2015 IL App (1st) 132164-U

FOURTH DIVISION
June 30, 2015

No. 1-13-2164

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. 11 CR 3945
	)	
TIMOTHY SINICO,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Convictions and sentences for first-degree murder and attempted armed robbery affirmed. State presented sufficient evidence to prove beyond reasonable doubt that defendant agreed with codefendant to rob victim, thus rendering defendant guilty of first-degree murder on accountability theory. Non-IPI instructions were properly denied where IPI instruction adequately explained law of accountability and defendant's theory of case. Defendant was provided sufficient notice of mandatory 15-year sentencing enhancement. Defendant's sentence was not abuse of discretion.

¶ 2 Following a jury trial, defendant Timothy Sinico was found guilty of first-degree murder in the shooting death of Adrian Thompson and guilty of attempted armed robbery with a firearm.

Defendant was sentenced to 46 years in prison for first-degree murder, which included a 15-year firearm enhancement, and 4 years in prison for attempted armed robbery to be served consecutively for an aggregate sentence of 50 years in prison. On appeal, defendant contends: (1) there was insufficient evidence to prove him guilty of either first-degree murder or attempted armed robbery; (2) the trial court abused its discretion in refusing to submit defendant's proposed jury instructions; (3) the State failed to properly give notice to defendant of the 15-year firearm sentencing enhancement; (4) the jury did not make the requisite finding for the 15-year firearm sentencing enhancement to apply; and (5) his sentence was excessive. We affirm.

¶ 3 According to the State's theory of the case, defendant and codefendant Montrell Banks, who is not a party to this appeal,[1] agreed to rob a cannabis dealer, Adrian Thompson. Defendant and Banks entered Thompson's car under the guise of buying cannabis, and Banks attempted to rob Thompson. When Thompson did not comply, Banks, who was then outside the car, pointed a gun at Thompson. As Thompson tried to drive away, Banks fatally shot him. The State supported its theory with three witnesses who heard defendant make an agreement with Banks to rob Thompson.

¶ 4 At trial, Asaundra Washington testified that on April 23, 2009, she went to Darnell Benson's grandmother's house on Austin Boulevard, where he was living, at approximately 3 p.m. Asaundra, Darnell and Darnell's girlfriend, Tiarra Smith, sat around playing video games and smoking cannabis. The group then went outside to Darnell's detached garage, where they sat

[1] Banks's appeal is pending before this court in No. 1-13-2204.

in Darnell's car, listened to music and continued to smoke cannabis. Darnell's car was backed into the open garage with its hood facing the alley.

¶ 5 Later in the day, defendant and codefendant Banks arrived in Banks's car. Banks parked his car parallel with the alley in front of Darnell's garage. The group, now five in number, continued to hang out, listen to music, and smoke cannabis. While the group was in the garage, either Banks or defendant told Asaundra not to go inside because they were "about to hit a lick." Asaundra understood this slang to mean that defendant and Banks were going to rob someone, but they did not say whom they were planning to rob.

¶ 6 Some time later, Tiarra left to go to the store. Asaundra entered Banks's car, sat in the front passenger's seat and began to listen to music on an MP3 player. While in Banks's car, Asaundra noticed Thompson arrive in the alley in his car alone. Thompson parked his car parallel to Banks's car, but facing the opposite direction. Asaundra greeted Thompson and shared a cigarette with him.

¶ 7 Soon thereafter, defendant and Banks entered Thompson's car with Banks sitting in the backseat and defendant sitting in the front passenger's seat. Asaundra could not hear anything in Thompson's car and continued to listen to music in Banks's car until she heard a door slam. She turned around and saw Banks standing outside Thompson's car next to his front window. She stated that Thompson's car had moved up about a "garage up and over" from where it initially parked directly beside Banks's car. Asaundra saw Banks draw a gun, point it at Thompson's window and proclaim, "[d]on't tell me to hold on. I'm a Four Corner Hustler, don't tell me to hold on." She then heard a gunshot. Asaundra immediately ran out of Banks's car into the garage and

saw Thompson's car traveling rapidly in reverse down the alley. Banks retreated back to his car. Defendant, meanwhile, still in Thompson's car, jumped out as the car was moving in reverse and then told Banks that "he almost shot him." Defendant entered Banks's car, and they drove out of the alley in the opposite direction of Thompson's car.

¶ 8 Asaundra and Darnell, who had been standing in the garage, then ran toward his house but were unable to get inside because Tiarra had taken Darnell's house keys. After Tiarra returned with the keys about 10 to 12 minutes later, Asaundra realized that she had left her house keys in Banks's car. Either she or Darnell called Banks's phone, but defendant answered. She told defendant that she needed her keys, but defendant told her that he and Banks were not "going to bring them back." Banks then got on the phone with Asaundra and told her that he would bring the keys to her. Banks and defendant met Asaundra behind her house and returned her keys. She told them that "if they killed [Thompson] they was [*sic*] bogus." Banks responded and told her, "don't say anything," which Asaundra perceived as a threat. Defendant did not threaten her.

¶ 9 Asaundra said she did not call the police because she was only 16 years old at the time and was scared. About two weeks after the shooting, the police contacted her, but she did not respond because her mother told her not to get involved. In February 2011, the police again contacted Asaundra, who was then 18 years old. She went to a police station on February 5, 2011, and spoke to the police and an assistant State's Attorney. She told them that defendant and Banks discussed robbing someone and asked Darnell to participate, but he declined. That day, she identified Banks and defendant in a photo array as being involved in Thompson's death. A

week later, she viewed a lineup and identified Banks. However, she did not remember a lineup conducted in late February 2011.

¶ 10 On cross-examination, Asaundra admitted she had smoked possibly two blunts containing cannabis in Darnell's house and continued to smoke cannabis in Darnell's garage even after Banks and defendant arrived. She smoked cannabis for approximately four and a half hours prior to hearing defendant and Banks's conversation about hitting "a lick." However, she stated smoking cannabis did not negatively influence her ability to hear and see things. She remembered telling the police that once defendant and Banks arrived, no one re-entered Darnell's car. She acknowledged not warning Thompson because she did not think he was in any danger. She also admitted to not calling paramedics after seeing Thompson shot.

¶ 11 Darnell testified that in the afternoon and evening of April 23, 2009, he was "hanging out" in the detached garage of his grandmother's house along with Asaundra, Tiarra, Banks and defendant. Darnell went to high school with defendant and had met Banks through a mutual friend. Initially, Darnell was just with Tiarra, then Asaundra arrived around 3 p.m., and finally both defendant and Banks joined them between 5 and 7 p.m. In the garage, the group smoked cannabis, drank beer, and played music. Darnell stated they were sitting in his car, which was backed into the garage, facing the alley.

¶ 12 Defendant asked Darnell, who sold cannabis at the time, for another blunt, but Darnell refused because his cannabis was already pre-packaged and ready to be sold to other people. He told defendant to look for cannabis elsewhere. Defendant then called Thompson, a mutual friend of both defendant and Darnell, because he also sold cannabis. While everyone was "hanging

out," Darnell heard defendant say, "I'm going to rob [Thompson], foe." However, Darnell did not take defendant seriously because he had apparently said the same thing on a prior occasion and never followed through. Darnell also saw Banks playing around with a gun in the garage, in Darnell's car, and in Darnell's house.

¶ 13 Later in the night, Thompson arrived alone in his car and parked it parallel to Banks's car. On the way to Thompson's car, Darnell heard Banks say, "I'm fitting to get this n***, foe." Banks then entered Thompson's car in the backseat, while defendant entered the front passenger's seat. While sitting in his car, Darnell saw cannabis passed around among Thompson, Banks and defendant in Thompson's car. Then Banks emerged from the car, which was still directly in front of the garage, pulled the same gun he had been playing with earlier out from his pocket and demanded that Thompson empty his pockets. Banks proclaimed multiple times while pointing his gun at Thompson, "I'm a Four Corner Hustler. Empty everything in your pockets." Defendant put his hands up like "he was being robbed as well." Thompson opened his door, as if he was going to exit the car. However, Thompson shut the door and put the car into gear. Simultaneously, Banks shot Thompson and his car began to travel "very fast" in reverse down the alley.

¶ 14 After Darnell exited his car, he saw defendant jump out of Thompson's moving car. While defendant ran back to Banks's car, he yelled "[h]e dead, foe. He dead. And damn, you almost shot me." Both Banks and defendant entered Banks's car. Banks initially started to follow Thompson's car down the alley, but then turned around in the alley and fled in the opposite direction.

¶ 15 Afterward, Darnell and Asaundra, who had been in Banks's car, went back to Darnell's house. However, Tiarra had Darnell's house keys, so Darnell and Asaundra had to wait until Tiarra came back from the store to go inside. Darnell did not call the police because he was "[a]fraid of what could happen to [him] for telling what took place."

¶ 16 Later that night, Darnell received a phone call from defendant. Defendant said he and Banks were only able to obtain two bags of cannabis from Thompson and that on the way home, they were "gathering alibis." About two weeks later, Darnell saw Banks who told Darnell that he was going to sell his gun to one of the Bellwood Avenue Four Corner Hustlers. Another two to three weeks later, Banks told Darnell that he had sold the gun to Melvin "Rambo" Welch, a gang member.

¶ 17 On cross-examination, Darnell stated that no one was allowed to smoke cannabis inside his house. He admitted to smoking approximately two to four blunts of cannabis and drinking five to six beers the afternoon before the shooting. Darnell acknowledged that the cannabis affected his ability to perceive events around him that day. He further testified that he never saw Thompson and Asaundra share a cigarette.

¶ 18 In November 2010, Darnell spoke to police and an assistant State's Attorney. He told them that Banks had made statements about beating or robbing Thompson but did not mention anything about defendant saying the same. However, he claimed at trial that the questions had been focused more on Banks than on defendant. He also told investigators that Asaundra had been in his car the entire time and never moved to Banks's car but admitted to them that the events that night were "vague" in his mind.

¶ 19 Darnell also admitted on cross-examination that, while he did not call the police on April 23, 2009, he did call the police some time later, once he learned he was a prime suspect in Thompson's murder. Darnell testified that he never heard defendant say anything about robbing anyone prior to that day; only Banks had made such statements in his presence.

¶ 20 Tiarra testified that she was "hanging out" with Darnell, Asaundra, Banks and defendant in the afternoon of April 23, 2009. In Darnell's garage, the group talked, smoked cannabis and played music. She saw Banks playing with a "silver and white" gun. Tiarra heard Banks say that "he was going to rob [Thompson]" and defendant agreed to help him, though she could not recall the exact words defendant used. Around 9:30 or 10 p.m., Tiarra left the garage to go to the store a few blocks away. While walking back from the store, Tiarra saw Banks's car "speeding" down Austin Boulevard with both Banks and defendant inside. When she arrived back at Darnell's house, she noticed that Darnell and Asaundra appeared "startled."

¶ 21 On cross-examination, Tiarra admitted to smoking one blunt of cannabis that day. She noted that no one was allowed to smoke inside Darnell's house. She acknowledged that when she spoke to the police and an assistant State's Attorney while being videotaped, she did not mention that defendant agreed to help rob Thompson. However, she testified at trial that she told investigators, before being videotaped, that defendant agreed to help rob Thompson.

¶ 22 The State presented evidence that a gun found during a search of another individual's house was the same gun used in Thompson's murder. That individual testified that he bought the gun from Banks in late April 2009.

¶ 23 The parties stipulated that an autopsy performed on Thompson's body revealed that he died from a gunshot wound to the back and the manner of death was homicide.

¶ 24 Defendant did not testify or present any witnesses. He made a motion for a directed finding, but the trial court denied the motion.

¶ 25 During the jury instructions conference, defendant proposed three non-Illinois Pattern Jury Instructions ("IPI"). The first non-IPI instruction read: "A defendant's presence at the scene of a crime and knowledge that a crime is being committed is not sufficient by itself to establish the defendant's guilt."

¶ 26 The second non-IPI instruction read: "If the defendant performed acts that advanced the crime but had no knowledge that the crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt."

¶ 27 The third non-IPI instruction read: "A defendant's association with a person involved in a crime or a criminal scheme is not sufficient by itself to prove his participation in the crime or membership in the criminal scheme."

¶ 28 Defendant argued that the three proffered non-IPI instructions were necessary to support his theory of the case that his mere presence at the scene of the crime alone was insufficient to convict him of any of the crimes. The State argued that defendant's theory was adequately explained by the IPI instructions. Over defendant's objection, the trial court agreed with the State, stating "the [IPI] [i]nstructions adequately deal with the idea that there must be something that transcends mere presence on the part of the defendant."

¶ 29 During jury deliberations, the jury submitted a question to the trial court stating: "It seems to us that the law states that if [defendant] is guilty of armed robbery, that he is guilty of the murder. Is that true? Or can he be *** guilty of one and not the other?" Over defendant's objection, the court responded to the jury and told them: "[P]lease re-review the instruction that begins with the words 'a person is legally responsible for the conduct.' And re-review the instruction that begins 'to sustain the charge of first-degree murder.' "

¶ 30 After deliberations, the jury found defendant guilty of first-degree murder in the shooting death of Thompson and guilty of attempted armed robbery with a firearm.

¶ 31 In a posttrial motion for a new trial, defendant argued, *inter alia*, that the evidence at trial was insufficient to prove him guilty beyond a reasonable doubt and the three non-IPI instructions should have been included in the instructions to the jury. The court denied the motion, stating the jury "decided [defendant] was accountable for the actions of [Banks]," and the non-IPI instructions were unnecessary as the IPI instructions "adequately spelled out" the law.

¶ 32 At defendant's sentencing hearing, the State first argued that defendant was subject to a 15-year firearm enhancement. Then, the State argued that while defendant expressed remorse over the unfortunate situation he now was in, he never expressed remorse for Thompson, one of his friends.

¶ 33 Defense counsel first argued that defendant was not subject to the 15-year firearm enhancement. Counsel then stated that defendant had a loving family who had supported him throughout his proceedings and sent many letters to the court on his behalf. Counsel further argued about the relative guilt in the case between Banks, who pulled the trigger of the gun that

killed Thompson, and defendant, whose guilt for murder was predicated solely on an accountability theory. Finally, counsel noted defendant's employment history and his lack of a criminal background. Defendant spoke briefly and said, "I would like to say I feel I shouldn't be here today. I love my family. And God bless."

¶ 34 The trial court stated that it considered the evidence at trial, the presentence investigation, the evidence in aggravation and mitigation, including letters from his family, as well as the statutory aggravation and mitigation factors, the financial impact of incarcerating defendant, and defendant's allocution. The court noted that its sentence took "into account the seriousness of the offense" and that there was "a lot of forethought that went into the commission of this offense." Defendant was sentenced to 46 years in prison for first-degree murder, which included a 15-year firearm enhancement, and a consecutive term of 4 years in prison for attempted armed robbery for an aggregate sentence of 50 years in prison. Defendant filed a motion to reconsider the sentence, which was denied by the trial court. This appeal followed.

¶ 35 Defendant first contends that there was insufficient evidence to find beyond a reasonable doubt that he had an agreement with Banks to rob Thompson.

¶ 36 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); *In re Winship*, 397 U.S. 358, 364 (1970). When assessing the sufficiency of the evidence in a criminal case based on an accountability theory, the reviewing court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt.

People v. Givens, 237 Ill. 2d 311, 334 (2010). All reasonable inferences must be allowed in favor of the prosecution. *Id*. 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. Accordingly, a jury's determination regarding witness credibility is given "great weight." *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 37 Section 5-2 of the Criminal Code of 1961 states that "[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(c) (West 2008). Proof of the defendant's "intent to promote or facilitate" the crime may be found in one of two ways: (1) the defendant shared the same criminal intent of the principal; or (2) there was a common criminal design between the defendant and the principal. *People v. Fernandez*, 2014 IL 115527, ¶ 13; *In re W.C.*, 167 Ill. 2d 307, 337 (1995). This case involves the latter, not the former; the State's theory is not that defendant shared Banks's intent to shoot and kill Thompson, but rather that defendant shared a common criminal design with Banks to rob Thompson. The fact that the common criminal design was to commit a robbery and not a murder, however, does not absolve defendant of criminal liability for the resulting murder. 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.' " *Fernandez*, 2014 IL 115527, ¶ 13 (quoting *In re W.C.*, 167 Ill. 2d at 337). Thus, if defendant engaged in a common design with Banks to rob Thompson, and Banks shot and killed Thompson in furtherance of that robbery, defendant is as responsible as Banks for the murder. See, *e.g.*, *Fernandez*, 2014 IL 115527, ¶ 18 (defendant, who admitted aiding codefendant in planning and commission of burglary, was guilty of attempted murder when codefendant shot responding officer, even though defendant remained in car at all times and did not know that codefendant was armed); *People v. Kessler*, 57 Ill. 2d 493, 499 (1974) (fact that defendant participated in plan to commit burglary sufficient to find defendant accountable for attempted murder of tavern owner and responding state trooper, though defendant never left car and did not know that codefendant even possessed a gun).

¶ 38 Defendant does not dispute this principle of law but argues that the State failed to prove a common criminal design in this case. He claims that that there was insufficient evidence to show that defendant agreed to help Banks rob Thompson, or that defendant even knew that Banks was planning to rob Thompson. He argues that the testimony of the State's witnesses was not "clear and convincing" based in large part on each witness's heavy cannabis use on the day Thompson was killed. He further argues the witnesses were inconsistent in describing each other's locations throughout the afternoon and night and that, although they testified to hearing defendant agree to rob Thompson with Banks, their videotaped statements did not contain that assertion.

¶ 39 While evidence that a defendant affirmatively agreed with his accomplice to engage in a crime is obviously direct evidence of a common criminal design, words of agreement are not necessary; the agreement may be found from the circumstances surrounding the commission of the act. *In re W.C.*, 167 Ill. 2d at 338. As defendant correctly notes, one's mere presence at the scene of the crime, coupled with knowledge that the crime is being committed, is insufficient to support accountability. *Id.* But neither is defendant's presence at the scene irrelevant. Indeed, our supreme court has held that factors relevant in this inquiry include " '[p]roof that the defendant was present during the perpetration of the offense, that he fled from the scene, that he maintained a close affiliation with his companions after the commission of the crime, and that he failed to report the crime.' " *Fernandez*, 2014 IL 115527, ¶ 17 (quoting *People v. Perez*, 189 Ill. 2d 254, 267 (2000)).

¶ 40 First, the State introduced direct evidence, through three witnesses, of an agreement between defendant and Banks to rob Thompson. Asaundra heard defendant and Banks talk about "hit[ting] a lick," which meant committing a robbery. Darnell heard defendant say, "I'm going to rob [Thompson], foe." And Tiarra heard defendant agree to rob Thompson, though she could not recall the exact words he used.

¶ 41 It is true that all the witnesses admitted to smoking cannabis that day, with Darnell and Asaundra acknowledging they smoked multiple blunts. The witnesses' testimony was not entirely consistent in placing each other in Darnell's garage, in Banks's car or in Darnell's car. Finally, Darnell admitted that he did not mention to the police initially that defendant agreed to rob Thompson with Banks. Likewise, in her videotaped statement, Tiarra did not state that defendant

agreed to help rob Thompson. However, she stated she told investigators this fact before being videotaped.

¶ 42 Defendant's arguments about the witnesses' drug use and inconsistent statements affect only the weight to be given to their testimony, and these arguments were presented to and implicitly rejected by the jury. See *People v. Baugh*, 358 Ill. App. 3d 718, 737 (2005) (finding defendant's attack on sufficiency of evidence unpersuasive where such attacks were presented to and rejected by trier of fact); see also *People v. Calabrese*, 398 Ill. App. 3d 98, 123-24 (2010) (issues involving witness credibility, witness's "smoking [of] marijuana" during night in question, and "differences among the witnesses' stories" are all for jury to resolve). The jury apparently concluded that the portions of the witnesses' testimony concerning defendant's agreement to rob Thompson were consistent and truthful. Furthermore, our supreme court has stated that variations in the testimony of witnesses are "to be expected anytime several persons witness the same event under traumatic circumstances." *People v. Brooks*, 187 Ill. 2d 91, 133 (1999). We cannot find that the deficiencies defendant identifies in the witnesses' testimony render their accounts so "improbable or unsatisfactory" that we must overturn the jury's verdict. See *Wheeler*, 226 Ill. 2d at 115.

¶ 43 Moreover, many of the other relevant indicia of a common design identified in *Fernandez* and *Perez* were present in this case to bolster the jury's finding of a common criminal design to rob Thompson. Defendant called Thompson to come to Darnell's house. Defendant was present during the commission of the attempted armed robbery; in fact, he was in Thompson's car along

with Banks. Defendant fled the scene with Banks and, together, they created alibis. Finally, there is no evidence that defendant reported the crime.

¶ 44 Accordingly, when the evidence is viewed in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that defendant agreed to rob Thompson with Banks. See *Fernandez*, 2014 IL 115527, ¶ 13. Because we find that there was an agreement between Banks and defendant to rob Thompson, we find that defendant was also accountable for the murder of Thompson, which indisputably was in furtherance of the attempted armed robbery. See *id.* ¶ 18; *Kessler*, 57 Ill. 2d at 499.

¶ 45 Defendant next contends that the trial court abused its discretion when it refused to allow defendant's three proposed non-IPI instructions. To reiterate, one of the instructions advised that defendant's "mere presence" at the scene, by itself, was insufficient to find him guilty. The second said that if defendant had no knowledge that a crime was going to be committed, he should be exonerated. The third said that defendant's association with Bank was not sufficient, by itself, to show his participation in a criminal scheme.

¶ 46 The purpose of jury instructions is to supply the jury with accurate legal principles with regard to the evidence so it can reach a proper verdict. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). Jury instructions must "fully and fairly announce the law applicable to the theories of the State and the defense." *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). The decision to allow a particular instruction is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *Id.* at 65-66. IPI instructions were "painstakingly drafted" to provide simple, brief, and unbiased language to the jury, and the use of non-IPI instructions on a subject

already covered by IPI instructions would defeat this goal. *People v. Pollock*, 202 Ill. 2d 189, 212 (2002). A trial court's refusal to give a non-IPI instruction will not constitute an abuse of discretion if there is an applicable IPI instruction, or "the essence of the refused instruction is covered by other given instructions." *People v. Gilliam*, 172 Ill. 2d 484, 519 (1996).

¶ 47 The trial court gave the jury Illinois Pattern Jury Instruction Criminal No. 5.03 ("Accountability"), which provides:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense.
>
> The word 'conduct' includes any criminal act done in furtherance of the planned and intended act." Illinois Pattern Jury Instruction, Criminal, No. 5.03 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 5.03).

¶ 48 Regarding the first rejected jury instruction, we agree with several decisions that have upheld a trial court's refusal to tender the jury an instruction regarding a defendant's "mere presence" at the crime scene where accountability was at issue. See *e.g.*, *People v. Nutall*, 312 Ill. App. 3d 620, 634 (2000) (rejecting defendant's non-IPI instruction on mere presence because jury was given IPI instructions on "the presumption of innocence, the burden of proof, the definition and elements of [the offense] and the proof necessary to find defendant guilty under an accountability theory"); *People v. Wilson*, 257 Ill. App. 3d 670, 697-98 (1993) (rejecting defendant's non-IPI instruction on mere presence because jury had been adequately instructed on defendant's theory of case and because IPI instruction on accountability explained the essence of the "mere presence instruction"); *People v.*

Thomas, 175 Ill. App. 3d 521, 529 (1988) (rejecting defendant's non-IPI instruction on mere presence where court stated "a defense theory based on 'mere presence' and *** the proposed instruction was, in substance, nothing more than an assertion of innocence" and because defense theory was already incorporated into IPI instruction on accountability).

¶ 49 We find that the trial court properly rejected the second and third proffered jury instructions as well. We do not deny that those jury instructions properly stated the law. If defendant had absolutely no knowledge that a crime was being planned, he would lack the "intent to promote or facilitate" the commission of that crime. 720 ILCS 5/5-2(c) (West 2008). The same result would obtain if all that could be said about defendant was that he "associated" with Banks. But as the trial court noted, those statements of law were fully covered in the IPI instruction that *was* given. See *Gilliam*, 172 Ill. 2d at 519 (trial court does not abuse discretion in refusing proffered jury instruction where "the essence of the refused instruction is covered by other given instructions."). IPI Criminal 4th No. 5.03, quoted above, clearly rules out liability where defendant had no idea a crime was planned and, without question, rules out liability if the State proves nothing more than the fact that defendant "associated" with Banks.

¶ 50 The jury was instructed as to defendant's presumption of innocence, the State's burden of proving defendant guilty beyond a reasonable doubt, the law of accountability in one concise, complete instruction, and the elements of first-degree murder and attempted armed robbery. The jury was well aware from the instructions that the State had to prove more than defendant's "mere presence" at the crime scene or his mere "association" with Banks, and that defendant's complete lack of knowledge of planned criminal activity would likewise exonerate him. The jury instructions thus "fully and fairly announce[d] the law applicable to the theories of the State and the defense." *Mohr*,

228 Ill. 2d at 65. The trial court did not abuse its discretion in refusing to submit the three proffered non-IPI instructions to the jury.

¶ 51 Defendant also argues that the inadequacy of the IPI instruction was highlighted when the jury submitted a question to the trial court, inquiring if it could find defendant guilty of one offense and not the other. However, the question posed by the jury does not clearly indicate confusion concerning defendant's mere presence at the scene of the crime. In any event, in response to the jury question, the trial court referred the jury back to the instructions on first-degree murder and accountability, which we have just found accurately and completely stated the law on this topic.

¶ 52 Defendant next contends that the State failed to give him proper notice of the possibility of the 15-year firearm sentencing enhancement. Defendant argues that the State failed to inform him at any time before trial that it would seek a 15-year firearm enhancement due to his use of a firearm during the commission of the offenses, as required by section 111-3(c-5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c-5) (West 2008)).[2]

¶ 53 Where a defendant challenges the sufficiency of his indictment for the first time posttrial, the defendant must show he was prejudiced in the preparation of his defense. *People v. Davis*, 217 Ill. 2d 472, 479 (2005); *People v. Mimes*, 2014 IL App (1st) 082747-B, ¶ 33. Section 111-3(c-5) of the Code of Criminal Procedure of 1963 requires that "if an alleged fact *** is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a

[2] Defendant also makes several arguments about never "personally discharging" a firearm during the commission of the crimes. However, defendant was not charged with or convicted of personally discharging a firearm.

written notification before trial." 725 ILCS 5/111-3(c-5) (West 2008); see *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 60. If the charging instrument includes the alleged fact that is the basis for the enhanced sentence, then no additional notification is required to be given to a defendant. *Jackson*, 2014 IL App (1st) 123258, ¶ 60.

¶ 54 The enhancement in question provides that "if the person committed the offense *while armed with a firearm*, 15 years shall be added to the term of imprisonment imposed by the court." (Emphasis added.) 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008). Where the enhancement applies, its imposition by the court is mandatory. *People v. White*, 2011 IL 109616, ¶ 26. The 15-year firearm enhancement applies even when a defendant's guilt is predicated on accountability. *Id.* ¶ 19; *People v. Rodriguez*, 229 Ill. 2d 285, 294-95 (2008) (15-year firearm enhancement applied to unarmed coconspirator found guilty of first-degree murder on accountability theory).

¶ 55 We find the decision in *Jackson*, 2014 IL App (1st) 123258, to be instructive in analyzing defendant's claim. In *Jackson*, a defendant similarly argued that the 15-year firearm enhancement was void because the State did not notify him at any time before trial that it would seek the enhancement based on the defendant's possession of a firearm in an attempted first-degree murder case. *Id*. ¶ 58. The indictment stated in relevant part that defendant, "with intent to kill, did an act to wit: *pulled the trigger of a firearm*." (Emphasis in original.) *Id.* ¶ 61. The court held that the indictment did not have to include the verbatim language from the sentencing enhancement statute; rather, the indictment only needed to provide notice of the alleged fact which is the basis for the enhancement. *Id.* ¶ 62. The court's rationale was that "[i]t is impossible for an individual to pull the trigger of a firearm without simultaneously being armed with a

firearm." *Id.* Finally, the court noted the best practice for the State was to include the enhancement language from the statute verbatim in the indictment "because it all but guarantees the defendant notice of potential sentencing enhancements." *Id.* ¶ 63.

¶ 56 In this case, defendant was charged with two counts of first-degree murder and one count of attempted armed robbery. Defendant's indictment on both counts of first-degree murder stated that defendant and Banks, "without lawful justification, shot and killed [Thompson] *while armed with a firearm*." (Emphasis added.) The trial court imposed a 15-year enhancement for first-degree murder, based on the fact that defendant and Banks were armed with a firearm when they committed the offense. See 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008).

¶ 57 Here, the State followed *Jackson's* suggestion to guarantee that a defendant is on notice of any potential sentencing enhancement. See *Jackson*, 2014 IL App (1st) 123258, ¶ 63. Both first-degree murder counts included that the crimes were committed "while armed with a firearm," which tracks verbatim the language of section 5-8-1(a)(1)(d)(i) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008)). Accordingly, we cannot say defendant lacked sufficient notice, or was prejudiced in any way in the preparation of his defense, when the alleged fact that served as the basis for the sentencing enhancement was included in the indictment verbatim from the enhancement statute.

¶ 58 Defendant next contends that the jury did not make the requisite finding on the 15-year firearm sentencing enhancement. He argues the jury's verdict form did not contain a special finding that defendant, or someone for whom he was legally responsible, was armed with a

firearm, and thus violated the principles articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶ 59 In *Apprendi*, the Supreme Court of the United States held that, when there is an increase in the prescribed penalties for a defendant, the "fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

¶ 60 We find *People v. Aguilar*, 396 Ill. App. 3d 43 (2009), instructive. In *Aguilar*, the defendant argued that the imposition of a 25-year sentencing enhancement violated *Apprendi* "because the verdict form returned by the jury did not contain a finding that defendant personally discharged a firearm during the offense." *Id.* at 59. We held in *Aguilar* that, because the jury instructions properly instructed the jury as to the finding that served as the basis for the sentencing enhancement and sufficiently articulated the facts that were required to be proven beyond a reasonable doubt, no special verdict form was necessary, and the enhancement did not violate *Apprendi*. *Id.* at 60; see also *People v. Hopkins*, 201 Ill. 2d 26, 39-40 (2002) (sentencing enhancement based on victim's age did not violate *Apprendi* where age of victim was element of aggravated battery charge of which defendant was convicted beyond reasonable doubt).

¶ 61 Here, based on IPI Criminal 4th No. 7.02, the trial court instructed the jury that to find defendant guilty of first-degree murder, it must find that "the defendant, or one for whose conduct he is legally responsible, *while armed with a firearm*, performed the acts which caused the death of [Thompson]." (Emphasis added.) This instruction also specifically directed the jury that only if this "proposition[] has been proved beyond a reasonable doubt" should it find defendant guilty.

¶ 62 The jury returned a signed general verdict and found defendant guilty of both first-degree murder and attempted armed robbery. The jury found beyond a reasonable doubt that defendant, or one for whose conduct he was legally responsible, committed the acts that caused Thompson's death while armed with a firearm. Because the jury made the requisite finding of fact underlying the 15-year firearm enhancement beyond a reasonable doubt, no *Apprendi* violation occurred.

¶ 63 Finally, defendant contends his sentence was excessive. He argues that the trial court failed to consider several mitigating factors, including his rehabilitative potential, his age and his absence of a criminal history.

¶ 64 Determining the proper sentence for a defendant requires the court to examine the specific facts of the case as well as many factors, including a defendant's rehabilitative potential and future dangerousness, the seriousness of the crime, the defendant's general moral character, his background, his prior criminal history, the need to protect the public, and the need to provide deterrence and retribution. *Mimes*, 2014 IL App (1st) 082747-B, ¶ 41 (collecting cases). Sentencing courts are given broad discretionary powers when determining the proper sentence to give a defendant. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Where a sentence is within the statutory range, it may not be reversed absent an abuse of discretion. *People v. McGee*, 398 Ill. App. 3d 789, 795 (2010). When mitigating evidence has been presented to the sentencing court, it is presumed that the court considered it, absent some indication other than the sentence itself. *People v. Willis*, 409 Ill. App. 3d 804, 815 (2011). Moreover, the court need not assign or recite a value to each sentencing factor. *People v. Beasley*, 314 Ill. App. 3d 840, 847 (2000). Finally, where the sentencing court examines the presentence report, there is a presumption that

it took into account the defendant's potential for rehabilitation. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010).

¶ 65 Defendant was charged with first-degree murder and attempted armed robbery. The sentencing range for first-degree murder was between 20 and 60 years (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)), and defendant received 31 years. The sentencing enhancement for a person being armed with a firearm during the commission of the offense was a mandatory 15 years. 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008). Finally, the sentencing range for attempted armed robbery, a Class 1 felony, was between 4 and 15 years in prison (720 ILCS 5/8-4(c)(2), 18-2 (West 2008)), and defendant was sentenced to the minimum 4 years. Thus, the range of defendant's aggregate sentence was between 39 and 90 years in prison, and defendant received 50 years in prison—well within and, in fact, at the lower end of the sentencing range.

¶ 66 The record indicates that the trial court considered the evidence presented at trial, the presentence investigation report, the evidence in aggravation and in mitigation, and the financial considerations of incarcerating defendant. It is true that defendant did not have a criminal conviction prior to this one, was only 20 years old when he committed the crimes and had been gainfully employed as a laborer. However, we must weigh the mitigating evidence against the aggravating evidence, such as the seriousness of defendant's offenses and the nature in which they were committed. Indeed, the seriousness of the offense is considered the most important factor in a sentencing determination. *Jackson*, 2014 IL App (1st) 123258, ¶ 53. The evidence showed that defendant helped plan the robbery of Thompson in advance and lured him to Darnell's house under the guise of buying cannabis. The court indicated that the premeditated

nature of the crime played a significant role in its decision to sentence defendant above the minimum sentence for murder. Because the trial court is presumed to have considered the mitigating evidence and defendant's rehabilitative potential when it read his presentence report, and because it properly placed emphasis on the seriousness of the offense, we cannot find that the trial court failed to consider the appropriate factors or otherwise abused its discretion in sentencing defendant to 50 years in prison.

¶ 67 For all of the reasons stated herein, defendant's convictions and sentence are affirmed.

¶ 68 Affirmed.