

2012 IL App (1st) 100378

FOURTH DIVISION
March 1, 2012

No. 1-10-0378

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).

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. 08 CR 2058
)	
JAVIER ASCENCIO,)	The Honorable
)	Thomas Joseph Hennelly,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where evidence established common design in acts of defendant and second gunman in separately firing two rounds of shots, defendant could be convicted on accountability theory of offenses pertaining to victims struck by shots of second gunman; defendant's convictions were affirmed.
- ¶ 2 Following a jury trial, defendant Javier Ascencio was convicted of two counts of first degree murder and two counts of aggravated battery with a firearm. Because more than one

person was killed in the events that led to defendant's convictions, defendant was sentenced to a mandatory term of natural life in prison. Defendant also was sentenced to 20 years for each aggravated battery count, to be served concurrently with the natural life sentence. On appeal, defendant contends the State failed to prove beyond a reasonable doubt that he was accountable for the murder of Rigoberto Castaneda, who was shot by an unknown gunman. Defendant also argues the evidence was insufficient to show that one of the aggravated battery victims, Edgar Irenio, was injured by a bullet fired by defendant. We affirm defendant's convictions.

¶ 3 The charges against defendant arose from a shooting in the early morning hours of May 5, 2007, among a group of between 60 and 100 members of rival gangs attending a party in a warehouse at 4615 West Huron in Chicago. The party was attended by members of the Latin Kings, who were rivals of the Gangster Disciples and Maniac Latin Disciples.

¶ 4 Defendant was charged with the first degree murder of Castaneda and Guillermo Ortega and with aggravated battery with a firearm as to Irenio and Denisse Del Real. Several people at the party, including Mayra Diaz, Arturo Pinon and Oscar Rodriguez, testified that defendant was one of the gunmen. Diaz testified she was outside the warehouse when she heard the first shots being fired. Diaz said she saw defendant emerge from the building holding a gun; defendant yelled "King love" and ran away from the warehouse.

¶ 5 Pinon testified he and Ortega are Disciples and that tensions escalated during the evening between the Disciples and the Latin Kings. Pinon observed defendant fire five or six shots and then heard a second round of shots. Two days after the shooting, Pinon selected defendant from a police lineup. Pinon also identified defendant in court as the gunman who fired the first round of shots. Ortega, who is Pinon's cousin, was fatally injured in the second round of gunfire.

¶ 6 Rodriguez testified that after defendant bumped him in the crowd, he saw a gun in defendant's hand, and defendant fired the first two shots. Rodriguez identified defendant in a lineup but did not see who fired the second group of shots.

¶ 7 Del Real testified she knew defendant by the nickname of "Mole" and saw him display a Latin Kings gang sign. She testified defendant shouted "King love" and fired a gun into the crowd. Del Real was shot in the lower back during the first round of shots.

¶ 8 Guadalupe Lara arrived at the party with a group that included Ortega and Castaneda, who was also a Disciple. Lara knew defendant to be a Latin King and testified that defendant fired about 10 shots into the crowd in rapid succession. Lara said about one second elapsed between the first round of shots and the second round, which came from defendant's direction. Lara did not see who fired the second set of shots; however, after that round, she saw Castaneda was badly injured. Lara was impeached with her grand jury testimony, given on May 16, 2007, that she saw defendant fire the second group of shots.

¶ 9 Hector Vargas testified Irenio was shot in the left arm but did not see who fired that shot. Ballistics evidence established the bullets recovered from the bodies of Castaneda and Ortega came from different .38 caliber firearms.

¶ 10 At trial, the parties stipulated that two video cameras were recording events inside and outside the warehouse, and the parties agreed to the admission of a portion of those videotapes into evidence. The jury viewed a portion of the video that depicted defendant and a second man standing together shortly before defendant fired into the crowd. After defendant fired those shots, both men walked toward the front door. As they neared the door, a fight broke out in the middle of the room. The video depicts defendant tapping the second man on the shoulder, after

which the second man then turned to the crowd and fired several shots, striking Castaneda.

Defendant and the second gunman then left together.

¶ 11 The defense presented no evidence. Over the defense's objection, the jury was instructed that defendant could be convicted on an accountability theory as to the crimes involving each of the four victims. At sentencing, the court imposed a term of natural life imprisonment pursuant to section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2006)) because defendant was found guilty of murdering more than one victim.

¶ 12 On appeal, defendant challenges the sufficiency of the evidence to convict him on two bases. First, defendant contends the State failed to prove his guilt as to the death of Castaneda on an accountability theory because the identity of the gunman who shot Castaneda was not determined. Secondly, defendant argues the State did not prove his guilt of aggravated battery with a firearm against Irenio because the evidence did not establish how Irenio was injured and who inflicted that injury.

¶ 13 A defendant's challenge to the sufficiency of the evidence is reviewed to determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). This standard of review applies regardless of whether the evidence is direct or circumstantial. *People v. Grimes*, 386 Ill. App. 3d 448, 455 (2008), citing *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 14 We first consider whether the evidence was sufficient to establish defendant's guilt for the death of Castaneda on an accountability theory. As the jury in this case was instructed, a defendant is accountable for the conduct of another when, "[e]ither before or during the

commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2006). To prove accountability in the context of this case, the State must demonstrate beyond a reasonable doubt that either (1) the defendant shared the criminal intent of the second gunman; or (2) there was a common criminal design between defendant and the second gunman. See *People v. Perez*, 189 Ill. 2d 254, 266 (2000).

¶ 15 Defendant concedes the existence of a second gunman and acknowledges contact between himself and the second man before the second round of shots. However, defendant argues the second gunman's identity and potential gang affiliation are unknown, and he denies they acted in concert. Defendant asserts the evidence did not show that he handed the second man a gun or knew the man was armed.

¶ 16 Under the common design rule, when two or more persons engage in a common criminal design, any acts committed by one party to further the common design are attributable to all parties to the common design, rendering each party individually responsible for the consequences of the acts of the others. *Perez*, 189 Ill. 2d at 267; *Grimes*, 386 Ill. App. 3d at 452. A common plan can be inferred from the circumstances surrounding the commission of the unlawful conduct, and a defendant need not express words of agreement to be held accountable for the acts of another. *Grimes*, 386 Ill. App. 3d at 452; see also *People v. Taylor*, 164 Ill. 2d 131, 141 (1995).

¶ 17 The testimony of witnesses and the video established that Castaneda was felled by the second round of gunshots, which were not fired by defendant. Nevertheless, reviewing the evidence in the light most favorable to the prosecution, the State established defendant and the

second gunman engaged in a common plan. Defendant acknowledges the video depicts his contact with the second man before the second round of shots. The video that was played for the jury is included in the record on appeal and has been reviewed by this court in its entirety. The video of the security camera footage shows defendant and the second man walking to the door together after defendant fired the first round. The video also depicts defendant tapping the second man on the shoulder immediately before the second man fires the next group of shots, which struck Castaneda. The video then shows the men leaving the building together.

¶ 18 Based on that evidence, defendant was culpable for Castaneda's death on an accountability theory. The evidence demonstrated a common design by establishing that defendant fired the first round of shots and then tapped the second man on the shoulder, after which the second man fired. See *People v. Cooks*, 253 Ill. App. 3d 184, 189-90 (1993) (defendant was legally accountable for acts of second unidentified shooter under common design theory when defendant "set in motion" the series of events by gathering fellow gang members and approaching group together with second man, then fleeing from scene after shooting).

¶ 19 Defendant further contends the evidence did not establish his guilt of aggravated battery with a firearm because no evidence was presented as to the source of Irenio's injury and, even assuming *arguendo* that Irenio was struck by a bullet, the State failed to show who fired that shot. Vargas, who was present at the shooting, testified that Irenio was shot in the arm. Although defendant attempts to cast doubt on the credibility of Vargas's testimony, it is the task of the jury, not the reviewing court to assess the believability of the witnesses and the weight to be given their testimony and to draw reasonable inferences from the evidence. *People v. Evans*, 209 Ill. 2d 194, 211 (2004).

¶ 20 Moreover, similar to our analysis of Castaneda's death, even if the second man fired the shot that struck Irenio, defendant is accountable for that injury, as the evidence established a common design when defendant made contact with the second man just before the second round of shots. See *Perez*, 189 Ill. 2d at 267 (acts committed by one party are attributable to all parties to common design, rendering each party individually responsible for the consequences of acts of others).

¶ 21 In conclusion, the evidence was sufficient to support defendant's convictions on an accountability theory for the shooting death of Castaneda and the aggravated battery of Irenio, based on the common design of defendant and the second gunman.

¶ 22 Accordingly, the judgment of the trial court is affirmed.

¶ 23 Affirmed.