FOURTH DIVISION
July 16, 2015

No. 1-13-1017

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. 09 CR 16351
	)	
DEMETRIUS DILLON,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: The State presented sufficient evidence to prove defendant was accountable for two aggravated criminal sexual assaults committed by his codefendants prior to his arrival at a second floor apartment where a common criminal design could be inferred from the circumstances surrounding the two sexual assaults; the trial court did not abuse its discretion in sentencing defendant to a greater prison term than a codefendant where the two were not similarly situated.

¶ 2 After a jury trial, defendant Demetrius Dillon was found guilty of four counts of aggravated criminal sexual assault, one based on his own act of penetration and three based on the acts of penetration of his codefendants under an accountability theory. The court sentenced defendant to 18 years in prison for his act of penetration and consecutive terms of 6 years for each of his codefendants' acts for an aggregate sentence of 36 years. On appeal, defendant contends that: (1) the State failed to present sufficient evidence that he was accountable for the two aggravated criminal sexual assaults that occurred prior to his arrival at the second floor apartment; and (2) his sentence should be reduced for being "unconstitutionally disproportionate" to his codefendant's sentence. For the reasons that follow, we affirm.

¶ 3 The victim, L.H., testified that at night on August 12, 2009, she was with her friend at her friend's boyfriend's house. After her friend and her friend's boyfriend began to argue, L.H. left the house and walked to a convenience store located a few blocks away. When she arrived, the store was already closed.

¶ 4 As L.H. continued to walk, she saw codefendants Tramaine Shorty and Kenneth Thomas on the opposite side of the street and heard one of them call her name. She thought she recognized one of them as "Little Dave," an acquaintance, so she walked in their direction. As she neared them, she realized it was not Little Dave and began to walk away. Shorty and Thomas told her she was "too pretty to be walking alone," and they would help her return home safely. L.H. asked them if she could borrow their cell phone to call her friend for a ride home. Shorty and Thomas agreed to let her use the phone, but only after they stopped at a liquor store.

¶ 5 However, instead of walking to a liquor store, Shorty and Thomas brought L.H. to a white house in an area she did not recognize. She sat on the porch of the house with them for

some time and continued to inquire about using their cell phone. While they were sitting on the porch, defendant approached the fence of the house and Shorty met him there. L.H. could not hear their conversation, but at the end of it, both defendant and Shorty looked at her.

¶ 6 Defendant left, Shorty returned to the porch and L.H. asked if she could use the bathroom. Shorty and Thomas brought L.H. into a vacant second floor apartment inside the house. Shorty then left the apartment to get alcohol from the store. While Thomas and L.H. sat in the apartment alone, Thomas tried to touch L.H., but she pushed him back. L.H. then attempted to leave the apartment, but Shorty returned. Shorty and Thomas began to drink, but L.H. refused. Shorty tried to force her to drink, but the drink spilled on L.H.

¶ 7 Thomas and Shorty then began touching L.H. She tried to leave again, but Shorty grabbed her. Eventually, Thomas exposed his penis and forced it into L.H.'s mouth. Shorty then exposed his penis and penetrated L.H.'s vagina despite L.H. telling both men to stop. Later, Thomas and Shorty switched positions. Thomas penetrated L.H.'s vagina, and Shorty attempted to force his penis into L.H.'s mouth.

¶ 8 L.H. then heard a knock at the door. Thomas opened the door, and defendant entered the apartment while grabbing his penis. Thomas again forced his penis into L.H.'s mouth and defendant, who was behind L.H., forced his penis into her vagina. Shortly thereafter, several police officers entered the apartment and arrested defendant, Shorty and Thomas.

¶ 9 Angelique Covington testified that a little after midnight on August 13, 2009, she saw three men walking on the 4200 block of West Wilcox Street, including defendant who she recognized from her neighborhood. She saw two of the men run across the street into a green and

white house while defendant was slightly behind them walking toward the same house. Defendant eventually entered the same house.

¶ 10 Ten to fifteen minutes later, Covington heard a female crying and the sounds of someone being beaten in a gangway. She heard multiple male voices exclaim, "b***, you're going to suck our dicks" and a female voice respond, "I can't, I can't." Covington approached a stranger, asked to use the stranger's cell phone and called the police.

¶ 11 She continued to hear a female crying, then from the second floor of the house. The police eventually arrived, entered the house, and brought out three men, including defendant, and a female.

¶ 12 Defendant testified that he was friends with Shorty and knew Thomas from his neighborhood. He did not speak to either of them that day or night. He did enter a house on the 4200 block of West Wilcox Street around 11 p.m. because the house was vacant and his friends would "hang[] out" there.

¶ 13 Defendant walked up to the second floor apartment, expecting to see his group of friends, and knocked on the door. Shorty opened the door, and defendant saw Thomas and a half-naked female. He thought that Thomas and the female had "just finished having sex." He never said anything to the female, never touched her and never had sex with her. About 30 to 60 seconds after entering the apartment, the police arrived.

¶ 14 The jury found defendant guilty of aggravated criminal sexual assault for his act of penetration of L.H.'s vagina and three additional counts of aggravated criminal sexual assault by accountability for Shorty's act of penetration of L.H.'s vagina, Thomas's act of penetration of L.H.'s vagina and Thomas's act of penetration of L.H.'s mouth. The jury also found that L.H. was

less than 18 years old when the offense was committed, and the offense was committed on the same victim by one or more other individuals and defendant participated with the knowledge of the others' participation, subjecting defendant to extended-term sentencing.

¶ 15 In sentencing defendant, the court stated it considered the presentence investigation report, the facts of the case, the aggravating and mitigating evidence, defendant's social background, his educational background and his rehabilitative potential. The court also noted that it was "aware of the dispositions of the other co-defendants whose cases were disposed of before" defendant's case.[1] While defendant was eligible for extended-term sentencing, the court decided against imposing an extended term. The court sentenced defendant to 18 years in prison for his act of penetration and consecutive terms of 6 years in prison for his codefendants' acts of penetration for an aggregate sentence of 36 years.

¶ 16 Defendant moved to reconsider his sentence based in part upon a lack of proportionality between his sentence and those of Thomas and Shorty. In denying his motion, the trial court stated that Thomas "accepted responsibility for his actions" by pleading guilty, and Shorty was found guilty by a different jury on "not as many counts as" defendant.

¶ 17 Defendant first contends that the State failed to present any evidence that he was accountable for the sexual assaults committed by Thomas and Shorty prior to his arrival at the second floor apartment. Defendant does not dispute his conviction based on his own act of

[1] Thomas pled guilty to one count of aggravated criminal sexual assault and was sentenced to 11 years in prison. Shorty was found guilty by a jury of one count of aggravated criminal sexual assault and sentenced to 20 years in prison. His case was affirmed on direct appeal in *People v. Shorty*, 2013 IL App (1st) 110818-U.

penetration or his conviction based on Thomas's act of penetration after defendant arrived at the second floor apartment.

¶ 18 Due process mandates that a defendant may not be convicted of a crime unless each element constituting that crime is proven beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) quoting *In re Winship*, 397 U.S. 358, 364 (1970). When assessing the sufficiency of the evidence in a criminal case based upon an accountability theory, the reviewing court must view the evidence in the light most favorable to the prosecution and then decide if any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Fernandez*, 2014 IL 115527, ¶ 13. All reasonable inferences must be allowed in favor of the prosecution. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). We will not overturn a conviction unless the evidence is "so improbable or unsatisfactory that it creates" reasonable doubt of guilt. *Id.* Finally, while we must carefully examine the evidence before us, we must give the proper deference to the trier of fact who saw the witnesses testify (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. The testimony of a single witness, if positive and credible, is sufficient evidence to convict a defendant even if the testimony is contradicted by the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 19 Section 5-2 of the Criminal Code of 1961 states "[a] person is legally accountable for the conduct of another when *** [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 (West 2008). Incorporating the common criminal design rule was the "underlying intent" of the accountability statute. *Fernandez*, 2014 IL 115527, ¶ 13. Thus, when two or more people 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). To establish a common design to commit a crime, "[w]ords of agreement are not necessary," rather, "the common design may be inferred from the circumstances surrounding the perpetration of the unlawful conduct." *People v. Johnson*, 2014 IL App (1st) 120701, ¶ 22. When a defendant "voluntarily attache[s] himself to a group bent on illegal acts, with knowledge of its design," his conduct will support "an inference that he shared the common purpose." *People v. Perez*, 189 Ill. 2d 254, 267 (2000). However, mere knowledge of or consent to the commission of a crime is "insufficient to constitute aiding or abetting." *People v. Walker*, 392 Ill. App. 3d 277, 289 (2009).

¶ 20 While defendant accurately states that two of his convictions resulted from conduct that occurred prior to his arrival at the second floor apartment, this fact does not preclude a finding that he was nevertheless accountable for that conduct. Prior to any crimes occurring, defendant had a conversation with Shorty, and both men looked straight at L.H. at the end of the conversation. Furthermore, defendant returned to the apartment during the very moment Shorty and Thomas were sexually assaulting L.H. Finally, upon entering the apartment, L.H. stated defendant was already grabbing his penis. Even though L.H.'s testimony is the only evidence connecting defendant to a common criminal design with Shorty and Thomas, our courts

repeatedly have sustained convictions based upon the testimony of a single witness who is credible and positive, which the jury implicitly found. See *Siguenza-Brito*, 235 Ill. 2d at 228; *Smith*, 185 Ill. 2d at 541. Therefore, a rational trier of fact could infer a common criminal design from the circumstances surrounding the perpetration of the first two sexual assaults even though defendant was not present when they were committed. See *Johnson*, 2014 IL App (1st) 120701, ¶ 22.

¶ 21 Defendant further argues that he was not accountable for the sexual assaults committed before he arrived at the apartment because there was no "overt act" on his part to facilitate the crimes committed by Shorty and Thomas. However, defendant himself need not provide such an overt act to make him accountable for Thomas and Shorty's sexual assaults. See *People v. Taylor*, 164 Ill. 2d 131, 140 (1995) ("One may aid and abet without actively participating in the overt act."). This principle is the essence of accountability law: A defendant can be found accountable for the overt act of another, so long as they share a common criminal design. Accordingly, defendant's lack of an overt act facilitating the two sexual assaults prior to his arrival is inconsequential in sustaining his accountability for those assaults because the jury implicitly found that he, Shorty and Thomas shared a common criminal design.

¶ 22 Finally, defendant argues that cases holding a defendant can be accountable for others' acts without being present at the scene of the crime are "readily distinguishable" citing to *People v. Rybka*, 16 Ill. 2d 394 (1959). Initially, we note that for support of defendant's contention, he states "cases" are "readily distinguishable" yet only cites to one case, *Rybka*. In *Rybka*, a group of white men decided to attack a random black man. The group left a store, separated into two different cars and drove around the south side of Chicago looking for a target. *Id.* at 397. The

occupants of one car found a black man and killed him while the occupants of the other car did not. *Id.* at 405-06. The supreme court held that the men in both cars had "an understanding that the group left the store to [attack a black person] or to 'roll somebody.' " *Id.* at 407. Thus, the defendants who did not actually participate in the killing of the man were still accountable for the murder. *Id.* at 408.

¶ 23 Defendant argues the key distinction between his case and *Rybka* is that "Shorty may have told [defendant] that he and Thomas intended to sexually assault L.H. if she refused their sexual advances, but a consensual sexual encounter was possible" whereas legal conduct was not possible in *Rybka*. However, there is no evidence that Shorty and Thomas discussed a consensual sexual encounter with L.H. Furthermore, defendant argues his "lascivious entrance can be explained by his expectation to join a sex party" not a gang rape. However, the jury is not required to "search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Moreover, defendant is asking us to make inferences from the evidence presented, which is a task reserved for the trier of fact. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 28 (stating "[t]he trier of fact must resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts") (internal quotation marks omitted).

¶ 24 Accordingly, we cannot say that when the evidence is viewed in the light most favorable to the State, no rational trier of fact could have found beyond a reasonable doubt that defendant shared a common criminal design with Shorty and Thomas to sexually assault L.H. See *Fernandez*, 2014 IL 115527, ¶ 13. Because we find that there was a common criminal design, we

find that defendant was accountable for the sexual assaults that occurred prior to his arrival at the second floor apartment, which were acts in furtherance of the common criminal design.

¶ 25 Defendant next contends that his 36-year sentence should be reduced because it is "unconstitutionally disproportionate" to Shorty's sentence who was convicted of one count of aggravated criminal sexual assault based on accountability for the single act of penetration by defendant and sentenced to 20 years in prison.

¶ 26 The parties dispute the standard of review applicable to defendant's claim. Defendant cloaks his claim as an "unconstitutionally disproportionate" sentence and argues that because his claim involves an alleged violation of his constitutional rights, we should review his claim *de novo.* The State responds, arguing that sentences within the statutory range are subject to the discretion of the trial court. We agree with the State and will review defendant's contention for an abuse of discretion. See *People v. Willis*, 2013 IL App (1st) 110233, ¶¶ 122, 127 (applying abuse-of-discretion standard to a defendant's disproportionate-sentencing claim); *People v. Stroup*, 397 Ill. App. 3d 271, 274 (2010) (applying abuse-of-discretion standard to a defendant's disproportionate-sentencing claim).

¶ 27 Similarly situated defendants should not receive grossly disproportionate sentences. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005). In other words, where defendants are not similarly situated, disproportionate sentences may be justified. *People v. Cooper*, 239 Ill. App. 3d 336, 363 (1992). Codefendants will not be considered similarly situated when they have been convicted of a different set of crimes. *Stroup*, 397 Ill. App. 3d at 275; *People v. Martinez*, 372 Ill. App. 3d 750, 760 (2007).

¶ 28 We find *Stroup* and *Martinez* instructive in analyzing defendant's claim. In *Stroup*, a defendant argued that his concurrent 25-year sentences for armed robbery and home invasion were "grossly disparate" to his codefendant's concurrent 15-year sentences for the same offenses. *Stroup*, 397 Ill. App. 3d at 271. The reviewing court declined to consider whether the defendant's sentence was "grossly disparate" to his codefendant because his codefendant was also sentenced for aggravated criminal sexual assault, thus making them "not similarly situated." *Id.* at 271-75. Likewise, in *Martinez*, upon which the State relies, a defendant was sentenced to 20 years in prison for armed robbery. *Martinez*, 372 Ill. App. 3d at 760. His codefendant received 10 years in prison for the armed robbery, but an additional 40 years in prison for murder. *Id.* The reviewing court held that because the codefendant received an additional sentence for murder, "the two defendants were not similarly situated," and therefore, the trial court did not abuse its discretion in sentencing the defendant. *Id.*

¶ 29 In the case at bar, even though defendant and Shorty were tried and convicted based upon the same set of facts, they were not convicted of the same crimes. Defendant was convicted of four crimes: an aggravated criminal sexual assault based on his own act of penetration and three aggravated criminal sexual assaults based upon the acts of penetration of Shorty and Thomas. Shorty was only convicted for one crime: an aggravated criminal sexual assault based upon accountability for the act of penetration by defendant. Because defendant was convicted of three more crimes than Shorty, they were not similarly situated, and we decline to entertain defendant's disproportionate-sentencing claim. See *Stroup*, 397 Ill. App. 3d at 275. Accordingly, we find no abuse of discretion when the trial court sentenced defendant to 36 years in prison.

¶ 30 For the reasons stated above, we affirm the jury's finding of guilt and the trial court's sentence of defendant.

¶ 31 Affirmed.