

No. 1-11-2374

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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. 02 CR 26771
)	
GERARDO PELAYO, a.k.a., JOSE HERNANDEZ,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* Affirmed the decision of the trial court where defendant was proven guilty beyond a reasonable doubt of aggravated battery with a firearm where two witnesses identified him as the shooter and where defendant forfeited his claim that the trial court abused its discretion in limiting the cross-examination of a witness at trial.

¶ 2 Following a bench trial, defendant Gerardo Pelayo a/k/a Jose Hernandez a/k/a/ Ismael Ramirez-Cortez (Pelayo) was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(2) (West 2000)) and sentenced to 15 years in prison. On appeal, Pelayo contends he was not proven guilty beyond a reasonable doubt because no evidence at trial supported a finding of guilt based upon an accountability theory. Pelayo further argues the trial court abused its

discretion when it limited his cross-examination of a witness. For the following reasons, we affirm the decision of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On October 5, 2002, Pelayo was arrested and indicted for attempted murder of a peace officer (720 ILCS 5/9-1(a)(1), (b)(1) (West 2000)), aggravated battery with a firearm of a peace officer (720 ILCS 5/12-4.2(a)(2) (West 2000)), two counts of attempted first degree murder (720 ILCS 5/9-1(a)(1) (West 2000)), and aggravated battery with a firearm ((720 ILCS 5/12-4.2(a)(1) (West 2000)). The charges stemmed from a shooting that occurred several months prior outside of the Coqui Club (club) located in the 3100 block of Armitage Avenue in Chicago, Illinois. A bench trial was held on March 28, 2011,¹ where the State presented the testimony of Officers Roberto Santiago (Santiago) and Luis Cruz (Cruz).²

¶ 5 I. Testimony of Roberto Santiago

¶ 6 Santiago, a Cook County sheriff's deputy assigned to the Department of Corrections, testified on direct examination he was off-duty in the early morning hours of December 10, 2001. Dressed in casual clothing and carrying his loaded service weapon, Santiago arrived at the club at approximately 1:45 a.m. after his shift to meet his coworker Cruz. While he waited for Cruz to arrive, Santiago went to the bar to order a drink. After Cruz entered the club, the two men spoke for a few minutes before Cruz went to the rear of the club.

¶ 7 According to Santiago, a young woman suddenly entered the club yelling that someone had been shot. The woman approached him and asked for assistance. Santiago went outside and immediately noticed two bodies lying on the street. He also saw people pointing at three "offenders" who were running away. In response, Santiago yelled "Stop, police!" in both English

¹ According to the record, the start of the trial was delayed several years due to Pelayo being held in federal custody on an unrelated matter.

² The State also presented the testimony of a third witness, Officer Rojas. The parties do not discuss the testimony of Officer Rojas, which is not relevant to this appeal.

and Spanish and gave chase. Santiago eventually caught up to the individuals as one of the men was "getting ready to step into" the passenger side of a pickup truck with the other two already inside.

¶ 8 At this point, Santiago grabbed the man entering the truck. Santiago testified that the two men "tussled," before Santiago noticed Pelayo, who was sitting towards the middle of the truck, withdraw a firearm. According to Santiago, he could see Pelayo's face as they were only three or four feet apart and nothing was obstructing his view. Pelayo then leaned over to the passenger side. At the same time, Santiago pushed away the man with whom he was wrestling, turned toward Pelayo, and was shot. Santiago pulled out his revolver attempting to fire back at Pelayo but, according to Santiago, the handgun "misfired." Santiago yelled he had been "hit" and ran to take cover behind a mailbox. While crouched down behind the mailbox, Santiago attempted to reload his weapon when he heard another gunshot. Santiago testified he did not see who fired the shot. After the truck drove away, Santiago returned to the club, secured his weapon, spoke to police officers, and was ultimately transported to a hospital. After Pelayo's eventual arrest, Santiago identified Pelayo in a photographic array and in a lineup as the person who shot him.

¶ 9 During cross-examination, defense counsel attempted to question Santiago about his revolver. In particular, defense counsel cross-examined Santiago about an alleged inconsistency in his account of events regarding the misfiring of his weapon:

"Q. You claim the gun jammed, am I correct? Did the gun jam?

A. The gun misfired.

Q. You had a conversation with some of the Detectives right after the shooting, did you not, at the hospital?

A. Yes, sir.

Q. You told those Detectives that the gun didn't misfire, that the gun jammed, that you didn't pull any rounds off. As a matter of fact, you told them that you tried to

pull the trigger six times, squeeze the trigger six times, and nothing happened; am I correct?

A. Yes, sir.

* * *

Q. You told them that the gun you tried—that you tried to squeeze the trigger six times, and nothing happened; am I correct?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Overruled.

Q. You told them that you tried to squeeze the trigger six times, and nothing happened, correct?

MS. GREENSTEIN [Assistant State's Attorney]: Objection. That is not what his statement is.

THE COURT: Overruled.

Q. Answer my question. You told them, did you not, that you tried to squeeze the trigger six times, and nothing happened?

A. Yes, sir.

Q. You never told them that you fired a round, did you?

A. No.

Q. As a matter of fact—no, you never told them that?

A. I attempted to fire my weapon.

* * *

Q. Your gun has never jammed on you in your life?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Sustained.

Q. This time you claim the weapon jammed on you, correct?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Sustained."

In addition, defense counsel cross-examined Santiago about the care and maintenance of his weapon. The trial court sustained most of the State's objections regarding this line of testimony:

"Q. When you were in military school you learned to take care of your weapon?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Sustained.

Q. You always clean your weapon?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Sustained.

Q. You don't have a dirty weapon?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Sustained.

Q. The weapon you had was a revolver, correct?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Overruled.

Q. And revolvers just don't jam, do they?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Sustained.

Q. Automatics do, don't they?

MS. GREENSTEIN [Assistant State's Attorney]: Objection.

THE COURT: Sustained."

¶ 10 During redirect, Santiago explained that the truck had one long seat and did not recall whether defendant was sitting in the middle or on the driver's side, but that defendant leaned over

toward the passenger side with an extended arm to shoot. During recross-examination, Santiago clarified that the person who shot him was sitting inside the truck.

¶ 11

II. Testimony of Luis Cruz

¶ 12 Cruz, a Cook County sheriff's deputy assigned to the Department of Corrections, testified he met Santiago at the club around 1:45 a.m. After briefly talking to Santiago, he walked to the rear of the room to speak with some friends. While Cruz was in the back of the club, he heard a woman scream that somebody had been shot outside. At this point he noticed Santiago leave the club and followed him outside. When Cruz first exited the club, he saw Santiago chasing three men and followed. According to Cruz, he observed the three men enter a truck and then watched as Santiago pulled one of the men out of the truck and "put him on the floor." At the same time, Cruz went to the driver's side of the truck where he saw Pelayo, who was inside the truck, fire a handgun toward Santiago through the open passenger door. Cruz then went to the passenger side of the truck and fired his weapon. Ten months later, he identified Pelayo in a lineup. During cross-examination, Cruz acknowledged that the day after the shooting he told an officer that the incident "happened so fast" he would "never" be able to identify someone. Cruz explained, however, that he was "nervous" and "didn't know what to tell [the officer]" but that he "didn't lie to him."

¶ 13

III. Trial Court's Ruling

¶ 14 The trial court acquitted Pelayo of the first two charges, attempted murder of a peace officer and aggravated battery with a firearm of a police officer, noting the State did not "establish[] beyond a reasonable doubt that [Pelayo] would have known they—he was a police officer." The trial court reasoned, "[i]t seems like there were a lot of people out there, confusion and noise, and I don't know if three people running away from this scene could have actually heard the word, 'police,' and if that is sufficient—if the State established beyond a reasonable

doubt that these offenders that were leaving the scene knew that they were being pursued by some police officers."

¶ 15 The trial court additionally acquitted Pelayo of personal discharge of a firearm causing great bodily harm. According to the trial court, "[a]lthough an argument can be made that a single bullet wound in the arm is great bodily harm, I believe there is case law that says the exact opposite." The court reasoned, "a single bullet wound, especially when someone is not in pain, refuses pain medication at the hospital, is released, treated and released, and has to return sometime later for surgery to remove a bullet, I don't think could be defined as great bodily harm."

¶ 16 The trial court then discussed the remaining charges of aggravated battery with a firearm and attempted murder with a firearm. The trial court initially noted both Santiago and Cruz identified Pelayo in a lineup and in open court. The court further added, although Cruz "made a statement to the police shortly after the incident that this thing happened so fast he would not be able to make an identification, *** he subsequently did." The court explained, however, that "[Cruz's] version of events are very different from [Santiago's], and there is doubt as to whether [Pelayo] was the actual shooter or was merely accountable for the shooting." The trial court thus reasoned there was insufficient evidence to indicate Pelayo was guilty of attempted first degree murder with a firearm, but concluded Pelayo was guilty of aggravated battery with a firearm.

¶ 17 IV. Motion for New Trial

¶ 18 At the hearing on Pelayo's motion for a new trial, the defense argued the evidence at trial was insufficient to find Pelayo guilty pursuant to an accountability theory. The defense further argued that the evidence was insufficient to find Pelayo was the actual shooter because Cruz and Santiago gave "markedly different" accounts of the shooting. In denying the motion, the trial court characterized the impeachment of the officers' testimony as "non-impeachment or minor impeachment *** or a minor contradiction between testimony." The trial court went on to state

some of Pelayo's arguments were "more semantic in nature than anything else." The trial court then described Pelayo's involvement as "more than mere presence" as he was "actively engaged, aiding and abetting, or actually shooting." The court subsequently sentenced defendant to 15 years in prison.

¶ 19

ANALYSIS

¶ 20 Pelayo presents two arguments on appeal: (1) the State failed to prove him guilty beyond a reasonable doubt of aggravated battery with a firearm on a theory of accountability; and (2) the trial court erred when it sustained the State's objections to questions about Santiago's revolver. We address these arguments in turn.

¶ 21

I. Reasonable Doubt

¶ 22 Pelayo first contends he was not proven guilty beyond a reasonable doubt of aggravated battery with a firearm on a theory of accountability. According to Pelayo, the State did not present sufficient evidence by which a reasonable trier of fact could conclude he was accountable for the acts of the shooter.

¶ 23 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. *Id.* A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates reasonable doubt as to a defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009). We are not persuaded the evidence in this case was so improbable or unsatisfactory as to establish reasonable doubt of Pelayo's guilt under an accountability theory.

¶ 24 Pelayo in part relies on a statement made by the trial court that "there is doubt as to whether the defendant was the actual shooter or was merely accountable for the shooting." Pelayo argues the trial court's statement "effectively acquitt[ed]" him of the offense for which he was ultimately convicted. We do not agree. The trial court offered this statement as a reason why it did not find Pelayo guilty of attempted murder. Specifically, the trial court expressed doubt as to whether the identification of Pelayo definitively established him *as the shooter*. Pelayo, however, need not have actually pulled the trigger of the handgun to be accountable for the shooting. *E.g., People v. Mischke*, 278 Ill. App. 3d 252, 263 (1995).

¶ 25 Accountability exists where "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, [the defendant] solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2002). "Active participation has never been a requirement for the imposition of criminal guilt upon the theory of accountability." *People v. Ruiz*, 94 Ill. 2d 245, 254 (1982). "Proof that defendant was present during the perpetration of the offense, that he maintained a close affiliation with his companions after the commission of the crime, and that he failed to report the crime are all factors that the trier of fact may consider in determining the defendant's legal accountability." *People v. Taylor*, 164 Ill. 2d 131, 141 (1996). Moreover, a court may consider the defendant's flight from the scene of the crime as further evidence of his or her accountability. *People v. Dotson*, 143 Ill. App. 3d 135, 142 (1986).

¶ 26 Pelayo's own brief admits he was either the shooter or the driver of the truck; the brief states, "[i]f Pelayo was not the shooter, therefore, he must have been this third man in the driver seat." This fact supports the finding of accountability in this case. See *People v. Gomez*, 127 Ill. App. 3d 551, 556 (1984) ("a person who knowingly drives a get-away car is accountable for the crimes committed"); see also *People v. Lee*, 247 Ill. App. 3d 505, 509-10 (1993). Moreover, even were we to reject Pelayo's admission in his brief and assume he was neither the shooter nor

the driver, the evidence would still support finding Pelayo accountable. The trial court expressed no reservations about the identification of Pelayo as one of the two men in the truck. Both officers testified they were within a few feet of Pelayo during the shooting and had an unobstructed view of his face. Both officers identified Pelayo in court and in various lineups. Thus, the evidence established that at a very minimum Pelayo ran from the victims in the street, fled from the pursuing Santiago and Cruz, entered the get-away truck with the other offenders, and continued to flee and associate with the offenders after Santiago was shot. As the trial court expressly noted, Pelayo's involvement was "more than mere presence"; during the incident, Pelayo was "actively engaged, aiding and abetting, or actually shooting" at the officers.

¶ 27 Despite this evidence, Pelayo argues the State's case was "rife with credibility problems *** because Cruz's and Santiago's descriptions of the incident were markedly inconsistent." In particular, Pelayo points to differences in their accounts of Santiago's initial response to the shooting and to differences in their descriptions of Santiago's scuffle with the man boarding the truck. While minor inconsistencies existed between the testimony of Santiago and Cruz, Pelayo fails to demonstrate why these inconsistencies were ultimately fatal to the State's case. The two officers viewed the incident from different perspectives and the differences in their testimony do not destroy their credibility. See, e.g., *People v. Rodriguez*, 100 Ill. App. 3d 244, 249 (1981) ("Both witnesses viewed the occurrence from different positions and one could easily have observed or recalled details that the other did not."). The trier of fact is in the best position to judge credibility and this court will not re-weigh the evidence simply because Pelayo can point to slight variances in the witnesses' testimony. *People v. Sanders*, 2012 IL App (1st) 102040, ¶15. Accordingly, we do not find the evidence at trial to have been so improbable or unsatisfactory as to create reasonable doubt of Pelayo's guilt.

¶ 28

II. Scope of Cross-Examination

¶ 29 Pelayo next contends the trial court denied Pelayo his constitutional right to confrontation or, alternatively, abused its discretion by sustaining the State's objections to questions regarding Santiago's maintenance and cleaning of his firearm. Pelayo admits he did not make an offer of proof to the trial court as to what Santiago's testimony about the maintenance of his weapon would have entailed, but urges this court to review his contention for plain error.

¶ 30 When a line of questioning is objected to or denied by the trial court, the defendant must make an offer of proof in order to either persuade the trial court to permit the testimony or to establish on the record that the evidence sought through the line of questioning is directly related to the issue of bias or motivation to testify falsely. *People v. Tabb*, 374 Ill. App. 3d 680, 689 (2007). The purpose of an offer of proof is to disclose to the court the nature of the proffered evidence and enables a reviewing court to determine whether the exclusion of such evidence was proper. *People v. Andrews*, 146 Ill. 2d 413, 421 (1992). The failure to make an adequate offer of proof before the trial court results in the forfeiture of that issue on appeal. *Id.* Therefore, because Pelayo did not make such an offer of proof, he has forfeited this issue on appeal. This court may still reach the merits of Pelayo's contention through the plain error doctrine which permits us to address unpreserved errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The first step in determining whether the plain error doctrine applies is to determine whether any reversible error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). We find no reversible error occurred at trial because the testimony defense counsel sought to elicit would have been cumulative or irrelevant. Therefore, we need not address the merits of Pelayo's argument on appeal.

¶ 31 A criminal defendant has a "fundamental constitutional right to confront the witnesses against him, which includes the right to cross-examination." *People v. Kliner*, 185 Ill. 2d 81, 130

(1998). This right includes a reasonable right of cross-examination as to a witness's bias, interest, or motive to testify falsely. *People v. Nelson*, 235 Ill. 2d 386, 420-21 (2009). A defendant is given wide latitude in attempting to establish a witness's bias or motive during cross-examination. *People v. Rendak*, 2011 IL App (1st) 082093, ¶ 23. However, the evidence used to impeach a witness must be timely, unequivocal and directly related; it may not be remote or uncertain. *Id.* In reviewing whether the trial court improperly limited the cross-examination of a witness, this court reviews the whole record and any alternative means open to the defendant to impeach the witness. *People v. Harris*, 123 Ill. 2d 113, 145 (1998). The scope of cross-examination rests within the sound discretion of the trial court and its decision will not be reversed absent a clear abuse of that discretion. *People v. Leak*, 398 Ill. App. 3d 798, 822 (2010)

¶ 32 Here, the trial court did not err when it limited the cross-examination of Santiago regarding the maintenance and cleaning of his weapon. This court's review of the record reveals Pelayo was given a sufficient opportunity to confront, cross-examine, and test Santiago's credibility as a witness. Specifically, defense counsel questioned Santiago regarding the details of his altercation with the third man, where defendant was sitting in the truck, where the shooter was sitting, the events surrounding his attempt to fire his gun, and his statements to the police. Defense counsel had ample opportunity to cross-examine Santiago about apparent inconsistencies between his testimony at trial and his earlier statements to police. Specifically, the trial court was made aware Santiago had on an earlier occasion informed the officers that his handgun "jammed," while at trial he testified that it "misfired."

¶ 33 Pelayo, on the other hand, argues he should have been able to cross-examine Santiago regarding the care and maintenance of his revolver. According to Pelayo, misfiring is a malfunction caused by improper care of a handgun. Thus, this testimony allegedly would have suggested a motive for Santiago to testify falsely about whether the weapon misfired or jammed to avoid the embarrassment of admitting he was unable to properly use his handgun to apprehend

a suspect. Even accepting Pelayo's theory to be true, this alleged "embarrassment" still does not suggest a motive for Santiago to have falsely identified Pelayo as an occupant of the truck, the critical issue in this case. At the very most, Pelayo's cross-examination tenuously attacked Santiago's overall credibility as a witness. As described above, Pelayo already had ample opportunity to generally question Santiago's credibility on cross-examination and, thus, any further questioning would have simply been cumulative. Accordingly, we do not find the trial court exceeded its broad discretion in limiting the cross-examination of Santiago. See *People v. Kirwan*, 96 Ill. App. 3d 121, 126-27 (1981) (not error to limit additional credibility impeachment where it would have been time-consuming, cumulative, and distracting from the main issue of the case). While Pelayo may not have cross-examined Santiago in the *exact* manner he desired, there is no right to cross-examine a witness " 'in whatever way, and to whatever extent, the defense might wish.' " *Harris*, 123 Ill. 2d at 144-45 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Because Pelayo has failed to establish the trial court erred in limiting his cross-examination, we do not review the underlying merits of his constitutional and abuse of discretion claims.

¶ 34

CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.