SIXTH DIVISION
May 13, 2011

No. 1-09-0936

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 06 CR 11581
	)	
RAMELL STURDIVANT,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices McBride and R.E. Gordon concurred in the judgment.

O R D E R

Held: Defendant's conviction for first degree murder was affirmed where the State's evidence was sufficient to convict defendant under a direct liability and an accountability theory. The court's alleged error in instructing the jury on felony murder and accountability was harmless. Defendant failed to show the trial court committed plain error for alleged failure to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007)). Defendant failed to show the trial court's restriction of defendant's cross-examination of State's witness was plain error.

Following a jury trial, defendant Ramell Sturdivant was found guilty of first degree murder and sentenced to 32 years in prison. On appeal, defendant contends that: (1) the State failed to

prove him guilty where he was excluded as a possible donor to the DNA found on the murder weapon, tested positive for the presence of gun powder residue, might have been present at the scene of the shooting and fled the police in a van belonging to one of the two people who were shot; (2) the court erred by instructing the jury on felony murder after the court directed out the felony count; (3) the court erred by instructing the jury on an accountability theory where there was no evidence supporting that theory of liability and no evidence about the identity of the principle shooter or that defendant aided or abetted another in the planning or commission of the murder; (4) the court failed to comply with Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) during *voir dire*; and (5) the court improperly restricted defendant's right to cross-examine one of the State's witnesses. We affirm.

At trial, the State first called Thomas Armstrong. Thomas testified that around 7 or 8 p.m. on April 28, 2006, he went to his cousin Larry Porter's house at 1006 North Avenue in Chicago. Robert Porter, Ernestine Russell, Darrion Russell, Keith Gray, Alzyke Moore and a couple of other people were also at the house. Thomas was on the front porch between 9 and 9:30 p.m., where he watched his brother Melvin arrive in a blue van with the victim, LaByron Pinkney. Melvin parked the van next to Thomas's car and went into the house for about five minutes while the victim stayed in the van. When Melvin came out of the house to leave, a green minivan pulled up on the opposite side of Melvin's van. Thomas did not see anyone get out of the green minivan, but a minute later he heard four or five shots coming from that direction. He ran into the house to seek cover, then saw Melvin run into the house with a gunshot wound. Thomas went outside and saw the victim on the ground by the curb, "taking his last breath." Thomas

noticed that Melvin's blue van and the green minivan were gone. Ambulances came to take the victim and Melvin away. Thomas never saw the shooter or shooters, did not see who drove away in Melvin's van and never viewed a lineup or photo array.

Melvin Armstrong testified consistently with Thomas. He said that when he went into the house at 1006 North Avenue, he left his van running while the victim remained in the passenger seat. Melvin noticed a dark SUV-type vehicle pull up and heard the voices of at least two people inside it. Shortly after the vehicle pulled up, Melvin walked out of the house to his van and noticed a "young man in the middle of the street with a pistol." The man shot him once in the stomach and Melvin fell to the ground. About 15 seconds later he heard four or five more shots and saw the victim fall out of the van and onto the ground. As Melvin jumped up to run into the house, he saw his van being driven away. He could not tell who drove the van away or how many people got into it. He was unable to describe the weapon used or identify the person who shot him other than describing the assailant as "short" and wearing a white T-shirt.

Robert Porter testified that shortly after he arrived at Larry Porter's house, an Astrovan pulled up in the middle of the street and "they began to ask for something." Someone shouted out a "derogatory statement," and Robert saw an unknown person exit the Astrovan. Robert did not see where the person went. Shortly after, Robert heard a single gunshot and saw Melvin fall to the ground. He then heard "more than two or three" additional gunshots from the direction of the Astrovan. He took cover in the house and, when he went back outside, saw that both vans were gone. He did not see who drove either van away.

Robert later spoke to detectives and an assistant State's Attorney and was shown a lineup.

He could not remember identifying anyone as the shooter or what he said during his interviews. He remembered signing a document at the police station. Robert said that since the time of the incident he suffered a brain aneurysm, which made his memory of the incident "a little light."

Detective Robert Sandoval testified that on April 29, 2006, at about 10 p.m., he spoke to Robert Porter at the police station. Porter viewed a lineup and identified defendant as the person he saw walk up to the porch seconds before the shooting occurred. Assistant State's Attorney Paul Quinn arrived at the police station and Porter made a statement to Sandoval and Quinn.

Assistant State's Attorney Quinn testified that on the evening of April 29, 2006, he went to the police station and met with Detective Sandoval. Quinn then spoke to Porter about what had happened the night before and wrote a statement of what Porter told him. Quinn testified that Porter's statement identified defendant as the person who got out of the dark minivan and started approaching the porch. On cross-examination defense counsel asked Quinn what Porter said defendant was wearing, but the trial court sustained the State's objection to this line of questioning.

Officer David Williams testified that on April 28, 2006, at approximately 9:32 p.m., he and his partner went to the 1000 block of North Avers Avenue in Chicago after hearing multiple gunshots. As Williams got there he saw Alzyke Moore running northbound. Williams stopped him and conducted a pat-down search but found no weapons. The officers had Moore get into the squad car and show them from where the shooting was coming. They drove to 1002 North Avers and saw the victim dead on the ground with multiple gunshot wounds. Williams sent out a message to other officers in the area that the assailants had escaped in a blue or green van.

Officer Bryan Boeddeker testified that at about 9:35 p.m. on April 28, 2006, he and his partner received a flash message of a person shot on the 1000 block of North Avers. He also received a flash message of a green van fleeing from the scene. The officers drove toward the scene and saw a green van traveling southbound on Pulaski Road with its headlights off. They made a U-turn, activated their emergency lights and followed the van. The officers saw the van drive through two red lights at a high rate of speed, then crash on the corner of Jackson Boulevard and Kostner Avenue. When they approached the van, the driver's side door was open and the van was empty. Boeddeker testified he never saw the driver of the van.

Officer Michael Gentile testified that at about 9:40 p.m. on April 28, 2006, he was monitoring a flash message of a pursuit of a "dark blueish-greenish van with rims." As Gentile approached Jackson and Kostner, he saw a crashed vehicle matching the description. He saw defendant quickly exit the driver's side of the car and run to the crosswalk. Defendant was wearing a white T-shirt and blue jeans. After Gentile made eye contact with defendant and yelled "[p]olice," defendant began to run away. Gentile gave chase and arrested defendant. Gentile found a single, tight-fitting work glove in defendant's pocket.

Officer Patrick O'Donovan testified that on April 28, 2006, at about 9:40 p.m., he was driving westbound on Jackson approaching Killborn Avenue when he saw a blue-colored van coming straight at his police car. He saw that the van's headlights were off and there was a single black male driver. The van turned and struck a building at the southwest corner of Jackson and Kostner. Defendant exited the van through the driver's side door and was apprehended by other officers. O'Donovan looked inside the van and saw a firearm shell casing on the driver's seat of

the van.

Officer Herrera testified that on April 28, 2006, he received orders to follow the route of defendant's car chase and look for a gun. He received a call that a gun had been found by a concerned citizen in an alley at Washington Street and Kostner. When he arrived he stood guard over the gun until a forensic investigator arrived to recover it.

Officer David Ryan, a forensic investigator with the Chicago police department, testified that he collected evidence at 1002 North Avers. He found a fired bullet near the victim's body, then went to 4352 West Washington to collect the gun Herrera was guarding. There were a bullet in the chamber and four bullets in the gun magazine. Ryan checked the gun and the magazine for the presence of DNA. He next went to where the victim's van had crashed at 4401 West Jackson and found an empty cartridge case from a fired bullet on the front driver's seat.

Officer Brian Smith, a forensic investigator with the Chicago police department, testified that on April 30, 2006, at about 11:10 p.m., he administered a gunshot residue kit to defendant at the police station.

Officer John Miller, a forensic investigator, testified that no fingerprints were found outside or inside the victim's van. Miller said that there were various reasons fingerprints might not be found, including wearing gloves.

Amanda Soland, a forensic scientist with the Illinois State Police, testified that she conducted DNA analysis on gun swabbings and a bucal standard from defendant. She said defendant could be excluded as the donor of the DNA, but that it was possible for a person to touch an item and not leave behind cellular material containing DNA.

Robert Berk, a trace evidence analyst with the Illinois State Police, was qualified as an expert in the field of gunshot residue. Berk said he analyzed the gunshot residue kit prepared by Brian Smith and concluded that defendant had "either discharged a firearm, *** contacted an item that had primer gunshot residue on it, or [defendant's] hands were in the environment of the discharged firearm."

Marc Pomerance, a forensic scientist with the Illinois State Police, testified that he received the fired bullet found near the victim's body, the empty bullet cartridge case found in the blue van, the firearm found in the alley and the five unfired bullets from forensic investigator David Ryan. Pomerance determined that the fired bullet and empty cartridge case had been fired from the firearm found in the alley. He said the magazine in the gun would carry seven bullets and the chamber of the weapon would hold an additional bullet in the chamber.

The State rested, and no further evidence was presented. The court allowed a jury instruction on accountability over defendant's objection because "there had to be two people or more at the scene since both vans were driven away." The State sought a felony murder instruction and asked the trial court if it could amend the indictment for aggravated vehicular hijacking by adding the phrase "while armed with a dangerous weapon." The court denied the State's amendment and granted defendant's motion for a directed verdict on the aggravated vehicular hijacking charge. Over defendant's objection, the court allowed the felony murder charge given to the jury.

The jury found defendant guilty of first degree murder, and he was sentenced to 32 years in prison.

On appeal, defendant first contends that the State failed to prove him guilty because defendant was excluded as a possible DNA donor on the murder weapon, and the evidence only showed he tested positive for the presence of gun powder residue and fled from the police in Melvin Armstrong's van. Defendant argues that the evidence was insufficient to prove him directly liable or liable under an accountability theory. Defendant also argues he cannot be liable on a theory of felony murder because he was acquitted of the underlying felony. Because we find the evidence sufficient to convict defendant of intentional or knowing murder either as a principle or under an accountability theory, we need not address defendant's arguments on felony murder. See *People v. Smith*, 233 Ill. 2d 1, 20-21, 906 N.E.2d 529 (2009) (where a jury returns general verdict murder conviction, "it has been held that, where a defendant is charged with murder in multiple counts alleging intentional, knowing, and felony murder *** the defendant is presumed to be convicted of the most serious offense–intentional murder"); *People v. Collins*, 71 Ill. App. 3d 815, 824, 390 N.E.2d 463 (1979) ("one proper count in an indictment will sustain an indictment where there is a general finding of guilt, and if any single count is sufficient, we need not determine on review whether the others are sufficient").

We first note that the parties dispute the applicable standard of review. Defendant argues that the standard of review is *de novo* because this case involves the legal determination of whether an uncontested set of facts met the State's burden of proof. The State responds that the standard of review is not *de novo* but whether the evidence, viewed in the light most favorable to the State, would allow a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. We need not decide this dispute because, under either standard, the

evidence was sufficient to convict defendant as a principal or under an accountability theory.

First, the evidence was sufficient to prove defendant directly liable for the murder. Robert Porter identified defendant in a police lineup the day after the shooting and in a statement as the person who got out of the dark minivan and approached the porch. After defendant exited the van, multiple gunshots were heard and the victim and Melvin Armstrong were shot. The evidence showed defendant fled the scene in Melvin's van, eluded the police, crashed the van and fled on foot until he was apprehended. See *People v. Tucker*, 317 Ill. App. 3d 233, 243-44, 738 N.E.2d 1023 (2000) ("[f]light, when considered in connection with all other evidence in a case, is a circumstance that may be considered by a jury as tending to prove guilt") (citing *People v. Lewis*, 165 Ill. 2d 305, 349, 651 N.E.2d 72 (1995)). A pistol containing five live rounds was found along the route defendant fled and was confirmed to be the same weapon that fired the bullet found next to the victim's body. The empty bullet cartridge case found inside the van in which defendant fled was confirmed to have been fired from that same firearm. Defendant was also found with gunpowder residue on his hands. Robert Berk testified that this showed defendant had "either discharged a firearm, *** contacted an item that had primer gunshot residue on it, or [defendant's] hands were in the environment of the discharged firearm."

We also find the evidence was sufficient to convict defendant under an accountability theory. A defendant is legally accountable for the criminal conduct of another when: (1) the defendant solicited, ordered, abetted, agreed or attempted to aid another in the planning or commission of the crime; (2) the defendant's participation took place before or during the commission of the crime; and (3) the defendant

had the concurrent intent to promote or facilitate the commission of the crime. 720 ILCS 5/5-2(c) (West 2006); People v. Perez, 189 Ill. 2d 254, 267-68, 725 N.E.2d 1258 (2000). Accountability may be established through a defendant's knowledge of and participation in a criminal scheme, even if there is no evidence he directly participated in the criminal act itself. *Perez*, 189 Ill. 2d at 267.

Here, the evidence overwhelmingly establishes defendant intended to participate in the commission of the shooting. First, the evidence suggested defendant was acting with others. Melvin Armstrong testified that when the green van pulled up he heard the voices of at least two people inside it. Further, as stated by the trial court: "obviously there had to be two people or more at the scene since both vans were driven away. They couldn't be driven away by the same person. So there had to be two or more people there." But, even if the State was unable to show evidence of another assailant, it was not required to do so. *People v. Cooper*, 194 Ill. 2d 419, 435, 743 N.E.2d 32 (2000) ("a defendant may be found guilty under an accountability theory even though the identity of the principal is unknown").

As stated above, Robert Porter identified defendant in a police lineup the day after the shooting and in a statement as the person who got out of the dark minivan and approached the porch. After the victim and Melvin Armstrong were shot, defendant fled the scene in Melvin's van, eluded the police, crashed the van and fled on foot. See *Tucker*, 317 Ill. App. 3d at 243-44, citing *Lewis*, 165 Ill. 2d at 349 (flight is a circumstance that may be considered as tending to prove guilt). The weapon that fired the bullet found next to the victim's body was recovered along the route defendant fled. This is strong evidence that defendant intended to aid in the

commission of the crime by disposing of the murder weapon. See *People v. Redmond*, 341 Ill. App. 3d 498, 515, 793 N.E.2d 744 (2003). The gunpowder residue found on defendant's hands showed he had "either discharged a firearm, *** contacted an item that had primer gunshot residue on it, or [defendant's] hands were in the environment of the discharged firearm."

In support of his argument, defendant cites *People v. Garrett*, 401 Ill. App. 3d 238, 928 N.E.2d 531 (2010), *People v. Washington*, 375 Ill. App. 3d 1012, 874 N.E.2d 331 (2007), and *People v. Lopez*, 72 Ill. App. 3d 713, 391 N.E.2d 105 (1979). But, these cases are factually distinguishable because here the strength of the evidence demonstrating defendant's intent to facilitate the crime is much stronger. Defendant's actions show his intention to participate in the murder from beginning to end. We find the State proved defendant guilty beyond a reasonable doubt of first degree murder under a direct or accomplice liability theory.

Defendant next contends that the trial court erred by instructing the jury on felony murder after it directed a verdict on the underlying felony of aggravated vehicular hijacking. Assuming it was error for the court to instruct the jury on felony murder, it was harmless because we have found that the evidence supports a finding of guilt under a theory of direct liability and accountability. See *People v. Moon*, 107 Ill. App. 3d 568, 573, 437 N.E.2d 823 (1982); *Collins*, 71 Ill. App. 3d at 824. It was also not error for the court to instruct the jury on accountability because, as discussed above, the evidence was sufficient to convict defendant under an accountability theory.

Next, defendant contends that he was denied his right to a fair and impartial jury because the trial judge failed to question the prospective jurors about whether they understood the four

principles enumerated in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), and codified in Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). Defendant claims that this failure requires that his conviction be reversed and the cause remanded for a new trial.

This issue is controlled by our supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). We first note that defendant forfeited review of this issue by failing to object to it at trial or raise it in a timely-filed posttrial motion. *Thompson*, 238 Ill. 2d at 611-12 (citing *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988)). As suggested in *Thompson*, "[a] simple objection would have allowed the trial court to correct the error during *voir dire*." *Thompson*, 238 Ill. 2d at 612. Although under the plain-error rule defendant may bypass normal forfeiture principles, he has failed to show the evidence here is "so closely balanced that the error alone threatens to tip the scales of justice" against him or the error has "affected the fairness of his trial and challenged the integrity of the judicial process." *Thompson*, 238 Ill. 2d at 613-15. Accordingly, the plain error doctrine does not provide a basis for relaxing defendant's forfeiture of the issue.

Finally, defendant contends that the trial court denied his right to confrontation by erroneously limiting defense counsel's questions to Assistant State's Attorney Quinn about the contents of Robert Porter's statement. Defendant argues that the court improperly sustained the State's objection and denied defendant his right to confrontation because he was unable to elicit information from the statement "that would have cast doubt on the only evidence the State presented to establish [defendant's] presence at the scene of the offense."

Defendant concedes that this issue was not preserved in a posttrial motion but contends

that it should be reviewed for plain error. Plain error review allows review of a forfeited error where: (1) the evidence is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) the error is so serious that the defendant was denied a substantial right, and so a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467 (2005).

A criminal defendant's constitutional right to confrontation includes the right to cross-examination. *People v. Blue*, 205 Ill. 2d 1, 12, 792 N.E.2d 1149 (2001). In considering whether a trial court has erred in limiting cross-examination, " '[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors ***. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' " *Blue*, 205 Ill. 2d at 14 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986)).

Here, even assuming the court's limitation of the cross-examination was error, it was harmless. See *People v. Tabb*, 374 Ill. App. 3d 680, 690-91, 870 N.E.2d 914 (2007). The only evidence refuting Porter's statement was Gentile's testimony that he saw defendant wearing a white T-shirt when he fled from the van after it crashed. The day after the victim was killed, Porter positively identified defendant in a lineup and in the statement he made to Quinn as the

person who got out of the dark minivan and started approaching the porch. Given the strength of the evidence against defendant, the "damaging potential" to the State's case in allowing Quinn to testify that Porter told him defendant was wearing a dark T-shirt would have been minimal. See *Blue*, 205 Ill. 2d at 14. If the restriction of Quinn's cross-examination violated defendant's right of confrontation, it did not rise to the level of plain error. Defendant has failed to provide us with a basis for reviewing the alleged error under the plain error doctrine because the evidence of defendant's guilt as a principle or under an accountability theory was not closely balanced and the alleged error did not deny him a fair trial.

We affirm the judgment of the trial court.

Affirmed.