

No. 1-11-3090

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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. 10 CR 15022
)	
FRANK HOGAN,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Circuit court's judgment was affirmed where the State proved defendant guilty beyond a reasonable doubt of aggravated discharge of a firearm and intimidation based on a theory of accountability; and there was no unreasonable disparity between defendant's sentence and that of his codefendant.
- ¶ 2 Following a bench trial, defendant Frank Hogan was convicted of aggravated discharge of a firearm and intimidation based on a theory of accountability and sentenced to respective six and four year terms of imprisonment, to be served concurrently. On appeal, defendant contends that the evidence was insufficient to support a conviction for aggravated discharge of a firearm

because there was no reliable evidence that a firearm was actually discharged. Defendant also contends that the evidence against him was insufficient to support convictions for aggravated discharge of a firearm and intimidation under the accountability statute. Finally, defendant asserts that his sentence was unreasonably disparate to the boot camp sentence received by his codefendant Julian Alejandro.¹ We affirm.

¶ 3 Defendant and codefendant were charged with several offenses, including attempted first degree murder, aggravated discharge of a firearm, and intimidation. Codefendant pled guilty to one count of aggravated discharge of a firearm in exchange for an agreed sentence of four years' imprisonment with a recommendation for boot camp. Defendant proceeded to trial.

¶ 4 At trial, Jamil Ayesh testified that he owned a grocery store with his son at 4758 South Wood Street in Chicago. In July 2010, Jamil was the victim of a shooting and, as a result, he went to court several times. At about 8:35 p.m. on August 6, 2010, Jamil was outside of his store with his wife, Bahieh, and two grandchildren when a van stopped about 35 to 40 feet away from them. Jamil identified defendant as the driver. The passenger of the van stated, "we have a court coming. If you come in one more time, we're going to shoot you." Jamil responded that he would continue to attend court and told the passenger of the van to "[g]o ahead and shoot," which he did. Jamil indicated that he saw the gun the passenger used to shoot at him, but he could not describe it. On cross-examination, Jamil testified that the gun codefendant pointed at him was black, but later admitted that he was just guessing regarding the color of the gun. After the passenger fired a single shot at him, Jamil ran, his wife took their grandchildren inside of the store, and the van fled. The van attempted to leave quickly, but slowed down as it went over the speed bumps. Jamil was able to remember a part of the license plate, which he gave to police when they arrived. The police left, and shortly thereafter, returned to take Jamil to 4859 South

¹ Codefendant is not a party to this appeal.

Winchester Avenue, where he identified defendant as the driver of the van in question. He also identified the shooter at that time.

¶ 5 Jamil's wife, Bahieh Ayesh, testified similarly to Jamil. She also testified that although she viewed a lineup and identified the shooter, she could not identify the driver. She indicated that three shots were fired during the incident in question, and that she saw the gun. However, she was unable to describe the gun.

¶ 6 Officer Joseph Gunning testified that after speaking with Jamil, he and his partner toured the surrounding area looking for the offenders. After searching for about 10 minutes, Officer Gunning found a vehicle matching Jamil's description, pulled it over, and spoke with defendant, who was the driver. Codefendant was in the passenger seat, and two women were in the backseat. No gun was ever recovered. Police brought Jamil to the area where the van was pulled over, and he identified defendant and codefendant as the offenders who drove by his store and shot at him one time.

¶ 7 Defendant testified that he was convicted of theft in 2009 and sentenced to probation. On the evening of August 6, 2010, defendant was with friends at 49th Street and Seeley Avenue. Defendant left that area with codefendant and codefendant's friend, and drove them to a corner store at 48th and Wood Streets. Defendant parked the car near the store and expected codefendant to exit the car, go into the store, and come back with something. However, codefendant took off his seatbelt, never went into the store, and told defendant to keep driving. Defendant did not know the owner of the store or his wife, never heard any guns fired while he was at the store, and did not see codefendant with a gun.

¶ 8 Defendant then drove to 48th Street and Seeley Avenue, dropped off the friend in the backseat, picked up two of codefendant's female friends, and drove them to McDonald's on Archer Avenue and Pershing Road. Defendant parked in the McDonald's parking lot and the two

girls went inside of the restaurant while defendant and codefendant stood outside. After the girls returned, they all went back inside of the car and defendant continued driving until he was pulled over by police and arrested.

¶ 9 Following closing argument, the trial court found defendant guilty of aggravated discharge of a firearm and intimidation. In doing so, the court found that Jamil and Bahieh Ayesh were credible and that codefendant fired a gun in their direction. In contrast, the court stated that defendant's story was a lie. In evaluating whether defendant was accountable for the actions of codefendant, the court found that defendant was with him prior to the event, after the event, and made no attempt to distance himself from codefendant. The court also noted that the gun was disposed of at some point after the incident because it was not in the car when police arrested defendant and codefendant about 20 minutes later. The court concluded by finding that defendant understood what was happening and aided and abetted codefendant during the commission of the crimes against the victims.

¶ 10 At sentencing, Daniel Nelson, defendant's uncle, testified in mitigation that defendant's father was in and out of incarceration his entire life and that defendant did not have a male role model. Nelson further indicated that defendant's younger brother was murdered in 2010. According to Nelson, defendant has supported his family and worked multiple jobs. Melvin De Young also testified in mitigation that defendant assisted him in his "off-the-street program" by providing transportation and being available to help when it was needed.

¶ 11 In aggravation, the State argued, in part, that defendant should be sentenced to a substantial amount of time in prison for his part in threatening the victim in order to prevent him from going to court. Defense counsel responded by maintaining that defendant did not deserve a substantial prison term, particularly where his codefendant, who actually committed the shooting, received boot camp, and defendant had no prior acts of violence in his background.

¶ 12 Following mitigation and aggravation, the trial court sentenced defendant to respective terms of six and four years' imprisonment for aggravated discharge of a firearm and intimidation. In doing so, the court stated that, in aggravation, defendant was on probation for theft. It also emphasized that the facts of the case were particularly aggravating where defendant was part of an organized attempt to prevent a citizen from attending court for redress of his grievances. The court specifically noted that such conduct "strikes right at the heart of the criminal justice system." In mitigation, the court added that defendant had family support, helped his family, had an extensive amount of employment experience, and did not have the benefit of a father. The court also stated that:

"I have wrestled with what would be an appropriate sentence for you now for about two hours. What gives the court *** the most trouble is what happened to the person who fired the shots. And I know that it was a plea and you were at trial, and so you can't really compare them, but it really bothers me that your codefendant got the sentence that he got. *** I will tell you, quite frankly, [defendant], if your codefendant were sitting there with you and I were sentencing you both, I would give you both ten years in the penitentiary ***. But I think that would be grossly unfair to sentence you to that kind of sentence, given the sentence your codefendant got, even though I don't know what his background was, apparently, and I don't know anything more about him than what the sentence was. But I still think that weighing everything it's got to come down on the seriousness of this offense."

¶ 13 On appeal, defendant contends that the State presented insufficient evidence to convict him of aggravated discharge of a firearm where the State failed to prove that a firearm was in fact discharged. Defendant specifically maintains that no gun was ever recovered, and the only evidence of a shooting was the allegedly inconsistent and false testimony of Jamil and Bahieh Ayesh.

¶ 14 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing 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. Perez*, 189 Ill. 2d 254, 265-66 (2000). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 15 A person commits the offense of aggravated discharge of a firearm when he knowingly or intentionally discharges a firearm in the direction of another person. 720 ILCS 5/24-1.2(a)(2) (West 2010).

¶ 16 Viewing the evidence in the light most favorable to the State, as we must, the evidence in this case sufficiently established that codefendant discharged a firearm. Jamil Ayesh was the victim of a shooting in July 2010, and, as a result, he went to court several times. At about 8:35 p.m. on August 6, 2010, while Jamil was outside of his store with his wife, Bahieh, and two grandchildren, a van stopped about 35 to 40 feet away from them. Jamil identified defendant as the driver. The passenger of the van, identified by both Jamil and Bahieh as codefendant, threatened that he would shoot Jamil if he went to court. Jamil responded that he would continue

to go to court and told codefendant to "[g]o ahead and shoot." Codefendant then fired at Jamil, who ran away; Bahieh took the children inside of the store, and the van fled. Based on the strength and certainty of the testimony of Jamil and Bahieh, the evidence shows that codefendant discharged a firearm. See *People v. Negron*, 297 Ill. App. 3d 519, 529 (1998) (stating that unless vague or doubtful, even a single eyewitness will sustain a conviction if the witness viewed the accused under circumstances permitting identification).

¶ 17 Nevertheless, defendant asserts that Jamil and Bahieh's testimony was unreliable and inconsistent where Jamil testified that codefendant shot at him one time while Bahieh stated that three shots were fired, and neither witness could describe the gun. Despite defendant's contentions to the contrary, such inconsistencies are minor, particularly where the trial court, which was in a better position to observe the demeanor and credibility of the witnesses, made an explicit finding that Jamil and Bahieh were credible eyewitnesses. See *People v. James*, 348 Ill. App. 3d 498, 505 (2004) (minor inconsistencies in testimony, by themselves, do not create a reasonable doubt). Moreover, defendant contends that because no gun was recovered, and there was no physical evidence that a gun was fired in the area, the evidence here was insufficient. Contrary to defendant's argument, however, the lack of physical evidence in this case is unnecessary to corroborate an eyewitness account. See *People v. Herron*, 2012 IL App (1st) 090663, ¶23 ("[because the trial court found [the witness'] identification and testimony to be credible, the lack of physical evidence had no bearing on [the defendant's] conviction").

¶ 18 Defendant also asserts that Jamil and Bahieh's testimony cannot be believed because defendant's behavior after the alleged shooting belied that of an individual who had just participated in a shooting, *i.e.*, defendant did not speed from the scene, that he returned with the alleged shooter to the vicinity of the crime scene within 40 minutes after the shooting, and that he obeyed police when they pulled him over. However, all of this evidence was analyzed by the

trial court. *People v. Baugh*, 358 Ill. App. 3d 718, 737 (2005). It specifically found Jamil and Bahieh's testimony "very credible" and characterized "defendant's story [as] quite frankly a lie." Defendant is thus requesting this court to reweigh the evidence at trial, which we decline to do. See *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992) (an appellate challenge to the sufficiency of the evidence does not allow the reviewing court to "substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses"); *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (the credible and positive testimony of a single witness is sufficient to convict even though the defendant contradicts it).

¶ 19 Defendant next contends that the evidence against him was insufficient to support convictions for aggravated discharge of a firearm and intimidation under the accountability statute.

¶ 20 A defendant may be deemed legally accountable for another's conduct when "[e]ither 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, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2008); *People v. Jones*, 364 Ill. App. 3d 740, 747 (2006). For accountability, a defendant's mental state is generally shown circumstantially by inferences reasonably drawn from the evidence. *People v. Jones*, 376 Ill. App. 3d 372, 383 (2007).

¶ 21 Active participation is not required to establish accountability where a defendant shares a common criminal design or agreement with a principal. *People v. Taylor*, 164 Ill. 2d 131, 140 (1995); 720 ILCS 5/5-2(c) (West 2010). A defendant's presence at a crime scene, knowledge that a crime is being committed, voluntary attachment to and close affiliation with his companion before and after the crime was committed, failure to report the crime and flight from the scene

are circumstances which may be considered to determine if a defendant shared a common criminal design or agreement with a principal. *Taylor*, 164 Ill. 2d at 140-41.

¶ 22 Here, viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found defendant accountable for shooting at Jamil Ayesh. Defendant testified that he agreed to drive codefendant to the grocery store, and Jamil identified defendant as the driver of the van in question, a fact to which defendant admitted. Although defendant did not shoot at Jamil, he took no action to oppose the commission of the crime, and continued to associate himself with codefendant after the crime. Defendant drove codefendant away from the scene, went to McDonald's with codefendant, and was still driving the van when police pulled it over. In addition, as the court noted, the gun that was used to shoot at Jamil was disposed of during the time between the shooting and the arrest of defendant and codefendant. A reasonable inference can thus be drawn that defendant assisted codefendant with the disposal of the gun. We also note that in holding defendant accountable for the actions of codefendant, the trial court explicitly found "defendant lied in an attempt to cover up what did happen" and that defendant actually "understood what was going on and *** was absolutely aiding and abetting." See *People v. Rodriguez*, 187 Ill. App. 3d 484, 491 (1989) ("guilty verdicts are unassailable to the extent that they reflect a credibility determination").

¶ 23 In reaching this conclusion, we have considered *People v. Phillips*, 2012 IL App (1st) 101923, the case relied on by defendant, and find it does not warrant a different result. In *Phillips*, we found insufficient evidence to support a defendant's conviction for aggravated discharge of a firearm and aggravated battery with a firearm under a theory of accountability where the State had purportedly not proven the defendant knew his codefendant was in possession of a firearm or planned to shoot a victim before the defendant drove the codefendant to the location where the crimes took place. *Phillips*, 2012 IL App (1st) at ¶¶21-22. In *Phillips*,

however, neither the defendant nor his codefendant Dontrell Sanders, who was the actual shooter (*People v. Sanders*, 2012 IL App (1st) 102040), testified in their joint trial. Here, defendant testified and the trier of fact explicitly rejected his testimony as a lie. Even in *Phillips*, the court acknowledged that the trier of fact is responsible for making credibility determinations. *Phillips*, 2012 IL App (1st) at ¶19, relying on *People v. Smith*, 185 Ill. 2d 532, 541-42 (1999).

¶ 24 Defendant also contends that his concurrent six and four-year sentences were unreasonably disparate to codefendant's sentence of boot camp, and thus constituted an abuse of discretion by the trial court. He specifically maintains that his sentence was unjust in comparison to his codefendant because codefendant's conduct was the more serious in this case.

¶ 25 In general, an arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). However, by itself, a disparity in sentences does not establish a violation of fundamental fairness. *Caballero*, 179 Ill. 2d at 216. "A sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial." *Caballero*, 179 Ill. 2d at 217. It is proper to grant dispositional concessions to defendants who plead guilty since the public interest in the effective administration of criminal justice is served. *Caballero*, 179 Ill. 2d at 218.

¶ 26 We initially note that the disparity is not as great as defendant alleges because codefendant's sentence was not merely boot camp as defendant alleges. Rather, codefendant received a sentence of four years for his conviction for aggravated discharge of a firearm, with an agreement that codefendant was recommended for boot camp. The final decision as to whether codefendant received boot camp was left to the Illinois Department of Corrections, and thus codefendant's sentence carried a possible penalty of four years' incarceration, rendering the difference between the two defendants much less than defendant purports.

¶ 27 Furthermore, codefendant pled guilty and, thus, acknowledged his guilt, showed willingness to assume responsibility for his conduct, and made a public trial unnecessary. See *Caballero*, 179 Ill. 2d at 218. Moreover, the trial court was very clear in its findings that it took codefendant's sentence into consideration when sentencing defendant, who was on probation when he committed the present crimes. It specifically stated that it would give defendant a reduced sentence in light of the sentence received by codefendant. Therefore, defendant has not established that the difference between his sentence and codefendant's was unconstitutionally disparate, and he has failed to make a substantial showing of a violation of his constitutional rights. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant.

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 29 Affirmed.