

No. 1-10-3360

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07CR11290
	)	
JONATHAN MIRANDA,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

*HELD:* defendant's convictions for home invasion and aggravated battery with a firearm upheld where there was sufficient evidence to hold him accountable for those crimes and where the State's comments during rebuttal arguments did not improperly shift the burden of proof or deprive defendant of his right to a fair trial.

¶1 Following a jury trial, defendant Jonathan Miranda was found guilty of home invasion and aggravated battery with a firearm under an accountability theory, and was sentenced to 21 years' imprisonment and 6 years' imprisonment, respectively, the sentences to be served consecutively.

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Defendant appeals his convictions and the sentences imposed thereon, arguing that: (1) the evidence was insufficient to convict him of the aforementioned offenses; and (2) the State's rebuttal argument deprived him of his right to a fair trial. For the reasons explained herein, we affirm the judgment of the circuit court.

## ¶2 I. BACKGROUND

¶3 On April 25, 2007, during the course of an undercover narcotics surveillance operation, defendant and his two cousins, Jason and Wellington Jaramillo, were arrested and subsequently charged with multiple counts of aggravated discharge of a weapon (720 ILCS 5/24-1.2(2) (West 2006)), home invasion (720 ILCS 5/12-11(a)(2), (a)(3) (West 2006)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)), armed violence (720 ILCS 5/33(A)-2(a)(1) (West 2006)), aggravated battery (720 ILCS 5/12-4(b)(1) (West 2006)), aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2006)), and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)1/3(a) (West 2006)). Defendant elected to proceed by way of a jury trial.

### ¶4 Wire-Tap Testimony

¶5 Defendant's arrest stemmed from a shooting that took place at the residence of Froylan Lopez, a known narcotics dealer, on April 25, 2007. At the time of the incident, the residence had been placed under police surveillance based on information that officers received during the course of a lengthy undercover narcotics surveillance operation. Lieutenant Osvaldo Valdez provided an overview of the investigation leading up to the shooting.

¶6 In 2007, Lieutenant Valdez was a member of the Chicago Police Department's Organized Crime Division. During the course of that year, he was assigned to supervise an undercover

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narcotics surveillance operation called "Sam I Am." He explained that the initial target of the undercover investigation was a narcotics dealer named Samuel Granados. After placing a wiretap on Granados' phone and monitoring several conversations, Lieutenant Valdez learned that Luis Diaz was Grandos' drug source and a second wiretap was then placed on Diaz's phone. After listening to conversations between the two men, Lieutenant Valdez learned the identity of Diaz's cocaine source: Froylan Lopez. During a phone conversation that was intercepted on April 3, 2007, police learned that Diaz owed Lopez money for drugs that had been covertly seized<sup>1</sup> by police on March 23, 2007. In later calls, Diaz reported that Lopez was "f\*\*\*ing with" him and harassing him about the money that Diaz owed him and stated that someone is "going to have to make him disappear from here for [him]" because he "do[esn't] get [his] hands dirty."

¶7 During the course of the investigation, Lieutenant Valdez testified that police also intercepted a number of conversations between defendant's cousin, Jason Jaramillo and Diaz. The majority of these conversations pertained to cocaine sales; however, the topic of one conversation was Jason's acquisition of a handgun. Lieutenant Valdez explained that during the majority of the conversations between Jason and Diaz, Jason would request various amounts of cocaine from

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<sup>1</sup> Lieutenant Valdez explained that during the course of prolonged narcotics investigations, officers are frequently sent out to intercept known narcotics transactions. "Many times [the officers] pose as corrupt officers and will take the narcotics from the offenders without placing them under arrest leading them to believe that the police just took the narcotics and let them go." The drugs are then inventoried and used as evidence once the narcotics investigation concludes and the offenders are arrested and charged with narcotics crimes.

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Diaz that he wanted to sell to customers. Diaz, in turn, would respond that he would have to check with his supplier to see if the amounts of cocaine that Jason requested were available. Police would then intercept calls that Diaz placed to Lopez, his narcotics source, in which Diaz requested various amounts of cocaine to sell. These amounts corresponded the amounts that Diaz and Jason had previously discussed.

¶8 Lieutenant Valdez testified that on April 21, 2007, police intercepted another call between Jason and Diaz, in which they discussed Diaz's continuing troubles with Lopez. During this conversation, Diaz indicated that he wanted Jason to meet with Lopez. Although the specifics of the meeting were not discussed, Diaz informed Jason that Lopez would likely be armed and instructed Jason to carry a weapon when he met with Lopez. Diaz also advised Jason not to mention Diaz's name to Lopez, and requested Jason to involve his brother Wellington in the meeting. Diaz specifically requested Jason to have Wellington call him. Police subsequently monitored conversations that took place between Diaz and Wellington. During these conversations, Diaz made arrangements to meet with the Jaramillo brothers. The houses of Diaz, Lopez and the Jaramillo brothers were subsequently placed under surveillance. Surveillance efforts confirmed that a meeting between the Jaramillos and Diaz subsequently took place.

¶9 On April 24, 2007, at approximately 8:30 p.m., Lieutenant Valdez indicated that police intercepted another phone call between Diaz and Jason discussing the Jaramillo brothers' upcoming meeting with Lopez. During this conversation, Diaz asked Jason, "What have you guys thought about, or what? Are you guys going to do the job, or not?" Jason, in turn, reassured Diaz that they were going to do "the job" that Diaz requested the following day. Jason further informed

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Diaz that "[his] cousin is going to come around nine-thirty (9:30) [that evening] and we are going to go over [to Lopez's house] to see the whole situation." Diaz inquired about Jason's cousin's involvement and Jason explained "he is just going to drive like that we are going to give him one thousand (\$1,000) just to drive." Although Jason did not refer to his cousin by name, he informed Diaz that his cousin had a small car that "costs a lot of money, and – it's not– the car is not hot." Diaz then reiterated that if Jason made a "mistake" or "fail[ed] or something" he was not to involve Diaz in the matter. Jason reassured Diaz that he would not bring up Diaz's name when he and his brother met with Lopez.

¶10 Following this conversation, Lieutenant Valdez indicated that surveillance officers observed a car drive the Jaramillos from their house located in Berwyn to Melrose Park where Lopez resided. At 11:29 p.m., after Jason, Wellington and their cousin returned from Lopez's neighborhood, the brothers contacted Diaz about their plan. During this phone call, the Jaramillos reported seeing multiple doors that allowed access to Lopez's house and asked Diaz about what he knew about the interior of Lopez's home. After Diaz provided them with a layout of Lopez's house, Wellington informed Diaz that he planned to dress in nice clothes and simply ring Lopez's doorbell and attempt to get Lopez to invite him inside. Diaz agreed with the plan and told Wellington, "you should look like a nice tie, you should look decent." Diaz believed that Lopez would be more inclined to invite Wellington inside if he looked respectable.

¶11 On cross-examination, Lieutenant Valdez acknowledged that Jason Jaramillo never mentioned his cousin by name when he was telling Diaz who would drive Jason and Wellington to Lopez's home for their meeting. He further acknowledged that defendant's name was not

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discussed on any of the conversations that the police intercepted and recorded. Moreover, while undercover surveillance officers observed Jason and Wellington drive around Lopez's home the evening prior to the shooting, defendant had not been seen at that time.

¶12 Surveillance Testimony: April 24, 2007

¶13 Sergeant Noel Sanchez testified that in 2007, he was a supervisor of the "Sam I Am" wiretap investigation. On April 24, 2007, at approximately 3:30 p.m., Sanchez was en route to Luis Diaz's home in Cicero where he was assigned to conduct surveillance. At that time, Sergeant Sanchez reported that he was in radio contact with other officers who were also conducting surveillance in the area and he was provided with a description and license plate number of a white Cadillac that had been seen leaving the Jaramillo's home. The car was reported to have three occupants. Based on the information that he was provided, Sergeant Sanchez found the Cadillac, followed it, and observed it stop briefly at Diaz's home. After the Cadillac left Diaz's home, mobile surveillance of the car commenced and officers followed the vehicle to Lopez's house located in Melrose Park. At that time, the Cadillac had four occupants, and Sergeant Sanchez observed the Cadillac circle Lopez's home twice, driving "in a very slow deliberate methodical manner." Surveillance officers then followed the Cadillac back to Diaz's home in Cicero. When the Cadillac departed Diaz's home, Sergeant Sanchez testified that there were again three occupants in the car. At that point, a decision was made to stop the Cadillac in order to ascertain the identities of the occupants of the car. During the traffic stop, officers identified Nicholas, Jason, and Wellington Jaramillo. After stopping the vehicle and ascertaining the names of the occupants, Sergeant Sanchez explained that the Cadillac was permitted to drive away and

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surveillance officers confirmed that the Cadillac returned to the Jaramillo residence.

¶14 Sergeant Sanchez remained on surveillance detail throughout the day. At approximately 10:35 p.m. that evening, Sergeant Sanchez observed a dark-colored Oldsmobile Intrigue with an Illinois license plate G238-857 stop at the Jaramillo residence. He observed two occupants exit the car and enter the residence. Due to rainy weather conditions, Sergeant Sanchez was not able to obtain a good view of the two individuals and "couldn't tell \*\*\* if they were male or female." Approximately five minutes later, four people exited the Jaramillo's house and drove off in the Oldsmobile. Surveillance officers followed the vehicle as it drove to Lopez's residence in Melrose Park. Sergeant Sanchez testified that the Oldsmobile reached Lopez's neighborhood at approximately 11:05 p.m. and circled his residence twice and before it stopped near Lopez's house. At that point, one of the vehicle's occupants exited the car and was observed as he walked around the perimeter of Lopez's house and then returned to the parked Oldsmobile. The car was then followed as it returned to the Jaramillo's Berwyn residence. Once the Oldsmobile arrived at that location, two occupants of the vehicle exited the car and entered the house. The remaining two occupants of the car drove off. Sergeant Sanchez testified that mobile surveillance officers attempted to follow the car, but they lost sight of the vehicle due to the poor weather and traffic conditions as well as the "evasive driving" of the Oldsmobile driver. Sergeant Sanchez acknowledged that the police were unable to make any positive identifications of any of the four people who were in the Oldsmobile that evening and that no cameras or video equipment were utilized by the surveillance officers at that time. He explained that a decision not to use such equipment was made because it could have potentially compromised their investigation.

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¶15 Following Sergeant Sanchez's testimony, the parties stipulated that the police ran a vehicle check on the Oldsmobile and that "the certified copy of title indicated that the owner of a 1998 Oldsmobile Intrigue four-door was a Digmey G. Rincon [defendant's mother] and a Jonathan Miranda."

¶16 Chicago police officer Christopher Wilson, another surveillance officer assigned to the "Sam I Am" operation, corroborated Sergeant Sanchez's account of the surveillance efforts undertaken on April 24, 2007, and the two trips that the Jaramillo brothers made to Froylan Lopez's neighborhood the night before the shooting. At approximately 3:40 p.m., Officer Wilson testified that he was conducting surveillance at Diaz's house located at 1510 South 50th Court in Cicero. At that time, Officer Wilson was awaiting the arrival of a white Cadillac. Once the vehicle arrived at Diaz's house, Officer Wilson observed Diaz exit his residence and enter the rear passenger-side door of the vehicle. The vehicle was then followed to Lopez's neighborhood in Melrose Park and was observed as it circled Lopez's residence twice before it returned to Diaz's house.

¶17 Officer Wilson remained at his surveillance location, which was approximately 300 to 400 feet south of Lopez's residence. At approximately 11:05 p.m., he was notified over the radio by other surveillance officers that an Oldsmobile Intrigue had left the Jaramillo residence and was en route to his location. After receiving this information, Officer Wilson observed a car matching the radio description drive into the neighborhood and circle Lopez's house twice before coming to a stop. Once the vehicle stopped, Officer Wilson observed one of the occupants exit the vehicle. The occupant was dressed in black and had the hood of his sweatshirt pulled over his head.

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Officer Wilson watched him as he walked up the driveway of Lopez's house but lost sight of him as the man walked around the house. When the man returned to the vehicle approximately five minutes later, the Oldsmobile drove away and was followed by other surveillance officers. Given the darkness, rainy weather, and poor lighting conditions, Officer Wilson acknowledged that he was unable to see how many occupants were in the vehicle or identify any of the occupants.

¶18 Surveillance Testimony: April 25, 2007

¶19 Chicago Police Officer Angelo Velazquez was another member of the "Sam I Am" surveillance operation. Based on prior wiretap and surveillance efforts, Officer Velazquez was aware that Lopez was involved in the sale of narcotics and was the target of a potential robbery. On April 25, 2007, at approximately 10:15 a.m., Officer Velazquez's surveillance position was approximately 50 feet away from Lopez's Melrose Park residence. At that time, he observed a small blue Audi pull into Lopez's driveway. Two occupants exited the vehicle and walked towards the rear of Lopez's house while the Audi remained parked in the driveway with its engine running. Approximately one minute later, Officer Velazquez heard a house alarm sound from Lopez's house and saw two men run back to the Audi "frantically." Once the men reached the Audi, the car "frantically reverse[ed]" of the driveway and drove south on Louis Avenue with its tires "screeching."

¶20 Officer Velazquez immediately used his radio to relay what he observed to other surveillance officers in the area and left his surveillance position to follow the Audi. He testified that he was driving "over 60 miles an hour," but was not able to catch up to the speeding vehicle which must have been driving in excess of that speed. In addition to speeding, Officer Velazquez

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observed the vehicle fail to stop at three stop signs and drive through a red light. The vehicle did eventually slow down and Officer Velazquez testified that he was able to catch up to the Audi when it came to a stop behind another car and waited to make a left turn at the intersection of North Avenue and 25th Avenue. Because he was driving a covert police car and not an enforcement vehicle, Officer Velazquez could not curb the Audi so he remained in his position behind the Audi and waited for enforcement officers to arrive. Officers Gomez and Murphy were the first two enforcement officers to arrive at the scene. They stopped their squad car "next to the Audi on an angle" in an effort to block the Audi from "[a]ny type of further progress." Officers Gomez and Murphy then exited their vehicle and approached the Audi with their guns and badges out. They were shouting, "Police, get out of the car," and attempted to open the Audi's doors, but the driver put the car into reverse and "smash[ed]" into Officer Velazquez's covert police vehicle. Once it had room to maneuver, the Audi made a 180-degree U-turn and attempted to drive off, but was blocked from doing so when it crashed head-on into another enforcement vehicle that had arrived on the scene that was driven by Officer Villa.

¶21 Although the Audi's tires remaining spinning after the collision, it was not able to move so Officer Velazquez joined Officer Villa and together, they approached the Audi. Officer Velazquez removed Wellington Jaramillo from the passenger-seat of the vehicle. Other officers removed Jason Jaramillo and defendant from the Audi. Officer Velazquez testified that defendant was removed from the driver's seat of the vehicle. Once all of the occupants were removed from the vehicle, officers recovered two guns from the rear of the Audi.

¶22 Officer Daniel Villa confirmed that he attempted to assist Officer Velazquez in curbing the

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Audi. As he approached the intersection of North Avenue and 25th Avenue, Officer Villa observed Officers Murphy and Gomez exit their enforcement vehicles and approach the Audi. They were wearing bulletproof vests and their star shields and were announcing their office. At that point, Officer Villa observed the Audi back into Officer Velazquez's covert vehicle and execute a U-turn. As the Audi attempted to drive away, Officer Villa maneuvered his car squad car in front of the vehicle, and a collision ensued. After the crash, Officer Villa and the other officers approached the Audi with their guns drawn and their stars out, and ordered the occupants to show their hands. He confirmed that defendant, along with Wellington and Jason Jaramillo, were all removed from the vehicle. Defendant was removed from the driver's seat.

¶23 Chicago Police Officer Francisco Gomez testified that on April 25, 2007, at approximately 10:25 a.m., he and his partner, Officer Murphy received a radio communication about a blue Audi that had left the Melrose Park surveillance location at a high rate of speed. They were in a four-door Crown Vic equipped with lights and sirens. Officer Gomez and his partner encountered the vehicle at the intersection of North Avenue and 25th Avenue. He and his partner exited their police car with their guns drawn and approached the Audi. They identified themselves as police officers and ordered the occupants to open the doors. Both men were wearing bulletproof vests and had their stars displayed. Officer Gomez testified that when he and his partner attempted to open the doors of the car, the driver of the vehicle put the car in reverse and struck Officer Velazquez's covert surveillance vehicle. He confirmed that the Audi made a U-turn and attempted to leave the scene, but became blocked in when it struck Officer Villa's car. After the car stalled, Officer Gomez went to the Audi's driver's side door and saw his partner remove defendant from

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the vehicle.

¶24 Chicago Police Officer Nelson Gonzalez confirmed that he, too, assisted his fellow officers in subduing and removing the occupants of the blue Audi. After defendant and the Jaramillos were removed from the car, Officer Gonzalez recovered two weapons from the backseat of the vehicle. One weapon was a .40 caliber semi-automatic weapon and the other was a .357 caliber Smith and Wesson revolver. Officer Gonzalez transferred the weapons to Investigator Amy Lilliebridge, an Evidence Technician employed by the Cook County Sheriff's Department.

¶25 The parties stipulated that Investigator Lilliebridge received two guns collected by Officer Gonzalez on April 25, 2007. One of the guns was a six-shot Smith and Wesson .357 Magnum revolver containing four live rounds and the other was a Hi-Point semi-automatic pistol that contained six live rounds. She also received shell casings and one fired bullet that had been collected at Froylan Lopez's residence. The parties further stipulated that Illinois State Police Firearms Examiner Leah C. Kane received aforementioned guns, shell casings, and bullet and examined the firearms evidence. She concluded that the shell casings that were subsequently found at Froylan Lopez's residence were fired from the guns recovered from the Audi.

¶26 The parties stipulated that license plate number of the 2002 blue Audi TT Coupe was submitted to the Secretary of State. Records show that on April 25, 2007, the vehicle was registered to a Digmey Rincon, defendant's mother, who resided at 8925 Oswego in Morton Grove, Illinois.

¶27 Detective Chris Calhoun testified that after defendant and his cousins were detained, he

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was assigned to investigate the shooting at Lopez's residence. During the course of his investigation, Detective Calhoun and his partner, Detective Butler, interviewed defendant at police headquarters. Before initiating conversation, Detective Calhoun informed defendant of his *Miranda* rights and obtained defendant's written waiver of those rights. Video and audio equipment were then used to record the conversation that ensued. The video of defendant's interview was subsequently published to the jury.

¶28 In the brief interview, defendant acknowledged that the Audi was his car but stated he was "not an active participant" in the events that transpired at Lopez's house. Defendant said he was just giving his cousins a ride and denied that the guns recovered from his car were his. When asked if he knew why he was taken into custody, defendant responded, "They pulled me over. Slammed into my car, dragged me out, and that's all I know."

¶29 After presenting the aforementioned testimony from law enforcement officers, the State called Froylan Lopez to testify about the events that occurred at his residence on April 25, 2007. Lopez confirmed that he was living at 10021 West Palmer in Melrose Park in April 2007, and testified that his wife, mother-in-law, son and daughter lived with him. At that time, Lopez had been engaged in the sale of drugs for about four years and was not a legal resident of the United States. One of the people he sold cocaine to was Luis Diaz. At approximately 10:30 a.m. on April 25, 2007, Lopez was in his house with his 73-year-old mother-in-law and his 5-year-old son when he heard a knock at his door. When he opened the door, he encountered Wellington Jaramillo, who stated that he was looking for him. When Lopez confirmed his identify, Wellington began pushing the door to get into Lopez's house. Lopez pushed back, but Wellington

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blocked the door, pulled out a gun, and demanded that Lopez give him either money or drugs. At that point, Lopez indicated that Wellington and Jason both entered his house and forced their way into the kitchen. They ordered Lopez's mother-in-law to sit down, and ordered Lopez to "take [his] shirt off and get down on [his] knees." As Lopez was removing his shirt, Wellington struck him in the back of his head with the gun. Lopez felt dizzy, but was able to get to his feet and activate the alarm button that he had in his residence. Once the alarm sounded, Wellington "started to fire" his weapon at Lopez and he was shot four times. Lopez testified that he was struck by bullets in each of his forearms, once in his abdomen, and once in his left leg.

¶30 After the shooting, Wellington and Jason ran out of Lopez's house and he was able to get to a phone and call 911. In response to Lopez's call, police and paramedics arrived at his home and transported him to the hospital, where he received medical treatment. Approximately one month after the incident, Lopez spoke to Assistant State's Attorneys from the Cook County State's Attorney's Office. He confirmed that he agreed to testify for the State about the shooting in exchange for a promise of immunity. Lopez acknowledged that he made a "good deal" and has not been charged with any narcotics offenses despite his prior history of narcotics sales.

¶31 The parties stipulated that Froylan Lopez was transported to Loyola University Hospital on April 25, 2007, where he presented with multiple gunshot wounds and a scalp laceration. Lopez sustained gunshot wounds to his left and right wrists, as well as to his abdomen and trunk. He underwent emergency surgery to treat the gunshot wound to his abdomen and he has suffered sensory nerve damage to his right hand as a result of the shooting.

¶32 Defense Testimony

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¶33 After the State rested its case, the defense moved for a directed verdict, which the trial court denied. Defendant then elected to testify on his own behalf. He testified that on April 24, 2007, he worked an afternoon shift at National Tire and Battery, and returned to his house in Morton Grove. His girlfriend came over and they spent time at his house. He indicated that he did not leave his residence after returning there after work. His mother and sister were also home that evening. The next day, defendant received a phone call from his cousin Jason at approximately 7:30 a.m. Jason was looking for defendant's younger brother Arturo. Jason informed defendant that he and Wellington had an interview and that he wanted Arturo to drive them to the interview. Because Arturo was at school, defendant agreed to drive his cousins to the interview. Defendant testified that he left his house in Morton Grove around 9:30 a.m. and drove to his cousins' house. When he got there, both of his cousins were dressed nicely. Wellington was wearing "dressy clothes, dressy pants, dressy shirt and a tie, all black" and Jason was "wearing some nice jeans and a sweater." Jason sat in the back seat of defendant's car and Wellington sat in the front seat and provided defendant with directions to the interview location. Defendant was not familiar with the area and simply followed his cousin's directions. Wellington told defendant he was interviewing with a guy that owned a landscaping business.

¶34 Defendant testified that he and his cousins "ended up in a residential area" in Melrose Park and that Wellington directed him to pull into a driveway. When he did, both of his cousins exited the vehicle and walked to the back of the house. Because there was a fence, defendant did not have a direct view of the rear door of the house. Defendant simply sat in the car with his radio on and waited for his cousins to return. After a minute or so, Wellington and Jason ran

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back to defendant's car. Jason did not say anything, but Wellington told him "Drive, drive, drive, get out of here." Wellington was "frantic." Defendant asked his cousin what was going on and noticed that Wellington had a gun resting in his lap. He had never seen either of his cousins with guns before. Wellington then pointed the gun at him and said, "Drive, shut up and drive." Defendant testified that he "had no other choice" so he "backed out, and [he] peeled out of there." Defendant explained that he had never had a gun pointed at him before. Defendant kept driving and followed the directions that Wellington gave him. When Wellington told him he was driving too fast, defendant slowed down near an intersection and stopped in a left-turn lane behind another vehicle. He wanted to get out of the car and leave the vehicle but Wellington did not know how to drive. As defendant waited in the left-turn lane, "another car came out of nowhere and kind of like cut [him] off." At the time, defendant did not know the car was a police car because it was not marked. Once that happened, Wellington cursed and ordered defendant to reverse the car. Defendant complied, "jammed [his] car into reverse" and backed into a vehicle that was behind him. Defendant put his car back into first gear and his car spun around. He explained that he was "panic stricken" and that the "whole time [he] had [his] foot on the gas, so as soon as [his car] spun around, [his] car started to drive forward again" and he collided with another vehicle. After the second collision, defendant's car stalled.

¶35 Defendant testified that the next thing he knew, he was "pulled out of [his] car, slammed on the ground, [and] handcuffed." At that moment, defendant had not known what had happened inside Froylan Lopez's house, but acknowledged that he did not think anything good happened there. He was not aware that his cousins had entered the house with the intention of shooting

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Lopez. After being handcuffed, defendant and his cousins were transported to the Melrose Park Police Precinct, but defendant was put in a different cell than his cousins. Aside from Jason instructing defendant to keep his mouth shut, he did not have any conversations with his cousins once they were taken to the precinct. Defendant and his cousins were subsequently transported to a holding cell in Maywood. He was again instructed to "keep [his] mouth shut."

¶36 On cross-examination, defendant testified that neither of his cousins were carrying bags when he picked them up and indicated that he did not see either of them carrying guns.

Defendant saw the guns for the first time when his cousins re-entered his vehicle after running frantically from Lopez's house. He acknowledged that he drove through a stoplight after leaving Lopez's house and estimated that he was probably driving "[s]omewhere around" 60 miles per hour. Defendant testified that he did not know where he was going at that time and was simply followed Wellington's directions. He did not ask his cousins what had happened. At the time that he struck two vehicles at the intersection of North Avenue and 25th Avenue, defendant denied that police officers had previously approached his car and ordered him and his cousins out of the car. Before that day, defendant did not know who Froylan Lopez or Luis Diaz were. He reiterated that he did not drive his cousins to Lopez's house with the intent to rob or harm Lopez.

¶37 Defendant acknowledged that he agreed to let Detective Calhoun interview him after his arrest and admitted that many of the responses that he initially provided to Detective Calhoun were untruthful. Specifically, he admitted that he told Detective Calhoun that he did not know whose guns were found in his car even though he knew that they belonged to his cousins. He also admitted that when Detective Calhoun asked him questions about the house that defendant

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drove his cousins to, defendant responded, "what house?" even though he knew the house to which Detective Calhoun was referring. Defendant explained, "I was scared. I didn't know what to tell him." Defendant also acknowledged that he never told police that he believed he was driving his cousins to an interview; rather, he merely advised the investigating officers that he and his cousins were just driving around. He admitted that he made a "poor choice" in failing to be more forthright in response to Detective Calhoun's questioning.

¶38 Arthuro Miranda, defendant's younger brother, testified that on April 24, 2007, he was 16-years-old and lived in Morton Grove with his brother, his sister, his mother, and step-father. At that time, he had access to an Oldsmobile Intrigue. Although that vehicle was registered to his mother and his brother, Arthuro testified that it was his car. That evening, he received a call from Wellington Jaramillo, one of his cousins. Wellington asked Arthuro to "hang out" so he drove with his friend Luis Madrid to his cousins' house in Berwyn. When Arthuro and Luis arrived at his cousins' house, Wellington asked him to take them to another friend's house. Arthuro explained that neither of his cousins had driver's licenses at the time and that he agreed to take his cousins to "someplace in Melrose Park." Arthuro had never been there before and could not recall the address that he drove to that night. When they arrived in Melrose Park, Wellington instructed Arthuro to "circle the block because his friend wasn't answering him." After circling the block twice, Wellington instructed Arthuro to stop the car and let him out because he wanted to go up to the residence. Arthuro testified that he waited with Luis and Jason in the car while Wellington walked around the residence.

¶39 When Wellington returned to the car, he told Arthuro that his friend was not answering

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his calls and said that they should just return to their house. Because it was late, Arturo drove home after he dropped his cousins off at their residence. The next morning, the day of the shooting, Arturo went to school. While he was at school, Arturo was not able to check his phone. Once school ended, Arturo saw that he had missed several calls from his cousins. He did not see his cousins or his brother that day.

¶40 Arturo acknowledged that he received a felony conviction when he was 18 years old and that he was testifying because he wanted to help his older brother. He acknowledged that the Oldsmobile that he drove on the evening of April 24, 2007, was registered to defendant, but denied that defendant drove the Oldsmobile the night before the shooting. Arturo confirmed that defendant drove a blue Audi.

¶41 After live witness testimony concluded, the parties delivered closing arguments. The State argued that defendant knew exactly what was going to happen when he drove his cousins to Lopez's house on April 25, 2007, and denied that it was merely "a crime of opportunity" or a "spur of the moment crime." Based on the calls intercepted between Jaramillos and Luis Diaz discussing the specifics of their plan, the State argued that they would not have taken a chance on their getaway driver; rather, defendant was informed of, and agreed to, their plan.

¶42 The defense responded that defendant was a "good kid" who was put in a bad situation by his cousins. The defense noted that while numerous phone conversations were recorded during the course of the "Sam I Am" investigation, defendant's name never came up, and argued that the State failed to present any direct evidence that defendant was a knowing and willing participant in the events that took place on April 25, 2007.

¶43 After hearing closing arguments, the jury returned with a verdict finding defendant guilty of home invasion and aggravated battery with a firearm. Thereafter, the court presided over a sentencing hearing. After hearing the arguments advanced in aggravation and mitigation, the court sentenced defendant to 21 years' imprisonment for home invasion and 6 years' imprisonment for aggravated battery of a firearm, the minimum sentences permitted by statute. Following statutory mandate, the trial court ordered that the sentences be served consecutively. Defendant's post-trial and post-sentencing motions were denied. This appeal followed.

## ¶44 II. ANALYSIS

### ¶45 A. Sufficiency of the Evidence

¶46 On appeal, defendant first challenges the sufficiency of the evidence. He argues that the State failed to present sufficient evidence to prove him guilty of home invasion and aggravated battery of a firearm under an accountability theory. Although he was present at the crime scene and did flee afterwards, defendant argues that the State presented no evidence that he knew that his cousins intended to commit a crime or that he agreed to participate in their criminal scheme. Because a defendant's mere presence at, and flight from, a crime scene is not enough to sustain a conviction on accountability grounds, defendant argues that his convictions must be reversed.

¶47 The State disputes defendant's characterization of the evidence. Although it agrees that a person's presence at, and flight from, a crime scene alone, is not sufficient to establish criminal accountability, the State argues that based on the extensive wiretapping and surveillance testimony, there was additional circumstantial evidence that would allow a reasonable jury to conclude that defendant knew of his cousins' plan to rob Lopez of drug money when he drove

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them to Lopez's house.

¶48 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not the reviewing court's role to retry the defendant; rather, it must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979); *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008).

¶49 Here, defendant is convicted of home invasion and aggravated battery with a firearm based on the legal principle of legal accountability. Criminal accountability is governed by section 5-2 of the Criminal Code of 1961 (Criminal Code). That section, in pertinent part, provides:

"When accountability exists. A person is legally accountable for the conduct of another when:

\* \* \*

(c) either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense.

When 2 or more persons engage in a common criminal design or agreement, any acts in furtherance of that common design committed by one party are considered to be the acts

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of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts. Mere presence at the scene of a crime does not render a person accountable for an offense; a person's presence at the scene of a crime, however, may be considered with other circumstances by the trier of fact when determining accountability." 720 ILCS 5/5-2(c) (West 2006).

¶50 "Accountability focuses on the degree of culpability of the offender and seeks to deter persons from *intentionally* aiding or encouraging the commission of offenses." *People v. Perez*, 189 Ill. 2d 254, 268 (2000). To prove that a defendant had the intent to promote or facilitate the commission of a crime, the State must establish beyond a reasonable doubt that the defendant either shared a criminal intent of the principal offender or that there was a common criminal design. *Perez*, 189 Ill. 2d at 266; *People v. Velez*, 388 Ill. App. 3d 493, 512 (2009). The intention of a defendant may be inferred from the character of his acts as well as from the circumstances surrounding the commission of the charged offense. *Perez*, 189 Ill. 2d at 266. Similarly, the existence of a common design or purpose may also be inferred based upon the surrounding circumstances. *Velez*, 388 Ill. App. 3d at 512 (recognizing that "words of agreement are not necessary to establish such purpose or design"). Although a defendant's mere presence at the scene of a crime or his flight from a crime scene, alone, is insufficient to establish a defendant's accountability, the fact-finder may consider these factors in determining whether he is legally accountable. *Perez*, 189 Ill. 2d at 267; see also *People v. Phillips*, 2012 IL App (1st) 101923, ¶ 11. In addition to these factors, the fact-finder may also consider the defendant's presence during the planning of a crime, his failure to report the crime, and his continued

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association with the principal or principals after the commission of a crime in making its accountability determination. *Perez*, 189 Ill. 2d at 267; *Velez*, 388 Ill. App. 3d at 512; *People v. Taylor*, 164 Ill. 2d at 140-41 (1995). Ultimately, evidence that the defendant voluntarily attached himself to a group bent on illegal acts, with knowledge of its design, supports an inference that he shared a common criminal purpose and will sustain a conviction on accountability grounds. *Perez*, 189 Ill. 2d at 167. More specifically, evidence that a defendant agreed to act as a look-out or get-away driver is sufficient to sustain an accountability finding for crimes committed by the principal. See, e.g., *People v. Lee*, 247 Ill. App. 3d 505, 510 (1993); *People v. Gomez*, 127 Ill. App. 3d 551, 556 (1984); *In re Johnson*, 40 Ill. App. 3d 493, 496 (1976).

¶51 Based on the record, we find there was sufficient evidence to allow a reasonable trier of fact to conclude that defendant had knowledge of his cousins' criminal purpose and acted with the intention to aid his cousins in the commission of their crime against Froylan Lopez. Defendant's presence at, and flight from, Froylan Lopez's house after the shooting is well-documented and undisputed. Surveillance officers observed defendant sit in Lopez's driveway with his car running, while his cousins went inside Lopez's house. After the activation of Lopez's house alarm, defendant drove over 60 miles per hour away from the scene. Officer Velazquez testified that defendant failed to stop at three stop signs and drove through a red light at an excessive rate of speed. Despite eventually being blocked in, and approached by Officers Gomez and Murphy, at the intersection of North Avenue and 25th Avenue, defendant failed to abide by their orders to exit the vehicle, and instead remained his car and struck two police vehicles in an effort to flee from the intersection, before his car stalled and he was removed from the vehicle.

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Although defendant's presence at, and flight from, the crime scene, alone is not dispositive of his accountability, we reiterate that these factors are nonetheless relevant and may be considered when evaluating whether the evidence is sufficient to sustain a criminal conviction on accountability grounds. *Perez*, 189 Ill. 2d at 267.

¶52 In addition to these factors, the State presented additional circumstantial evidence of defendant's *prior* knowledge of, and complicity in, his cousins' criminal design. Although defendant testified for the first time at trial, that he believed he was driving his cousins to an interview, not a robbery, there is evidence that would permit a reasonable fact-finder to conclude that defendant was aware of his cousins' true intent and agreed to aid them in their criminal endeavor by driving them to and from the crime scene. Notably, in a conversation recorded on April 24, 2007, the night before the shooting, Jason informed Diaz that his cousin was going to drive him and his brother Wellington when they went to "take care of" Lopez. Jason explained that they were going to pay their cousin \$1,000 "just to drive." Although defendant's name was not specified in that conversation or in any of the wiretapped conversations recorded by police during the course of operation "Sam I Am," Jason did reassure Diaz that his cousin had a small, expensive car that was "not hot." Defendant, in turn, admitted at trial that he drove his cousins to Lopez's house in his Audi TT, which he described as a two-door "rather small sports car." In addition, after this phone call, members of the "Sam I Am" surveillance detail, observed an Oldsmobile, registered to defendant, slowly circle Lopez's residence twice. Although defendant testified that he remained at home with his girlfriend the night before the shooting and defendant's brother testified that it was he, not his brother, who drove the Oldsmobile that

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evening, it was up the fact-finder to weigh the evidence, assess the credibility of the witnesses, resolve conflicting evidence, and draw reasonable inferences therefrom. *People v. Washington*, 2012 IL110283, ¶ 60.

¶53 Ultimately, the jury heard testimony from defendant as well as from a number of law enforcement officers involved in the surveillance operation and defendant's arrest, and entered a verdict against defendant on accountability grounds. Based on our review of the record, and viewing the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence to allow a reasonable trier of fact to conclude that defendant knowingly and intentionally aided his cousins in criminal activity. Accordingly, we reject defendant's challenge to the sufficiency of the evidence.

#### ¶54 B. Closing Arguments

¶55 Defendant next challenges the propriety of the State's rebuttal argument. He argues that the State impermissibly shifted the burden of proof onto defendant when it observed that defendant failed to call his mother, sister, or his brother's friend Luis Madrid, to support his contention that he spent the night prior to the shooting at home rather than with his cousins. Defendant argues that aside from Luis Madrid, he never injected the names of these witnesses into his defense, and thus, the State's commentary on his failure to call these witnesses to support an alibi defense was improper and deprived him of his constitutional right to a fair trial.

¶56 The State responds it was entitled to comment on defendant's failure to produce the aforementioned witnesses because defendant introduced the existence and names of these potential witnesses into evidence. The State thus argues that the prosecution's comments were

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appropriate inferences based on the evidence and did not improperly shift the burden of proof onto defendant.

¶57 To evaluate a defendant's allegation of prosecutorial misconduct during closing argument, a reviewing court will consider the closing argument as a whole and evaluate the challenged comments in the context in which they were delivered. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Reversal is warranted only if the prosecutor's comments resulted in "substantial prejudice" to the defendant. *Wheeler*, 226 Ill. 2d at 123; *People v. Walton*, 376 Ill. App. 3d 149, 160 (2007). Substantial prejudice exists when it can be determined that the improper remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123; *Gutierrez*, 402 Ill. App. 3d at 895.

¶58 In reviewing such a claim, it is important to note that prosecutors are generally afforded wide-latitude during closing argument. *People v. Caffey*, 205 Ill. 2d 52, 131 (2001); *People v. Phillips*, 392 Ill. App. 3d 243, 275 (2009). Accordingly, a " 'defendant faces a substantial burden in attempting to achieve reversal [of his conviction] based upon improper remarks made during closing arguments.' " *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010), quoting *People v. Williams*, 332 Ill. App. 3d 254, 266 (2002). Indeed, prosecutors may comment on the evidence as well as any reasonable inferences that the evidence may support, even if the inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). To be proper, however, the inferences must be reasonable and based on the facts and circumstances proven during the trial. *Gutierrez*, 402 Ill. App. 3d at 895; *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). Thus, " [i]f it is developed in a trial that a witness exists, presumably under the control

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of a defendant, who can throw light upon a vital matter, and he is not produced, certainly a jury may fairly consider that fact, and likewise, counsel would have a legitimate right to comment thereon.' " *People v. Nevitt*, 135 Ill. 2d 423, 451 (1990), quoting *People v. Williams*, 40 Ill. 2d 522, 528 (1968); *People v. Kubat*, 94 Ill. 2d 437, 498 (1983). In contrast, a prosecutor is not entitled to comment on a defendant's failure to call an exculpatory witness where there is no evidence that such a witness exists. *Nevitt*, 135 Ill. 2d at 452.

¶59 Here, during rebuttal argument, the State disputed the defense's assertions that defendant had no prior knowledge of his cousins' criminal intent and that it was defendant's younger brother Arturo who drove his cousins to Melrose Park and circled Lopez's house the night prior to shooting. Specifically, the State made the following statements:

"You heard from Arturo Miranda. He told you that he went and drove around this neighborhood with some guy named Luis Madrid. Where is Luis Madrid? I didn't hear from Luis Madrid. Did you?"

Later, the State argued:

"Jonathan Miranda sat on that witness stand and told you that his mother and his sister were his alibi witnesses for the night of April 24th, that he couldn't have possibly been in that Oldsmobile Intrigue circling 10021 West Palmer earlier or later that evening on the 24th because he had just finished his night shift, he had just come home from work, he had his girlfriend over, Stephanie, and his mom and his sister. Did you hear from Stephanie? Did you hear from his mother? Did you hear from his sister to support that alibi?"

¶60 We do not find that these statements were improper. Although defendant never disputed

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that he was present at, and fled from, the scene of the crime, and did not assert an alibi defense *per se*, he did argue that he did not have knowledge of his cousins' criminal intent when he drove them to Lopez's house on April 25, 2007. To support this assertion, defendant presented evidence that it was his younger brother Arturo, not him, that drove Jason and Wellington to Lopez's neighborhood the night before the shooting. Indeed, defendant testified that he was at his house with his girlfriend, and his mother and sister on the evening before the shooting. Defendant's brother, in turn, claimed that he and his friend Luis Madrid drove his cousins to Lopez's neighborhood that night. Because defendant injected the existence of these witnesses into the case, the State was entitled to comment on defendant's failure to call these witnesses to testify on his behalf. See, e.g., *Kubat*, 94 Ill. 2d at 498; *People v. Burrows*, 148 Ill. 2d 196, 253-54 (1992); *People v. Tatum*, 389 Ill. App. 3d 656, 671-72 (2009). The fact that additional information about these witnesses was brought out on cross-examination is of no consequence. See *People v. Woods*, 292 Ill. App. 3d 172, 176-77 (1997) (recognizing that the State may comment on a defendant's failure to call alibi witnesses regardless of whether these witnesses are initially identified by the defendant on direct or cross-examination because "in either case he chooses to take the witness stand voluntarily"). Ultimately, we find that the State's comments were reasonable inferences based on the evidence presented at trial and did not impermissibly shift the burden of proof onto defendant. Even if we were to agree with defendant that the State's comments were improper, we do not find that they were so egregious that they deprived defendant of his right to a fair trial and warrant reversal of his convictions. See *Caffey*, 205 Ill. 2d at 104.

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¶61 CONCLUSION

¶62 For the aforementioned reasons, we affirm the judgment of the circuit court.

¶63 Affirmed.