FIFTH DIVISION
SEPTEMBER 25, 2015

No. 1-13-2733

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 9595
	)	
CORTEZ POWELL,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The State proved defendant guilty of first degree murder under an accountability theory where the evidence established defendant knew his companions were gang members, voiced his displeasure with a common rival, accepted a weapon and gloves, and fired a shot at the crime scene.

¶ 2 Following a bench trial in 2013, defendant Cortez Powell was convicted of first degree murder based on an accountability theory (720 ILCS 5/5-2(c), 5/9-1(a)(1) (West 2008)). Defendant's 35-year prison sentence included a 15-year enhancement for being armed with a firearm during the offense (730 ILCS 5/5-8-1 (West 2008)). On appeal, defendant contends the

State did not prove he participated in the crime or that he and his companions had a shared criminal intent or a common criminal design. We affirm.

¶ 3 Defendant and Brian Ward were charged with the first degree murder of Damier Love. Defendant was tried separately from Ward. Before trial, defendant filed a motion to suppress his inculpatory statements to police, asserting his statement was involuntary because he was drunk during his interrogation and he was unable to understand his *Miranda* rights as they were read to him. The trial court denied defendant's motion based on its viewing of defendant's videotaped statements.

¶ 4 Defendant also filed a motion to quash his arrest and suppress evidence, arguing the police lacked probable cause to arrest him in the early morning hours of April 30, 2009. In support of the motion, defendant testified he was home on North Lockwood and began walking to his girlfriend's house on West Cortez. Defendant said he was wearing a brown, blue and white shirt and tan and white pants.

¶ 5 Defendant testified he was walking in the 900 block of North Lorel between Iowa and Chicago Avenues when the police "pulled up" and frisked him for weapons. He denied having any weapons or contraband and said he cooperated with the police. After being searched, defendant was arrested and taken to the police station, where he made a statement admitting to actions in connection with Love's shooting. On cross-examination, defendant said that before he was stopped by police, he heard gunshots and ducked down next to a motor vehicle. Defendant did not observe anyone else on the sidewalk.

¶ 6 Chicago police officer Jose Rojas testified he and his partner were driving east on Chicago Avenue and heard gunshots. Proceeding in that direction, the officers observed a body

on the sidewalk and observed two males running away from the body. One male wore a dark hooded shirt and blue jeans, and the other wore a white hooded shirt and blue jeans. Both of their hoods were raised over their heads.

¶ 7 Officer Rojas sent a radio message describing the subjects and the direction in which they fled. As other officers arrived, Officer Rojas observed defendant emerge from the yard of 808 North Lorel, walking away "at a fast pace." Defendant was wearing a t-shirt. The officer followed defendant on foot, shouting at him, and he detained defendant near 900 North Lorel.

¶ 8 As Officer Rojas approached defendant, defendant said, "I didn't kill that m----f----, I ran in that yard." Defendant was sweating profusely. When asked who lived at the house, defendant responded his aunt and then said his grandmother; however, defendant could not name either woman or recite the house's address. A black sweater, gloves and a weapon were recovered from the yard. The trial court denied defendant's motion to quash his arrest and suppress evidence, finding the officer's testimony to be more credible than that of defendant.

¶ 9 At trial, O.D. Jones testified he was shot in the leg at about 12:15 a.m. on April 30, 2009, near a liquor store at Lorel and Chicago Avenues. Jones was standing with Meschel Peterson when Love and two other individuals approached them and asked Peterson to purchase alcohol for them. Peterson agreed and went inside the store. As Peterson exited the store and approached Love to hand him his purchase, Love was shot in the back. Shots were fired at Peterson and Jones, and Jones ran into the store. Jones testified he heard about five additional shots. Jones identified Ward in a photo array and lineup as the person he observed shoot Love.

¶ 10 Chicago police forensic investigator Brian Smith testified that rubber latex gloves, a black hooded shirt, and a revolver containing six spent shell casings were recovered from the

backyard of 808 North Lorel. The parties stipulated that defendant's DNA matched the DNA recovered from those items.

¶ 11 Officer Rojas gave testimony consistent with the testimony offered at the hearing on the motion to suppress defendant's statement. Dr. Tanya Townsend, an assistant Cook County medical examiner, testified that Love died from multiple gunshot wounds.

¶ 12 Chicago police detective Brian Spain testified that defendant was continuously videotaped while in police custody from 2 a.m. on April 30 until he was charged at 7 p.m. on May 1. Portions of defendant's statements made during that period were admitted into evidence and published to the court. Defendant identified photographs of Ward and Latrell Perkins and said they shot at Love.

¶ 13 Defendant said he was standing on a street corner at about 12:30 a.m. when Perkins, Ward and a person defendant knew as Cutboy approached in a vehicle that Cutboy was driving. Ward told defendant to "come rotate" with them, which he understood to mean he should ride around with them. Defendant said he knew Perkins and Ward were members of the Four Corner Hustlers street gang and admitted he was previously a member of the Vice Lords but said he was not a gang member at the time of the shooting.

¶ 14 Defendant said he did not know what Perkins and Ward had planned and they had not arranged to pick him up. During their ride, Ward told defendant he had "got into it" that day with members of the Stones gang. Defendant responded that his mother had been in an argument with the Stones that day that he had diffused. Defendant said he told Ward, "Man, I gotta squash that shit."

¶ 15 Cutboy drove to the home of Perkins' grandmother, and Perkins went inside. Ward put on blue latex gloves and handed a pair of gloves to defendant. Defendant said he put the gloves on because he thought a fistfight with the Stones would occur and he wanted to protect his hands.

¶ 16 Perkins emerged from the house with two guns in his waistband and handed defendant a loaded gun. Perkins and Ward told defendant they were going to "J-down on some Stones," which defendant said he understood to mean they were going to shoot someone. Defendant said he did not know which person was being targeted.

¶ 17 Cutboy stopped the vehicle in an alley behind a liquor store. Perkins and Ward exited the vehicle with their guns drawn, which defendant said took him by surprise. Defendant said he was afraid and initially remained near the vehicle but eventually followed them, holding the gun he was given. Defendant said he observed Perkins fire at Love's back and fire several more shots while standing over Love. Defendant did not observe Ward fire a gun but said he heard different-sounding gunshots fired toward the liquor store entrance.

¶ 18 Defendant said he fired his gun in the air one time because he "didn't want to feel like no bitch." He said Perkins and Ward would have "whupped his ass" if he did not fire the gun. After firing the gun, defendant threw it into the vehicle in which they came and jumped over a fence into the yard of a house behind the liquor store. Defendant discarded his hooded sweatshirt and gloves in the yard. Perkins and Ward entered the vehicle and left.

¶ 19 The defense presented no evidence in defendant's case in chief. In finding defendant guilty of first degree murder, the trial court stated it had considered defendant's statements to police at the time of his arrest and the physical evidence presented. The court noted that the "law

of accountability is kind of tailor[]-made for this group setting," meaning a case with multiple gang members.

¶ 20 The court found defendant's statement that he was not a gang member at the time of the shooting not credible, noting the discussion in which defendant and his companions targeted rival gang members. The court noted Perkins and Ward furnished defendant with a weapon and gloves, which defendant accepted, and said those acts constituted participation "in the plan and in the commission of this act." The trial court further noted defendant proceeded with Perkins and Ward to the scene of the shooting. The court did not find credible defendant's account that after he fired the weapon, he threw the weapon into the getaway vehicle, given the evidence of the gun found in the yard. However, the court found the State did not establish defendant fired the shot that caused the victim's death or that he fired a gun during those events.

¶ 21 At sentencing, the trial court found defendant eligible for a 15-year sentence enhancement for possessing a firearm during the offense. The court sentenced defendant to the minimum term of 20 years in prison for murder, along with the 15-year sentence enhancement, for a total term of 35 years.

¶ 22 On appeal, defendant contends the State failed to prove beyond a reasonable doubt that he was legally accountable for the actions of Perkins and Ward. He argues that although he was aware of a general plan to target a rival gang of his companions, he did not participate in or intend to facilitate the shooting. The State responds the evidence established defendant aided and abetted in the commission of the crime and participated with the requisite intent.

¶ 23 When a defendant has challenged the sufficiency of the evidence on appeal, this court must determine whether, viewing the evidence in the light most favorable to the State, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). As such, a reviewing court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). Those tenets recognize the "responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. Accordingly, a criminal conviction will be reversed only where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48. That standard of review applies regardless of whether the defendant elects a bench trial or a jury trial. *Brown*, 2013 IL 114196, ¶ 48.

¶ 24 Under Illinois' accountability law, a person "is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in section 5-2 [of the Illinois Criminal Code], or both." 720 ILCS 5/5-1 (West 2008). To convict a defendant for the conduct of another, the State must prove beyond a reasonable doubt that the defendant: (1) solicited, aided, abetted, agreed or attempted to aid another person in the planning or commission of the offense; (2) participated as such before or during the commission of the offense; and (3) had the concurrent, specific intent to promote or facilitate the commission of the offense. 720 ILCS 5/5-2(c) (West 2008); *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 37.

¶ 25 As to the first and second elements, defendant contends he did not aid or abet Perkins and Ward because he did not take part in the actual shooting. He points out that when his two

companions exited the vehicle and ran toward the liquor store, he remained near the vehicle and fired his gun into the air.

¶ 26 Active participation has never been a requirement in imposing guilt under an accountability theory; rather, a defendant may aid and abet in a crime without actively participating in the overt criminal act. *People v. Batchelor*, 171 Ill. 2d 367, 376 (1996); *Jaimes*, 2014 IL App (2d) 121368, ¶ 38; *People v. McComb*, 312 Ill. App. 3d 589, 593 (2000). "Accountability may be established through a person's knowledge of and participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself." *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 59 (citing *In re W.C.*, 167 Ill. 2d 307, 338 (1995)). The touchstone of accountability is holding a defendant responsible for the act of another, and as the statute indicates, a defendant can be held accountable for a shooting by participating in the "planning or commission" of the offense. 720 ILCS 5/5-2(c) (West 2008). Moreover, the statute states that a defendant's participation can occur "before or during the commission of the offense." 720 ILCS 5/5-2(c) (West 2008). As further set out in our discussion of the third and final element of accountability, defendant participated by aiding in the planning of the offense.

¶ 27 The State may prove the defendant's intent in an accountability case by showing either: (1) a shared criminal intent between the defendant and the principal; or (2) the existence of a common criminal design to commit an unlawful act. *People v. Fernandez*, 2014 IL 115527, ¶¶ 13, 21; *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). The shared-intent theory focuses on the defendant's knowledge of the criminal intentions of his companions, whereas a common design theory is based on the defendant's own intention to promote or facilitate the commission

of a crime. *Fernandez*, 2014 IL 115527, ¶ 21 (distinguishing those two bases of accountability). Although the State may prove a defendant's intent under either one of those theories, we conclude that the evidence in the instant case in fact established *both* that defendant shared the criminal intent of his companions *and* that a common criminal design was in place.

¶ 28 Defendant asserts he was "generally aware" of a plan to shoot at Stones gang members but contends he lacked any criminal intent because he did not know a specific target of the shooting or where or when a shooting would take place. Defendant also contends he never affirmatively indicated to Perkins and Ward that he would participate in their plan.

¶ 29 First, the record in this case contains clear evidence that defendant, Perkins and Ward had a shared criminal intent. A defendant's knowledge of his companions' criminal intent and plan has been found significant when determining whether he attached himself to one or more individuals knowing they intended to commit illegal acts. *People v. Malcolm*, 2015 IL App (1st) 133406, ¶ 51; see also *Fernandez*, 2014 IL 115527, ¶ 21. According to defendant's statement, when he agreed to ride around with Perkins and Ward, he knew they were members of the Four Corner Hustlers street gang. He also knew the driver of the vehicle by a nickname of Cutboy. Although defendant disavowed any current gang affiliation, he acknowledged his previous gang membership. After Ward told defendant about a conflict that day with the Stones gang, defendant commiserated by noting his mother's argument with the Stones that day. Defendant then stated, "Man, I gotta squash that shit." That exchange reflects that defendant shared his companions' intent to initiate a response to the recent conflict with the Stones gang.

¶ 30 Secondly, the facts also support a finding of a common criminal design. Words of agreement are not required to prove a common design or purpose, and a common design may be

inferred from the circumstances surrounding the crime. *Taylor*, 164 Ill. 2d at 141; *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 52. Evidence that the defendant voluntarily attached himself to a group bent on illegal acts, with knowledge of its design, supports an inference that he shared in a common purpose. *Taylor*, 164 Ill. 2d at 141. The following facts are relevant in determining the existence of a common criminal design: proof that the defendant was present during the perpetration of the offense, the defendant's flight from the scene, a close affiliation with his companions after the commission of the crime, and a failure to report the crime. *Fernandez*, 2014 IL 115527, ¶ 17 (citing *People v. Perez*, 189 Ill. 2d 254, 267 (2000)). Where "two or more persons engage in a common criminal design or agreement, any acts in 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 (citing *W.C.*, 167 Ill. 2d at 337).

¶ 31 According to defendant's statement, he and Ward discussed a common problem with the Stones gang after he entered the vehicle. After defendant expressly stated the need to "squash" that problem, Cutboy drove to the home of Perkins' grandmother. Defendant and Ward both donned a pair of latex gloves. Even though defendant maintained he put the gloves on to protect his hands in case there was a fistfight, it is also a reasonable inference that he knew he would be handling a weapon and wanted to keep it clear of his fingerprints. It was the province of the trier of fact to weigh the credibility of defendant's statement that he needed the gloves for a possible fight. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009).

¶ 32 Although defendant contends he never expressly told Perkins and Ward he would participate in a shooting, such affirmative agreement to a plan is not required. See *Fleming*, 2014

IL App (1st) 113004, ¶ 52. After defendant put on the gloves, he accepted a loaded gun from Perkins. Ward and Perkins used a slang term to state that they would shoot someone, and defendant understood the meaning of their statement. Defendant exited the vehicle and remained near the scene when Perkins and Ward left with their weapons drawn.

¶ 33 Even though defendant asserts he "kept his distance" from his companions after they left the vehicle, he was close enough to observe Perkins firing his weapon at Love. Thus, defendant was present during the actual shooting, which is a factor supporting the existence of a common criminal design. In addition, defendant fled from the scene into a nearby yard, where rubber latex gloves, a gun and an item of clothing were found that contained DNA matching that of defendant. No evidence was presented that defendant reported the shooting; in fact, defendant ran in the opposite direction when he was approached by Officer Rojas.

¶ 34 Defendant also contends he only fired his gun because Perkins and Ward would have been upset with him and harmed him if he did not do so. That representation supports our finding of a common criminal design because defendant would only have felt obligated to fire his gun to appease them, and been afraid of their reaction if he did not fire the gun, if he had been part of a common plan.

¶ 35 Defendant asserts this case is similar to *People v. Estrada*, 243 Ill. App. 3d 177 (1993), where this court found the evidence did not establish a common criminal design. We do not find the situation in *Estrada* comparable to the facts at bar. In *Estrada*, the defendant was convicted of first-degree murder under a theory of accountability for the shooting of the victim by Juan Portillo while the defendant rode in Portillo's vehicle. *Estrada*, 243 Ill. App. 3d at 178. After both the defendant and Portillo shouted at the victim and Portillo fired the shots, the defendant

exited the vehicle, smashed the window of a nearby house with a tire iron, and returned to the vehicle. *Estrada*, 243 Ill. App. 3d at 178-79. On appeal, this court reversed the defendant's conviction based on testimony that the defendant had already exited the vehicle when Portillo fired the shots; the court found no evidence the defendant was aware that Portillo intended to shoot the victim, noting it was less likely the defendant would have exited the vehicle if he knew Portillo intended to shoot. *Estrada*, 243 Ill. App. 3d at 185. Here, in contrast, defendant, Ward and Perkins discussed a plan to shoot members of a rival gang. In addition, defendant exited the vehicle at the scene after his companions had proceeded with their guns drawn. Defendant fired a weapon he was given by his companion and fled.

¶ 36 In conclusion, the State presented evidence that defendant and his companions were current or former gang members who voiced a common dislike for a different gang. Defendant accepted a weapon and proceeded to the crime scene with his companions after Ward and Perkins said they were going to shoot members of the rival gang. Viewed in the light most favorable to the prosecution, the evidence is more than sufficient to support defendant's conviction for first degree murder under an accountability theory beyond a reasonable doubt.

¶ 37 Accordingly, the judgment of the trial court is affirmed.

¶ 38 Affirmed.