

No. 1-12-2250

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 24305
)	
HARVEY BOWEN,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Where the evidence was sufficient to establish that defendant was accountable for codefendant's actions, defendant's conviction for aggravated battery with a firearm is affirmed.
- ¶ 2 Harvey Bowen, the defendant, and codefendant Anthony Gavin were tried in simultaneous but separate bench trials on charges of first degree murder, attempted first degree murder, armed robbery, aggravated battery with a firearm and aggravated discharge of a

firearm.¹ After a trial, defendant was convicted of aggravated battery with a firearm and sentenced to 12 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because it failed to show that he fired a gun at the victim, Eugene Winters, and failed to establish that he was accountable for codefendant Gavin's actions where there was no evidence of any plan or agreement between them to harm Winters.

¶ 3 At trial, Valerie Mason testified that in September 2006, she was living with her fiancé Eugene Winters, her nephew Grant Mason, James Mason, and her three children. On the night of September 19, 2006, Valerie and Winters went outside their home and looked at Grant's Pontiac Bonneville and noticed that it had bullet holes in it that had not been there that morning.

¶ 4 Grant Mason testified that on September 19, 2006, he was driving his Pontiac Bonneville when someone in another car fired gunshots at him. Three bullets struck the rear of Grant's car near the gas tank. Grant saw three people in the other car, but did not see their faces and did not know who fired the shots. Grant went home and told Valerie and Winters what happened, and they went outside and looked at his car. About 8:45 the following night, two detectives came to Grant's house and asked about the bullet holes in his car. Grant told them about the shooting the day before and gave them a description of the gunman's car. At the detectives' request, Grant drove his car to the police station, and the police removed the bullets. When shown a photograph of a blue Grand Marquis, Grant denied that it was the gunman's car. He also denied telling the detectives that defendant and Gavin shot at him.

¶ 5 Maywood police detective Randy Brown testified that he and Detective Peck spoke with Grant Mason at his home and saw bullet holes on the passenger side of his vehicle. Detective

¹ Codefendant Anthony Gavin's appeal is pending before this court in case number 1-13-0701; he is not a party to this appeal.

Brown testified, for impeachment purposes, that Grant told them that defendant and Gavin fired a gun at him while he was driving his car the previous day.

¶ 6 Melvin Holmes testified that about noon on September 20, 2006, he and his father were sitting on their front porch on Third Avenue. After they went inside their house and closed the door, Holmes heard gunshots. When he peeked out his front window, he saw a man lying on his back on the front lawn and a second man standing over him shooting him. The gunman got into the back seat of a blue Mercury vehicle driven by another man who had remained in the car, and they drove away.

¶ 7 Holmes told his father to call the police and an ambulance and went outside to help the victim, who had been shot in his leg and body. Holmes told the victim that help was on the way and asked if he could do anything for him. The victim, Eugene Winters, asked Holmes to roll up the windows of his van and remove the keys. Holmes took the keys from the van and returned to Winters. While he was attending to Winters, the blue Mercury slowly returned to the scene. The same gunman jumped out of the back seat of the car and walked towards them. As Holmes slowly backed away from Winters and walked backwards up his front steps, Winters crawled towards the house while talking on his cell phone. The gunman snatched the phone from Winters' and said "[w]ho the fuck you talking to?" The gunman then shot Winters in the face. Holmes entered his house and closed the door, and did not see where the gunman went.

¶ 8 The following day, Holmes viewed a lineup and identified defendant as the driver of the blue vehicle. Holmes testified that he never saw defendant get out of the vehicle, and that defendant was not the gunman. Holmes acknowledged that he never heard defendant say

anything to the gunman, such as "shoot him" or "get his phone." Holmes also acknowledged that he did not know if the gunman used the same gun during both shootings.

¶ 9 Maywood police detective Lawrence Connor testified that he responded to a call of shots fired on Third Avenue. En route to the scene, he saw defendant driving a blue Mercury Marquis and turning onto Ninth Avenue with codefendant Gavin in the back seat. Detective Connor then heard on his radio that the alleged offenders were in a blue Mercury Marquis heading toward Ninth Avenue. Detective Connor made a U-turn to follow defendant, but was blocked in traffic.

¶ 10 Denzel Edwards testified that he knew defendant, Gavin and Winters from the neighborhood. Edwards did not recall anything that happened on September 20, 2006, nor did he recall speaking with assistant State's Attorney (ASA) Maureen O'Brien on September 22, 2006. Edwards acknowledged that his signature appeared on a written statement and a Polaroid picture that "sort of" looked like him, but claimed he did not remember signing either item. Edwards also testified that he did not remember signing photographs of defendant, Gavin, a gun or a car.

¶ 11 Cortez Henderson testified that he was on Third Avenue and heard people arguing, then heard some gunshots. Henderson did not see Winters, nor recall seeing defendant or Gavin, or seeing anyone get shot. He also did not recall speaking with detectives that night, identifying defendant and Gavin in photo arrays, or identifying defendant the following night in a lineup. When asked if he had prior convictions, Henderson invoked his fifth amendment right against self-incrimination. Henderson acknowledged, however, that he was in custody in jail.

¶ 12 Maywood police officer Jeremy Pezdek testified that about 11 p.m. on September 20, 2006, he and Investigator Wheeler spoke with Cortez Henderson at the police station and Henderson said he knew defendant and Gavin. Henderson told them he was on Third Avenue

when he heard five or six gunshots, and while he was standing on the corner, he saw Eugene Winters on the ground talking on his cell phone. Henderson told police he then saw defendant drive past him in a blue Marquis, and Gavin ran up to Winters from across the street. Henderson saw Gavin take Winters' cell phone, stand over him, lean towards Winters' head and fire several gunshots. Gavin then entered defendant's blue Marquis and they drove away. Henderson did not tell police that he saw defendant get out of the vehicle, nor did he say that he heard defendant urge Gavin to shoot Winters, take his cell phone, or hurry back into the car. Henderson viewed a photo array and identified defendant as the driver of the vehicle and Gavin as the passenger and shooter.

¶ 13 Officer Pezdek further testified that the following evening, Henderson and Melvin Holmes viewed separate lineups and each identified defendant as the driver of the vehicle. Two days later, Henderson viewed another lineup and identified Gavin as the shooter.

¶ 14 In addition, Officer Pezdek testified that he, Detective Porter and Detective Peck conducted a video-recorded interview with defendant, which was admitted into evidence. In that video, defendant waived his *Miranda* rights and agreed to tell police what happened. Defendant stated that Eugene Winters came to his house the day before the shooting and told his aunt that if he saw defendant driving his Marquis, he was going to kill him. The next day, defendant was driving his car with Gavin when they saw Winters driving in the opposite direction. Winters made a U-turn and followed them. Defendant tried to get away, turning down different streets, but Winters followed him. On Third Avenue, defendant pulled over, and he and Gavin exited his vehicle. Defendant said he thought Winters was going to kill him, but he stopped his car because he wanted to be a man and talk with Winters face to face. Winters exited his vehicle and said he

wanted to talk to them. Defendant was concerned Winters was going to shoot him, but he knew Gavin had a gun, specifically, a 9 millimeter chrome and black Braco.

¶ 15 Defendant told police that he and Gavin were standing on someone's lawn, and Winters told them to get off the people's grass and stand against defendant's car. Winters asked them if they shot at his nephew the day before, and they denied it. Winters and Gavin began to argue, and Winters again told them to get off the grass because people were watching and to stand against the car. Defendant complied, but Gavin refused, then pulled out a gun, pointed it at Winters, and asked him if that was a problem. Winters replied "I got one of those too" and reached his left arm across his front to his right side pocket. Gavin then shot Winters in the leg and Winters fell to the ground. Gavin shot Winters a second time, then fired four or five more shots before he and defendant got into defendant's car, drove around the block and came up an alley. Gavin then saw that Winters was still alive and crawling towards someone's porch while on his cell phone. Gavin got out of the car, then smashed Winter's cell phone in the street and shot him again. Defendant claimed that Gavin shot Winters for safety reasons and that it "wasn't even in the plans to shoot" Winters, who defendant did not see with a gun. Defendant and Gavin left the area in defendant's car, and when they passed Officer Connor shortly thereafter, Gavin jumped out of defendant's car with his gun and ran, and defendant has not spoken to Gavin since that day. Officer Pezdek acknowledged that defendant never said that he had a weapon, that he shot Winters, or that there was a plan or scheme to go after Winters.

¶ 16 Aaron Smith testified that about 9 p.m. on September 21, 2006, codefendant Gavin arrived at his family's apartment and slept there overnight. The following afternoon, Smith was driving defendant home and stopped at a gas station when several police cars surrounded his car,

pulled Smith and Gavin out of the car and beat them. The police also forced Smith to sign a search warrant for his apartment and went to the apartment with him. The police removed a coat with a gun inside it from Smith's closet. Smith denied hanging the coat there, knowing whose it was, or telling police about the gun. Smith acknowledged that he spoke with police and ASA O'Brien, and that he signed a written statement. However, Smith repeatedly denied that he made numerous statements to O'Brien, and claimed he could not recall what happened.

¶ 17 Officer Pezdek testified that he, Investigator Peck and Investigator Wheeler met with Smith at his apartment, and that Smith and his grandfather, Roosevelt Lyles, both signed a form consenting to the search of their apartment. During that search, police recovered from a closet a tan jacket with a 9 millimeter chrome automatic handgun in the pocket.

¶ 18 ASA Maureen O'Brien testified that she spoke with 14-year-old Denzel Edwards and his parents at the police station, and he agreed to give a handwritten statement, which was published in court. The court stated that it would only consider Edwards' statement for impeachment purposes, and would not consider any of the hearsay contained therein. Edwards stated that he was sitting on his front porch with Gavin when defendant arrived at his house in his blue Marquis and said someone came to his house and threatened to kill him. Defendant refused to say who made the threat. Edwards and Gavin got into defendant's car to go to defendant's house, and on the way, they saw Eugene Winters driving a brown van in the opposite direction. Defendant said that Winters was the man who threatened to kill him, and Winters then made a U-turn and followed them. Edwards asked defendant why he was running from Winters and told him they should talk it over. When defendant stopped his car on Third Avenue, Winters stopped his van behind them. Edwards stayed in the front passenger seat of the car, and defendant and

Gavin got out. Winters exited his van and began arguing with defendant and Gavin, asking who shot at his nephew the previous day. Defendant and Gavin said they were there, but denied shooting. As the men continued to argue, Edwards got out of the car to tell them to talk it out. Winters asked Edwards if he had anything to do with the shooting, and when Edwards said "no," Winters told him to walk away, which Edwards did.

¶ 19 About 30 seconds later, Edwards heard one gunshot, turned around and saw Winters lying on the ground holding his right shoulder. Defendant and Gavin were both standing over Winters holding guns – defendant had a .32 or .22 caliber revolver, and Gavin had a silver 9 millimeter gun. Winters did not have any type of weapon, and he never threatened any of them with a weapon that day. As Edwards ran, he heard four or five more gunshots, then heard defendant's car pull away fast, screeching its tires. Defendant and Gavin came back around the block in the car, drove up to where Winters was lying, and Edwards then heard two or three more gunshots. All of the gunshots sounded like they came from the same gun. Edwards identified a photograph of the gun recovered by police from Smith's house as the gun Gavin was holding as he stood over Winters. Edwards ran to a friend's house and never spoke with defendant or Gavin again.

¶ 20 O'Brien further testified that Aaron Smith gave a written statement, which was also published in court for impeachment purposes only. Therein, Smith stated that he told police about Gavin's gun and where it was located, and Smith and his grandfather, Roosevelt Lyles, voluntarily signed a consent form to search their apartment. Smith brought the police to his apartment, took them into his bedroom, and pointed out Gavin's coat. The police then took the coat and gun. O'Brien testified that Smith never told her that he was beaten by police, or that he

was forced to sign the consent to search form. O'Brien acknowledged that Smith never spoke about defendant at all, and further, that Edwards never said he heard defendant and Gavin say that they were looking for someone or intended to hurt anyone.

¶ 21 Dr. Fred Luchette, trauma physician at Loyola University Medical Center, testified that one bullet was recovered from Winters' clothing and given to police. Assistant Cook County medical examiner Ponni Arunkumar testified that she reviewed the autopsy performed on Winters by former medical examiner Dr. Clare Cunliffe, which revealed that Winters sustained eight gunshot wounds. Five medium caliber bullets were recovered from Winters' body, and a bullet jacket fragment was recovered from the top of his head. Dr. Arunkumar opined that the cause of death was multiple gunshot wounds and the manner of death was homicide.

¶ 22 Maywood police evidence technician Patrick Grandberry testified that he recovered one spent shell casing and two pieces of a broken cell phone at the crime scene. Officer Grandberry also observed several bullet holes on Grant Mason's Bonneville, recovered a bullet from inside Mason's trunk, and performed a gunshot residue test on the back seat of defendant's blue Marquis. The officer also received a jar from Loyola Medical Center containing a bullet recovered from Winters, and a sealed envelope containing projectiles from the Cook County medical examiner's office. Officer Grandberry inventoried all of these items and submitted them to the crime laboratory for analysis, along with the recovered 9 millimeter firearm.

¶ 23 Marc Pomerance, a specialist in firearm identification, testified that the bullet recovered from Mason's trunk and the bullet recovered from Winters' clothing at the hospital were both fired from the recovered 9 millimeter firearm. The five bullets recovered during Winters' autopsy were all .32 caliber and fired by the same gun, but not the recovered 9 millimeter gun.

Pomerance testified that a 9 millimeter weapon is not designed to fire .32 caliber cartridges, and a .32 caliber cartridge is "way too small" to fit inside a 9 millimeter container.

¶ 24 Ellen Chapman, a specialist in trace evidence, testified that she analyzed the gunshot residue kit and concluded that the back seat of defendant's vehicle had been in contact with an item containing gunshot residue, or was in the environment of a discharged firearm.

¶ 25 Pursuant to defendant's motion for a directed finding, the trial court directed out all charges against defendant except for aggravated battery with a firearm. The court specifically found there was "sufficient evidence of aggravated battery with a firearm at the first shooting because he was involved with the other shooter." The court further explained there was "sufficient evidence based on the fact that they were there in front of the guy. The other fellow had the gun. He was with him, talking to him and everything, that, therefore, he was part of it."

¶ 26 The parties stipulated that one fingerprint was found on the handgrip of the recovered 9 millimeter firearm, but that fingerprint did not belong to defendant or codefendant.

¶ 27 The trial court found defendant guilty of aggravated battery with a firearm, and defendant now challenges that ruling on appeal. He contends that the State failed to prove him guilty beyond a reasonable doubt because there is no evidence that he fired a gun at Winters, and Holmes testified that defendant was not the shooter. Defendant acknowledges that the bullets recovered from Winters were of two different calibers, but claims that such evidence does not show that he fired a gun because the evidence is unreliable and unpersuasive where there was no testimony regarding the handling and safekeeping of the bullets recovered during the autopsy. Defendant further argues that the State failed to establish that he was accountable for codefendant Gavin's actions where there was no evidence of any plan or agreement between

them to harm Winters. Defendant asserts that Gavin acted on his own, and there is no evidence that he intended to help Gavin commit the offense.

¶ 28 The State argues that it proved defendant guilty as a principal because the two different calibers of bullets recovered from Winters shows that there were two different guns fired at the scene. The State further argues that defendant was accountable for codefendant Gavin's actions where he stood there throughout the shooting, then drove his car around the block and returned to the scene knowing that Gavin wanted to shoot Winters again because he was not yet dead.

¶ 29 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *Jackson*, 232 Ill. 2d at 280-81. In a bench trial, the trial judge, sitting as the trier of fact, is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 30 In this case, defendant was convicted of aggravated battery with a firearm. A person commits this offense when, in committing a battery, he intentionally or knowingly discharges a firearm, causing injury to another person. 720 ILCS 5/12-4.2(a)(1) (West 2006).

¶ 31 A person is legally accountable for another's conduct when, either before or during the commission of an offense, and with the intent to promote or facilitate its commission, he solicits, aids, abets, agrees or attempts to aid the other person in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2006); *People v. Cooper*, 194 Ill. 2d 419, 434 (2000). To prove that defendant intended to promote or facilitate the offense, the State must present evidence which establishes beyond a reasonable doubt that either defendant shared codefendant's criminal intent, or there was a common criminal design. *People v. Williams*, 193 Ill. 2d 306, 338 (2000).

¶ 32 Defendant's intent can be inferred from his actions and the circumstances which accompany the criminal conduct. *Williams*, 193 Ill. 2d at 338. Although defendant's mere presence during an offense, even when combined with his knowledge that a crime is occurring and flight from the scene, is insufficient to convict him under a theory of accountability (*Williams*, 193 Ill. 2d at 339), under the common design rule, where two or more people engage in a common criminal design or agreement, any act in furtherance of that design by one person is considered to be an act by everyone involved in the design or agreement, and each person is equally responsible for the consequences of that act. *Cooper*, 194 Ill. 2d at 434-35. Words of agreement are not necessary, and the trier of fact may infer defendant's accountability from the circumstances surrounding the commission of the unlawful conduct. *Cooper*, 194 Ill. 2d at 435. Moreover, proof of a preconceived plan or agreement to commit the offense is not required where the evidence shows that defendant was involved in the spontaneous criminal acts of his codefendant. *Cooper*, 194 Ill. 2d at 435.

¶ 33 In this case, we find that the evidence established that defendant acted in agreement with codefendant Gavin's shooting of Eugene Winters, and that he was therefore proved guilty of aggravated battery with a firearm based on a theory of accountability. The record shows that the night before the shooting at bar, someone fired gunshots at Grant Mason while he was driving his car, and that Winters believed that defendant and codefendant were involved in that shooting. According to defendant's statement, Winters came to his house that night and threatened to kill him. Defendant further stated that, the following day, Winters saw him and Gavin driving down the street, made a U-turn, and pursued them as defendant tried to evade him. Defendant told police that he thought Winters was going to kill him and was concerned Winters was going to shoot him. The evidence shows that, at the time defendant stopped his car, he was expecting a heated, and possibly violent, confrontation with Winters. In fact, defendant stated that he knew Gavin was armed with a 9 millimeter handgun, and therefore, he stopped his car to talk with Winters.

¶ 34 Defendant further stated that after he, Gavin and Winters exited their vehicles, Winters confronted him and Gavin about shooting at his nephew the previous day. Defendant and Gavin denied shooting at Grant Mason, and became engaged in an argument with Winters. Gavin then pulled out a gun and shot Winters. According to defendant, after Winters fell to the ground, Gavin shot him several more times while defendant stood there. Defendant and Gavin then got into defendant's car and drove away. Melvin Holmes, who was an eyewitness to the shooting, identified defendant in a lineup as the driver of the blue Mercury who was with the gunman. In addition, Detective Conner testified that as he was driving to the crime scene in response to a call of shots fired, he saw defendant driving his blue Mercury Marquis with Gavin in the back seat.

¶ 35 In weighing the evidence, the fact finder is not required to disregard the inferences that naturally flow from that evidence (*Jackson*, 232 Ill. 2d at 281), and here, the trial court initially found that the evidence of defendant's alliance and involvement with Gavin, without even considering any evidence of the subsequent shooting, established that he was engaged in the argument with Winters and "was part of it." Viewing the evidence in the light most favorable to the State, we find that it was reasonable for the trial court to conclude that defendant's actions established that defendant was not merely present at the scene, but that he and Gavin were engaged in the confrontation with Winters, that he drove Gavin from the scene after the shooting, and that he acted in agreement with Gavin's act of shooting Winters. Accordingly, the State proved beyond a reasonable doubt that defendant was accountable for the aggravated battery with a firearm of Winters, and we affirm the judgment of the circuit court of Cook County to that effect.

¶ 36 Based on our determination that defendant was proved guilty under the theory of accountability, we need not address defendant's argument that the State failed to prove him guilty as a principal.

¶ 37 Affirmed.