

No. 1-13-0349

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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. 11 CR 20771
	)	
PHILLIP SMITH,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Delort and Justice Harris concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Where codefendant displayed a BB gun and threatened to shoot it during the course of a robbery in which defendant participated, the evidence was sufficient to establish defendant's accountability for aggravated robbery.
- ¶ 2 Following a bench trial, defendant Phillip Smith was convicted of aggravated robbery and, based on his criminal history, sentenced to a Class X term of nine years in prison. On appeal, defendant contends that his conviction should be reduced to robbery because the

evidence was insufficient to establish his accountability for codefendant's use of a BB gun. For the reasons that follow, we affirm.

¶ 3 At trial, Artashus Melikyan testified that shortly after midnight on November 20, 2011, he was dispatched by the restaurant he worked at to deliver food to an address in Chicago. However, when Melikyan arrived at the address, he found a boarded-up building. A man, identified in court as codefendant Casey Dunbar, was standing on the street, close to the building. Melikyan called the telephone number printed on the delivery receipt and told the person who answered that he was attempting to deliver the food that was ordered.

¶ 4 After Melikyan hung up, codefendant approached the car. Melikyan lowered his window about eight inches to speak with him. Codefendant asked whether Melikyan had the food, Melikyan asked whether codefendant had the money, and codefendant told Melikyan to wait, as somebody would bring down the money. Codefendant then "backed off a few steps." After waiting another three or four minutes, Melikyan again dialed the telephone number on the delivery receipt, but this time no one answered.

¶ 5 Codefendant approached the car a second time, holding money out in his left hand. Melikyan lowered his window further, and when codefendant got "very close," he pulled a black gun from his waist area with his right hand. Codefendant said, "Don't let me shoot you" and "I'm going to shoot you." Melikyan tried to back up the car, but codefendant reached inside the car with both arms and used one hand to turn the car off. When asked whether codefendant still had the gun at that point, Melikyan answered, "I don't remember. But with his second hand he was trying to unlock the door, so he didn't have it."

¶ 6 As Melikyan and codefendant struggled over the door lock, a second man, identified in court as defendant, approached from across the street. Defendant joined in the struggle and was able to reach in through the open window and unlock the car's back door. Defendant opened the back door and got into the car. He took the bags of food from the front seat of the car and placed them next to him in the back seat. He then started reaching for Melikyan's back pockets. Melikyan continued to struggle in an attempt to keep the front door locked and push defendant's hands away from his pockets. Defendant wrapped his arm around Melikyan's neck, pulling him back against the seat. Codefendant told defendant, "Snap his head." Melikyan used his foot to honk the car's horn.

¶ 7 After 10 to 15 seconds of honking, codefendant said something to defendant and backed off. Melikyan could not remember the exact words codefendant used, but recalled something to the effect of, "It's cold, it's cold." Defendant let go of Melikyan and got out of the car with the food. Both men started running. Melikyan saw defendant drop the bags of food and then saw flashing police lights and officers chasing defendant and codefendant. Some time later, the police asked Melikyan to identify the men who had come up to his car. They drove Melikyan a short distance and showed him defendant and codefendant, whom he identified as his assailants.

¶ 8 Chicago police officer Altwasser testified that when he arrived at the scene, he saw defendant and codefendant run from the car together. At a vacant lot, they split up. Officer Altwasser followed codefendant, who reached into his pants and then threw a black object over a fence. Officer Altwasser's partner later recovered a black BB gun where codefendant had thrown the object. Officer Altwasser caught up with codefendant and arrested him.

¶ 9 Chicago police sergeant Jeffrey Stankus also testified that he saw defendant and codefendant flee the vehicle together. When the two split up, he followed defendant and arrested him after a short foot chase.

¶ 10 The trial court indicated that it had viewed a video recording taken from the dashboard of the police officers' car. The video is not included in the record on appeal. According to the trial court's description, the video showed two people running from a car, one of them holding and then dropping two bags, and two officers chasing the people on foot.

¶ 11 Codefendant testified that on the night in question, he was "standing there," waiting for his uncle to pick him up, when Melikyan pulled up in his car. Codefendant asked who he was looking for and Melikyan answered, "Back off, nigger." Codefendant got upset, put his hand through the window, and grabbed Melikyan. The two men tussled. Codefendant admitted that he had a BB gun, but denied taking it out of his pocket. He also denied having ordered food from the restaurant where Melikyan worked, denied being friends with defendant, denied having talked with defendant earlier that evening, and denied seeing defendant in the car or at the scene. Codefendant testified that when the police arrived, he ran, took the BB gun from his pocket, and threw it. He stated that the first time he saw defendant was when he was running from the police.

¶ 12 Defendant did not testify.

¶ 13 Following closing arguments, the trial court found defendant guilty of aggravated robbery. In the course of doing so, the trial court made the following statement:

"I find that [defendant], though he was not on the scene originally, though there may not have been a plan between [defendant] and [codefendant], I think they both took advantage of a situation that it presented itself to them. They saw a

delivery person there looking for the right address, and they chose to rob that person.

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I find that the police officers' testimony is in fact credible and I find that they are, the defendants acted together during the commission of the offense. Even though there has been no evidence of planning once the offense happened, they did act together, and that [codefendant], therefore, is accountable for [defendant's] removal of the food."

The trial court subsequently sentenced defendant, based on his criminal history, to a Class X term of nine years' imprisonment.

¶ 14 On appeal, defendant contends that his conviction should be reduced from aggravated robbery to robbery because the evidence was insufficient to establish his accountability for codefendant's use of the BB gun. He argues that because there was no evidence that defendant and codefendant planned a robbery, the State was required to prove that defendant aided, abetted, or agreed or attempted to aid codefendant's aggravated robbery with the intent to promote or facilitate that offense. According to defendant's argument, the State failed to establish that defendant had the intent to aid the aggravated robbery, as codefendant put away the BB gun before defendant became involved, and there was no evidence that defendant knew codefendant had a BB gun.

¶ 15 When a question as to a defendant's accountability for an offense is raised on appeal, a reviewing court must determine whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Fernandez*, 2014 IL 115527, ¶ 13.

¶ 16 Under section 5-2(c) of the Criminal Code of 1961, a person is legally accountable for the criminal conduct of another where "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). In order to establish that a defendant possessed the intent to promote or facilitate the crime, the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. *Fernandez*, 2014 IL 115527, ¶ 13. Under the common design rule, if " 'two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts.' " *Id.*, quoting *In re W.C.*, 167 Ill. 2d 307, 337 (1995). " 'Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another.' " *Id.*, quoting *W.C.*, 167 Ill. 2d at 338.

¶ 17 Our supreme court recently addressed accountability in a case similar to the one presented here. In *People v. Fernandez*, the defendant contended that he could not be held accountable for his codefendant's gun crime where he did not know that his codefendant possessed a gun and he did not possess the specific intent to promote, solicit, aid, or attempt to aid the commission of the gun crime. *Fernandez*, 2014 IL 115527, ¶ 12. The *Fernandez* court

rejected the defendant's argument and held that the defendant, by conceding his guilt for the burglary he committed with the codefendant, had effectively conceded his guilt for aggravated discharge of a firearm as well. *Id.* at ¶ 18. The court explained that section 5-2 of the Code "means that where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word 'conduct' encompasses any criminal act done in furtherance of the planned and intended act." *Id.* Thus, the defendant was legally accountable for *any* criminal act that the codefendant committed in furtherance of the burglary, including, in that case, discharging a firearm in the direction of a peace officer. *Id.* The court stated, "[T]here is no question that one can be held accountable for a crime other than the one that was planned or intended, provided it was committed in furtherance of the crime that *was* planned or intended." (Emphasis in original.) *Id.* at ¶ 19.

¶ 18 *Fernandez* dictates the result in the instant case. Here, defendant and codefendant aided each other in the commission of an offense when, working together, they robbed Melikyan. That being the case, defendant is legally accountable for any criminal act codefendant committed in furtherance of the robbery, including brandishing the BB gun and threatening to shoot.

Following the reasoning of *Fernandez*, the evidence in this case was sufficient to support defendant's conviction for aggravated robbery.

¶ 19 We reject defendant's argument that *Fernandez* does not apply here "because this case presents a 'specific intent' rather than a 'common design' question." It is true that under the accountability statute, the State may prove a defendant's intent to promote or facilitate an offense by showing either (1) that the defendant shared the criminal intent of the principal, or (2) that there was a common criminal design. 720 ILCS 5/5-2(c) (West 2010). However, we disagree

with defendant that the instant case involved the first of these categories. Here, although the trial court found no evidence of planning between defendant and codefendant, the evidence established that they acted in concert while committing robbery. Accordingly, this case appropriately falls into the common design category of the accountability doctrine. See *Fernandez*, 2014 IL 115527, ¶ 21 (in common design cases, a defendant is accountable where he aids another in the planning or commission of an offense); *People v. Phillips*, 2014 IL App (4th) 120695, ¶ 48 (shared intent is not an element of the common design rule). It is irrelevant that the trial court found no evidence of planning between defendant and codefendant, as a conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the defendant in the spontaneous acts of the group. *People v. Cooper*, 194 Ill. 2d 419, 436 (2000); *W.C.*, 167 Ill. 2d at 338.

¶ 20 Finally, we are mindful of defendant's argument that even under the *Fernandez* common design analysis, he is not accountable for codefendant's display of the BB gun because this action took place prior to his arrival at the scene. Defendant asserts that accountability under the common design rule does not operate retroactively to hold a defendant accountable for acts committed by a codefendant prior to the defendant's agreement to participate in the offense. We reject defendant's argument. First, defendant has cited no authority in support of his position. Second, the *Fernandez* court specifically stated that "section 5-2(c) means that where one aids another in the planning or commission of an offense, that person is legally accountable for the conduct of the person he aids; and that the word 'conduct' encompasses any criminal act done in furtherance of the planned and intended act." *Fernandez*, 2014 IL 115527, ¶ 18. In the instant case, defendant aided codefendant in the commission of a robbery. Therefore, he is legally

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accountable for codefendant's conduct, including any criminal act codefendant committed in furtherance of that robbery. The evidence at trial was that codefendant displayed the BB gun and threatened to shoot it in the course of robbing Melikyan. That codefendant put the gun away before defendant arrived at the car does not change the fact that brandishing it was an act taken in furtherance of the robbery.

¶ 21 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.