

FOURTH DIVISION  
June 30, 2015

1-14-2347

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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. 09 CR 3282
	)	
KAMEL AL-BITAR,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* The circuit court of Cook County's judgment convicting defendant is affirmed. It was the purview of the trier of fact to resolve inconsistencies in the evidence, determine the credibility of the witnesses, and decide what weight to give their testimony, and the judgment is not so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt.

¶ 2 The State indicted defendant, Kamel Al-Bitar, on multiple counts of attempt first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm,

aggravated battery, and aggravated unlawful use of a weapon based on the shooting of Mores Barcham. Following a bench trial, the circuit court of Cook County found defendant guilty and sentenced him to concurrent terms of imprisonment of eight years for aggravated battery with a firearm and three years for aggravated unlawful use of a weapon. Defendant appealed, arguing the evidence at trial was not sufficient to prove him guilty beyond a reasonable doubt and the trial court improperly convicted him under a theory of accountability for the real shooter's act based on their alleged common design. In his reply brief, defendant conceded the trial court found he was the actual shooter and did not convict him based on common design. Thus, all that remains for this court's consideration is defendant's argument the State failed to prove him guilty beyond a reasonable doubt. For the following reasons, we find the evidence at trial was sufficient to prove defendant's guilt beyond a reasonable doubt and affirm his conviction.

¶ 3

### BACKGROUND

¶ 4 Defendant does not dispute that the events that led to Mores Barcham being shot began when defendant's brother, Mahmoud Saleh, and "Assad" became involved in a disturbance at King Tut Restaurant in Chicago in the early morning hours of January 25, 2009. Eventually Mores Barcham was shot. Several witnesses testified at defendant's trial. We will briefly summarize only those portions of the testimony that are relevant to defendant's arguments on appeal.

¶ 5 Rimon Barcham owns King Tut Restaurant. Assad and Saleh were arguing with other customers in the restaurant, so Rimon and the restaurant's manager, Ehab Farag, got them to leave. Assad and Saleh came back two hours later with another man named John and

defendant. Assad approached Rimon looking for the men Assad and Saleh argued with earlier. Rimon tried to get them to leave when Saleh punched him in the face and fighting broke out. Rimon testified his brother Mores Barcham was dealing with defendant. Rimon's nephew Mikel Meshko was also present. Rimon testified that at some point Assad left and John and defendant were just standing. Later, defendant left. Rimon, Mores, and Mikel were beating Saleh. John was still just standing. Eventually John came to help Saleh up.

Defendant was not present at the time. Rimon saw defendant come back in. A couple of seconds later, Rimon heard a gunshot from the front door but did not see who was shooting. When the shot was fired, Rimon testified, John was carrying Saleh and they were almost out the door. Rimon did not see defendant fire the shot, but Assad was not there and John was helping Saleh out the door. A detective testified that Rimon identified defendant as the person who returned with two other individuals to the restaurant.

¶ 6 Ehab Nour was playing keyboards at the restaurant on the night in question. When the fight between Assad, Saleh, John, defendant and Rimon, Farag, Mikel and his vocalist, Wissam Zaia, started, he left the restaurant and was standing in the vestibule. The entrance to the restaurant has a door to the outside, then a vestibule, then double doors to the interior of the restaurant. Nour testified defendant was wearing a red and white scarf. He was certain the shooter was wearing a scarf but could not recall if anyone else was. While Nour was standing in the vestibule, he saw defendant leave and come back about a minute later with something pointy in his pocket that Nour believed was a gun. Nour testified Assad was still inside when defendant left. Nour tried to block defendant from re-entering the restaurant. Nour testified it was kind of icy as he was trying to block defendant and Nour slipped and

fell. Nour said when he slid and fell inside the vestibule defendant walked inside. Nour got himself up and looked through a window in the door to see defendant shoot Mores. Nour testified defendant was approximately 10 feet inside the restaurant when he shot. Nour testified that when he saw defendant fire one shot, Saleh, John, and Assad were still fighting inside the restaurant. They all left after the shooting. Nour did not talk to police that night but went to a police station a few days later and identified defendant in a lineup as the person who shot Mores. Nour had talked to Rimon once or twice before Nour called police.

¶ 7 At trial, Wissam Zaia testified Mores threw the first punch at Saleh. Zaia testified Assad left the restaurant and Rimon, Mores, and Mikel were kicking Saleh, who was on the floor, in the face. Zaia explained that at first, there was one-on-one fighting, but suddenly he saw Saleh on the floor with three people beating him. Zaia testified at trial that he did not see who shot Mores. What Zaia did see was someone open the interior double-doors to the restaurant with a big scarf around his face, shoot Mores, and leave. He testified that person was not defendant. Zaia did not see the gun but heard the shot and saw Mores go down. He was no more than seven or eight feet from the shooter. He could not see the color of the scarf the shooter wore because it was too dark in the restaurant. Zaia did not know where defendant was when the shooter came into the restaurant. He testified that prior to the shooting Saleh, Assad, John, and defendant had left and Mores was looking out a window to make sure they left the parking lot. At trial, Zaia testified he did not see defendant leave the restaurant and return. He testified he did not remember telling a detective that defendant was the shooter, but he also testified that Rimon told him to tell police that defendant, not Saleh, was the shooter. Zaia did not remember a photo array police showed him after the shooting

but he testified he did not tell police that Saleh shot Mores. Zaia testified he did not remember identifying defendant in a lineup and telling police defendant shot Mores. Zaia testified he felt pressured by Rimon to tell police defendant was the shooter instead of Saleh because Saleh had been beaten and would get away with the shooting. Zaia had also testified at a deposition that he saw defendant come back into the restaurant with a gun and shoot Mores. At the deposition, Zaia also testified the shooter did not use a scarf as a mask. He testified he was under the same pressure to identify defendant as the shooter at the deposition.

¶ 8 Hind Limane was dating Rimon at the time of the incident. She testified that when the fight started, Assad was holding Rimon's neck and Farag tried to remove Assad from Rimon, Saleh was fighting Mikel, and defendant was fighting Mores. Limane testified defendant was on top of Mores and her friend Tahrir grabbed defendant off of Mores. After that, she testified she saw Rimon and Mikel fighting Saleh and she saw that Assad had left. She testified the "other guy" was standing next to the door. After Tahrir pulled defendant away from Mores, defendant ran outside. At the time, Saleh was on the floor. Limane testified that a few minutes later, defendant returned with a gun. He held the gun straight up in the air, then pointed the gun in front of him and shot Mores. Limane testified Saleh was outside when defendant shot Mores because at the time defendant came back into the restaurant someone was walking Saleh outside. Limane admitted at trial that on the day of the shooting she did not tell police what she said in court. She lied to police and told them she was in the back of the restaurant with her back turned and went to look for her mother in the washroom when the arguing started. Limane told police she heard the gunshot while she was in the washroom with her mother. Limane testified she was scared and in shock from

what happened. Rimon had told her not to get involved. He did not tell Limane what he saw that night. Limane testified that after a friend talked to her she decided to tell the truth. She later explained that she was talking about what happened with friends at the courthouse when an assistant State's Attorney overheard and asked Limane if she had lied to police on the day of the shooting. Limane told the assistant State's Attorney she had lied to police and what really happened.

¶ 9 Ehab Farag testified that when the fight started after Assad, Saleh, John, and defendant returned, Farag was fighting Assad, Saleh was fighting Mikel, Rimon was fighting John, and defendant was fighting Mores. Farag testified he kicked out Assad, and then he, Rimon, Mores, and Mikel kicked out Saleh, John, and defendant. John helped Saleh to leave. According to Farag, they were all coming back into the restaurant with their backs turned when they heard gunfire and saw that Mores was hit. At trial, Farag testified he did not see who fired the gun. On the night of the shooting, Farag told a police officer that defendant was the shooter and later told a detective that he saw defendant open the door to the restaurant with his left hand then raise his right hand and fire one shot from a black semi-automatic. At trial Farag testified he said that to the detective because that is what everyone was saying at the restaurant. On the night of the shooting Farag also told a second detective that defendant shot Mores, but at trial he said that was according to what he heard from others. Rimon told him defendant shot Mores, but not that he opened the door with one hand and fired with the other--different people said those things. He testified he did not actually see who did the shooting. He testified that when the shot was fired, Farag was inside with his back turned to the direction of the shot, Assad was already out of the restaurant,

John was helping Saleh out, and Farag did not know where defendant was. A police detective testified that Farag identified defendant as the person who shot Mores.

¶ 10 Mikel Meshko testified that when he saw Saleh punch Rimon he started fighting Saleh and Rimon and John started pushing each other. Mikel testified he hit Saleh and Saleh fell. When he fell Saleh grabbed Mikel by the waist area. After Saleh was on the ground Mikel got on top of him and Rimon and Mores came to help Mikel. Someone said that was enough and Rimon, Farag, and John started helping Saleh out the door. Mikel testified that then, suddenly, the doors opened and he saw defendant shooting. When he heard the shot the fighting had stopped and Saleh was being taken out of the restaurant by Rimon, Farag, and John. Mikel was 5 to 10 feet from defendant and nothing was covering defendant's face. After defendant fired one shot he ran back out the door. Mikel testified he tried to follow defendant but someone was blocking the door from the outside. Mikel testified that neither he nor Mores had a weapon on the night at issue. Mikel testified he did not tell police that when he heard the gunshot his back was to the door and he did not see who fired the shot. The police officer Mikel spoke to testified Mikel did say his back was towards the door and he did not see who fired the gunshot. Rimon told Mikel the shooter's name but Mikel testified he saw defendant shoot. Mikel identified defendant as the person who shot Mores from a lineup. When Mikel identified defendant, he pointed at the person. He did not use defendant's name.

¶ 11 Mores testified he was fighting defendant when he slipped and fell and defendant jumped on him. Tahrir helped get defendant off Mores. When he got to his feet, Mores testified that he saw that defendant had a knife. Mores was able to get the knife from

defendant and throw it under a table. When he looked back he did not see defendant but Mores did not see him leave the restaurant. Mores joined the fight against Saleh. He did not see Assad. Saleh was on the floor. John, Farag, Rimon, and Mikel were in a group walking with Saleh to the door when Mores heard the gunshot. Saleh was still in the restaurant. Mores did not see who shot him. Mores identified defendant from a photo array as the person he was fighting. While Mores was in the hospital, he did not talk to Rimon about the incident until after police came to speak to him.

¶ 12 Saleh testified he went back to the restaurant because John was meeting him there to pick him up. Defendant was with John when Saleh and Assad parked in the parking lot. Assad was angry and ran back into the restaurant. Saleh, John, and defendant followed. Approximately 40 people remained in the restaurant. Saleh testified someone threw a punch and a brawl erupted. At some point Saleh was kicked and fell to his knees whereupon he grabbed the person in front of him to shield himself. Saleh testified he grabbed this person by the waist to try to pull the person over to cover himself. When Saleh grabbed the other person he felt a weapon with his right hand on the person's left waist. He grabbed the gun and it discharged as he and the man were falling backwards. He testified he did not point the gun at any specific person when it discharged. He testified he did not know what direction the gun was pointing. After the gun discharged Saleh was kicked in the head and the gun flew from his hand. Then John picked him up and they headed toward the door with Assad and defendant following right behind. They all left together and Saleh was placed in Assad's car. Saleh testified he told police the same story the day of the shooting. Saleh denied telling police specifically that the gun discharged in the direction of the ceiling. He identified the

scarf recovered from the scene (later found to contain his DNA in a blood stain) as his scarf he was wearing at the time of the shooting. A detective who spoke to Saleh testified that Saleh told the detective that Saleh saw a gun stuffed into the waistband of one of the men he was fighting, and shortly after seeing the gun he was knocked to the ground. He told the detective he grabbed the gun and as he pulled the gun out it went off. Saleh never told the detective he was falling backwards when the gun discharged. Saleh demonstrated to the officer that the gun was pointed up at an angle when it discharged.

¶ 13 The trial court also admitted, over objection, an audio recording of Assad. The recording is not contained in the record, but FBI Special Agent Michael Mangan testified that one of the statements in the recording was Assad saying he (Assad) told someone to shoot another person and referred to the incident occurring “last Saturday night.” Mangan testified the recording was made on January 29, 2009, four days after the shooting at issue. During argument, the State characterized the statement as “a statement about saying he told [Saleh] to shoot someone.”

¶ 14 In his posttrial motion for a new trial, defendant submitted affidavits by Wissam Zaia, John Dahbour, and George Metry. In pertinent part, Zaia averred that Nour told Zaia that Nour was outside in the parking lot and did not see the shooting. Zaia also averred that he did not see the shooting and that Rimon pressured him and others to identify defendant as the shooter. John averred he saw a gun discharge from Saleh’s hand as Saleh was falling backward during the fight. Metry averred that Nour admitted to Metry that Nour testified falsely. The trial court denied defendant’s motion for a new trial.

¶ 15 This appeal followed.

¶ 16

## ANALYSIS

¶ 17 Defendant argues the States' witnesses' testimony was "inconsistent, biased, and in some cases, thoroughly impeached by prior statements made to police," and that the trial court should have accepted Saleh's testimony he shot Mores Barcham accidentally during the fight. Defendant also argues the physical evidence does not support his conviction in part because only Saleh's DNA was on a scarf identified as belonging to the shooter. He also complains no physical evidence connects defendant to the shooting.

¶ 18 When the appeal challenges the sufficiency of the evidence to support a guilty verdict, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 54. In making this determination, we must construe all reasonable inferences from the evidence in favor of the jury's verdict. *Id.* In this case, it was for the court, as trier of fact, to determine the credibility of the witnesses and the weight to be given their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *Id.* We will not substitute our judgment on any of these matters for the judgment of the trier of fact. *Id.* Accordingly, we will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id.* We may affirm a conviction on any basis in the record. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 60.

¶ 19 We have reviewed the testimony and defendant's arguments as to why the testimony and evidence do not support the conclusion that defendant is guilty of the offenses charged.

We find the evidence is sufficient to prove defendant's guilt beyond a reasonable doubt. We first note, in response to defendant's argument to the contrary, that the absence of physical evidence to corroborate eyewitness identification is not grounds for reversal. *People v. Negron*, 297 Ill. App. 3d 519, 529 (1998). Thus, we find defendant's arguments regarding the lack of physical evidence in this case are inapposite.

¶ 20 Turning to defendant's challenge to the sufficiency of the evidence based on the testimonial evidence, defendant points to Rimon's testimony that he did not see who was shooting because he turned his back when defendant re-entered the restaurant. We reject this argument because Rimon's testimony provides circumstantial evidence of defendant's guilt. Rimon testified the fight was over and as to what all of the other antagonists were doing when defendant came back into the restaurant. Assad was not present and John was helping a beaten and battered Saleh out the door. This testimony is corroborated by multiple other witnesses. A reasonable inference from the evidence of what the other combatants were doing when the shot was fired is that defendant was the shooter. We must allow all reasonable inferences from the record in favor of the verdict whether the evidence is direct or circumstantial or whether the defendant received a bench or jury trial. *People v. Pollare*, 2015 IL App (3d) 130467, ¶ 26. Circumstantial evidence is sufficient to sustain a criminal conviction. *Id.* Rimon's testimony gives rise to a reasonable inference of defendant's guilt. Similarly, defendant notes that Farag testified he only identified defendant because people in the restaurant were saying defendant was the shooter. However, much like Rimon, Farag's testimony, other than his identification of defendant, provided circumstantial evidence of defendant's guilt. There has been no dispute that the combatants were Saleh, Assad, John, and

defendant. Farag testified that at the time of the shooting, Assad was not present, John was helping a wounded Saleh out the door, and he (Farag) did not know where defendant was. Farag corroborates relevant portions of Rimon's similar testimony and provides support for the reasonable inference that defendant was the person who shot Mores.

¶ 21 Defendant relies on Saleh's testimony admitting to accidentally discharging the gun to challenge the trial court's judgment. Defendant argues that Mikel corroborates Saleh's testimony the shooting was an accident. The only element of Saleh's testimony that Mikel corroborated was the fact that Saleh grabbed Mikel about the waist and they both ended up on the ground. In every other material way, Mikel's testimony contravenes the theory Saleh accidentally fired the shot. Mikel testified that someone told the men to stop beating Saleh, then Rimon, Farag, and John started helping Saleh out the door. It was not until Saleh was being helped out the door that the shot was fired. This directly contradicts Saleh's testimony that the gun went off as he pulled it from Mikel's waistband, either as he was falling or after he was already on the ground. Mikel's testimony is of no aid to defendant. The trial court found that the physical evidence contradicted Saleh's testimony and defendant has not challenged the bases of that finding. Specifically, the court found, in part, that the location of a recovered shell casing is inconsistent with Saleh's testimony. Defendant complains the shell casing was not tested to directly link it to this shooting, but it was for the trier of fact to draw reasonable inferences from the evidence and the court's inference is reasonable. Defendant also points out that Mores failed to identify his shooter. Mores' inability to identify defendant does not itself contradict or cast doubt on the evidence.

¶ 22 Defendant next attacks Hind Limane’s testimony on the grounds she initially lied to police and she is dating Rimon. The trial court acknowledged that Limane’s testimony was impeached but found that viewing the evidence collectively, including Limane’s, it was “very difficult to ignore that the defendant is the shooter.” “[A] reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence.

[Citation.] A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence.” *People v. Clark*, 2014 IL App (1st) 130222, ¶ 26. Defendant has not proved that crediting Limane’s trial testimony, based on her explanation for her lies to police and reluctance to testify, is against the manifest weight of the evidence. Nor is it apparent from the record that Limane testified as she did because of her relationship with Rimon. More importantly, the court found that defendant’s alternative theory of the case--that the gun discharged accidentally when Saleh grabbed it--was not supported by the physical evidence. While on the contrary, the State presented several witnesses who said they saw defendant shoot or circumstantially supported the identity of the shooter as defendant.

¶ 23 Defendant argues Nour’s testimony that defendant entered the restaurant after Nour slipped in the vestibule is “impossible and should be rejected” because Nour would have been blocking the doors making them impossible to open. Nour testified he slipped and defendant entered the restaurant. Defendant’s argument on appeal is nothing more than an assertion as to the meaning of Nour’s testimony that a rational trier of fact would not be required to accept. Defendant also argues that Nour’s testimony is undermined by affidavits submitted after the trial which cast doubt on his veracity. Defendant argues, with regard to Nour’s

allegedly discredited testimony, that the trial court did not fully consider the affidavits, did not consider giving defendant a hearing on this new evidence, and relied only on the evidence presented at trial to deny defendant's posttrial motion.

¶ 24 First, with regard to defendant's posttrial affidavits, the denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal absent an abuse of discretion. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010).

“In Illinois, newly discovered evidence warrants a new trial when: (1) it has been discovered since the trial; (2) it is of such a character that it could not have been discovered prior to the trial by the exercise of due diligence; (3) it is material to the issue and not merely cumulative; and (4) it is of such a conclusive character that it will probably change the result on retrial.” *Id.*

¶ 25 “New evidence must be of such conclusive character that it will probably change the outcome on retrial.” *People v. Blount*, 220 Ill. App. 3d 732, 744 (1991). “An accused's motion for new trial based on newly discovered evidence must be supported by an affidavit showing his lack of prior knowledge of such evidence and his diligence in obtaining it. [Citation.] In addition, the accused must present affidavits of witnesses who would testify regarding the new evidence on retrial unless the lack of such affidavits is sufficiently explained. [Citation.]” *Id.*

¶ 26 We find the trial court did not abuse its discretion. Zaia testified at defendant's trial and thus his affidavit does not constitute new evidence. Similarly, the evidence in John Dahbour's affidavit, the “John” identified by the witnesses who was involved in the fight, could have been discovered prior to the trial. Moreover, portions of Zaia and John's affidavits

are also cumulative of evidence presented at trial. Finally, Metry's affidavit as to Nour's alleged admission is not of such conclusive character that it would likely change the result on retrial. We find that the evidence other than Nour's testimony is sufficient to prove defendant's guilt beyond a reasonable doubt. Specifically, the circumstantial evidence of defendant's guilt, the physical evidence corroborating the testimony of witnesses who implicated defendant, as well as other eyewitness testimony. Our function is not to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Rather, the inquiry for this court is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* We find that a rational trier of fact could have found defendant committed the crimes charged. Rimon provided strong circumstantial evidence defendant was the shooter. Farag corroborated material elements of Rimon's testimony. That would be enough to sustain defendant's conviction. *Id.* However, a rational trier of fact could have also determined that Limane's trial testimony was credible based on her explanation for her initial falsehoods, and she provided a direct eyewitness identification of defendant as the shooter.

¶ 27 Defendant's arguments about the existing physical evidence are also unpersuasive. Defendant seeks to imply that Saleh was the shooter because there was evidence the shooter was wearing a scarf and the scarf found on the scene was Saleh's. But there is evidence defendant was also wearing a scarf. Nour testified defendant was wearing a red and white scarf and Zaia could not identify the color of the shooter's scarf. The State found three DNA profiles on the worn portion of Saleh's scarf and the stipulation entered by the parties excluded both defendant and Saleh as contributors of the DNA. A rational trier of fact could

infer there was more than one scarf or that Saleh's DNA got onto defendant's scarf as a result of the fight. In any event, the DNA evidence collected from the scarf the State tested is ambiguous and does not justify a reasonable doubt of defendant's guilt on appeal. Similarly, the evidence of a recording of Assad--allegedly proving Assad told Saleh to shoot Mores--is not sufficient to undermine the trial court's judgment. The trier of fact heard evidence of the recording and was not swayed. We will not disturb the trier of fact's determination of the weight to be afforded this evidence especially where, as the trial court noted, the evidence is incongruous with Saleh's testimony--on which defendant asks this court to rely--that the shooting was an accident.

¶ 28 The evidence, viewed in the light most favorable to the trier of fact's verdict, is such that a rational trier of fact could find defendant guilty of the offenses charged. The record does not demonstrate that the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 31 Affirmed.