 267. Words of agreement are unnecessary to show a common purpose to commit an offense, and accountability may be established through a person's knowledge of, and participation in, a criminal scheme even when there is no evidence that he directly took part in the criminal act itself. *Perez*, 189 Ill. 2d at 267.

When determining a defendant's legal accountability, the trier of fact may consider the defendant's presence during the offense, his flight from the scene, his continued affiliation with his companions, and his failure to report the crime. *Perez*, 189 Ill. 2d at 267. Evidence that a defendant voluntarily attached himself to a group "bent" on illegal acts, with knowledge of the group's plan, will also support an inference

that the defendant shared a common purpose and will sustain a conviction for an offense committed by another person. *Perez*, 189 Ill. 2d at 267.

Here, defendant admits, for the purposes of this argument, that he agreed to join in a bar fight. However, he asserts that he only did so after he saw Pedro put the gun away, and, therefore, cannot be held accountable for Pedro's decision to go outside the "original plan" and shoot the victim. We disagree.

Our supreme court has held that when a group decided to commit the substantive offense of battery, each person was therefore responsible for the conduct of the other that was done in furtherance of the intended battery. See *People v. Terry*, 99 Ill. 2d 508, 515 (1984). When the result of the group's "concerted acts" was murder, all were legally accountable for that murder pursuant to the common design rule. *Terry*, 99 Ill. 2d at 515. The court acknowledged that this rule could result in a person being accountable for a murder when only a misdemeanor was intended. *Terry*, 99 Ill. 2d at 515.

Here, defendant agreed to a plan to beat up the men that he and his friends believed were responsible for their ejection from the bar. The end result of the group's plan was that Pedro shot the victim, thus, all members of the group were legally accountable pursuant to the common design rule even if defendant only intended to engage in a fight. *Terry*, 99 Ill. 2d at 515.

Defendant argues that he cannot be held accountable for Pedro's decision to move beyond the scope of the original plan by using a gun rather than fists. However, while defendant may have agreed to a fistfight, he may be held accountable for the crime that actually occurred, even if it was different from the one in which he had planned to take part. See *People v. Garrett*, 401 Ill. App. 3d 238, 244 (2010) (rejecting the defendant's argument that he could not be held accountable for the victim's death when he had only agreed to a robbery, not an armed robbery, and reiterating that a defendant can be held accountable for a crime different from the one that was originally planned).

This court is unpersuaded by defendant's reliance on *People v. Estrada*, 243 Ill. App. 3d 177 (1993), and *People v. Lincoln*, 157 Ill. App. 3d 700 (1987). In *Estrada*, the evidence showed a lack of a common design, when, as the defendant was exiting a car to intimidate the victim, his friend shot the victim. See *Estrada* 243 Ill. App. 3d at 185. Here, there was a plan to beat the men that defendant and his companions considered responsible for getting them kicked out of the bar. In *Lincoln*, the defendant and his companions agreed to "get" a certain man, however, once the group arrived at the location, defendant was not present when a different person was shot and killed. *Lincoln*, 157 Ill. App. 3d at 706. Here, the victim was one of the targets of the plan and defendant was present at the time of

the shooting.

Defendant and his friends decided to start a fight, a plan which ultimately resulted in the victim's death. Thus, all members of the group were legally accountable pursuant to the common design rule even if the group's plan only called for a fistfight. See *Terry*, 99 Ill. 2d at 515.

Defendant next contends that the evidence at trial was so inconsistent and unsatisfactory that he cannot be held accountable for the victim's death. Specifically, he argues that his statement and Felipe's testimony were inherently unreliable, and that the State's evidence, viewed as a whole, contains so many inconsistencies that reasonable doubt remains.

Defendant argues his custodial statement is unreliable because of the circumstances under which it was acquired, *i.e.*, he had been in custody for over a day, he is not a native English speaker, he was not given an opportunity to read the statement, Ortiz was not a trained interpreter, and it was "wrong" on many of the objective facts. He also attacks Felipe's credibility because Felipe did not identify defendant as the person who took his chain until trial, and had previously indicated that Flores took the chain.

Here, the statement was taken after defendant had been in custody for a day and was translated through Ortiz, a native Spanish speaker who was not a trained interpreter. In support of

his assertion that the statement is inherently unreliable, defendant highlights the misidentification of the victim as Arturo. A trier of fact is not required to accept any possible explanation compatible with innocence and raise it to the level of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009).

At trial, the court questioned Ortiz regarding his language skills and his experience translating, and, at the conclusion of the examination, found that Ortiz had sufficient practical experience to serve as a translator. With regard to the amount of time that defendant had been in custody when the statement was made and inconsistencies between the events described by the statement and the testimony of other witnesses at trial, it was for the trier of fact to resolve any inconsistencies or conflicts in the evidence and draw reasonable inferences from the testimony presented. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

This court rejects defendant's argument that Felipe's trial testimony was rendered incredible when he had previously indicated that Flores took his chain and did not give defendant an "active" role in the incident until trial. Felipe testified that he did not remember describing two of the men to police immediately after the shooting, telling police that Flores took his chain, or whether he had previously identified defendant as the person who took his chain. However, Felipe did testify that

defendant participated in beating the victim and took the chain after the shooting. These inconsistencies were not fatal to Felipe's credibility; rather, they affected the weight the trier of fact assigned to his testimony. *Ross*, 229 Ill. 2d at 272. Here, the trial court found Felipe to be credible, as evidenced by the verdict.

Defendant next argues that inconsistencies between his statement and Felipe's testimony create reasonable doubt. He highlights differences with regard to the (1) "build-up" to the fight, (2) details of the chase, and (3) lapse of time between Felipe and the victim's exit from the bar and the shooting.

Here, Felipe testified that the incident began when he and the victim went outside, exchanged words and punches with Flores, and Flores threatened them. Defendant's statement, on the other hand, indicated that Flores threatened Felipe and the victim as soon as they walked outside. Felipe indicated he tried to open the doors to the building while the victim was being beaten, whereas defendant's statement indicated that as he and his friends chased Felipe and the victim, Pedro retrieved the gun.

Defendant essentially argues that because the version of events outlined by his custodial statement differs from Felipe's testimony, both are incredible and the State's case must fail. However, our supreme court has held that the testimony of a single witness, if positive and credible, is sufficient to

convict, even if it is contradicted by the defendant. *Siguenza-Brito*, 235 Ill. 2d at 228. While there are inconsistencies between the two chronologies, the trial court found Felipe's testimony placing defendant at the scene of the shooting as part of the group threatening Felipe and the victim to be credible; this court will not substitute its judgment for that of the trier of fact on this issue. See *Sutherland*, 223 Ill. 2d at 242.

This court is unpersuaded by defendant's reliance on *People v. Washington*, 375 Ill. App. 3d 1012 (2007). In that case, although the defendant was convicted of first degree murder on a theory of accountability, the court determined on appeal that there was no "objective evidence" at trial regarding who shot the victim. *Washington*, 375 Ill. App. 3d at 1025. While three objective witnesses testified that they did not see who fired the fatal shot, the defendant's three alleged accomplices testified inconsistently regarding who fired the gun.

The court's review of the evidence indicated that the only evidence linking the defendant to the crime, as either the shooter or the driver of the car from which the gun was fired, was the testimony of his alleged accomplices (*Washington*, 375 Ill. App. 3d at 1027), and the record lacked a "remotely consistent" account of the shooting (*Washington*, 375 Ill. App. 3d at 1029). Thus, the court determined that no rational trier of fact could have found the defendant guilty beyond a reasonable

doubt when, although he was present at, and subsequently fled from, the scene of the shooting, there was no indication that he aided in or encouraged the shooting itself. *Washington*, 375 Ill. App. 3d at 1030-31.

The instant case is not one where the only link between defendant and the crime is accomplice testimony. Rather, the testimony of an objective witness placed defendant at the scene of the shooting as a member of the group threatening Felipe and the victim.

Having reviewed the record in the light most favorable to the State, this court cannot say that no rational trier of fact could have found defendant accountable for the victim's death. *Ross*, 229 Ill. 2d at 272. This court reverses a conviction only when the evidence was so unreasonable or unsatisfactory that reasonable doubt remains as to whether the defendant was guilty. This is not one of those cases. *Ross*, 229 Ill. 2d at 272. Accordingly, we affirm defendant's conviction.

For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

Affirmed.