SECOND DIVISION
January 26, 2016

No. 1-14-0593

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. 12 CR 14942
	)	
MARKALLE NELLEM,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to sustain defendant's conviction of one count of aggravated battery with a firearm under an accountability theory, but his conviction for aggravated discharge of a firearm must be vacated on one-act, one-crime principles.

¶ 2 Following a bench trial, defendant Markalle Nellem was found guilty of aggravated battery with a firearm and aggravated discharge of a firearm by reason of accountability, and he was sentenced to six years in prison on each count, the two sentences to run concurrently. On appeal, defendant contends he was not convicted beyond a reasonable doubt on the basis of

accountability for the offenses by the principal, Romain Oatis. Defendant also asserts that his conviction for aggravated discharge of a firearm violated the one-act, one-crime doctrine. We affirm the judgment on the aggravated battery count but vacate his conviction for aggravated discharge of a firearm.

¶ 3 Defendant and his cousin, Romain Oatis, were charged by indictment with attempted murder and numerous other counts in connection with the drive-by shooting of Darryl Armstrong. They were tried in a simultaneous but severed bench trial. Oatis has a separate appeal (No. 1-14-0422).

¶ 4 Darryl Armstrong testified that on July 24, 2012, he was driving a black van with tinted windows. At about noon he was in the vicinity of St. Louis and Fulton Avenue, driving south on St. Louis. He stopped at a stop sign at Walnut. He heard shots and ducked down inside his van. He was unable to see where the shots came from. Then he drove the van around the corner to a car wash on Lake Street where the people there told him that he was bleeding. He was taken by ambulance to Mt. Sinai Hospital where he was treated for two gunshot wounds to his back and glass fragments in his left arm. The doctors told him that one of the gunshot wounds was a through-and-through shot. Armstrong did not see who shot him.

¶ 5 Officer Michael Roman testified that on July 24, 2012, he was assigned to conduct a narcotics surveillance in his vehicle in the general vicinity of North St. Louis Avenue, West Fulton and West Walnut. He was parked on the north side of St. Louis facing south at Carroll Street, a block and a half from Walnut and St. Louis. At about noon, he observed a black four-door vehicle, later identified as a Buick driven by defendant, proceeding southbound down St. Louis to Walnut Street. His attention was drawn to the Buick by its high rate of speed. When it

reached Walnut Street, it started to turn eastbound onto Walnut, and then it stopped. At that time Roman heard gunshots coming from the direction of the Buick. He could not see its occupants or whom, if anyone, was being shot at. Roman contacted other officers with his police radio and gave a description of the Buick. He saw it continue eastbound on Walnut. It was eventually stopped in the alley at 3244 West Fulton. Roman subsequently went to that location and identified it as the same vehicle that had stopped and fired shots at North St. Louis and West Walnut.

¶ 6 Officer Camarillo testified that on July 24, 2012, he was involved in the narcotics investigation with Officer Roman. At around noon, he was a passenger in an unmarked police vehicle driven by Sergeant O'Shea. They heard shots being fired in the area. At that time their vehicle was on West Fulton, near Homan. Walnut Street ran one block north of Lake Street, Fulton Street ran one block north of Walnut, and Carroll ran one block north of Fulton. The cross-street, Homan, was one block east of St. Louis. Within seconds after the shots were fired, Officer Roman radioed to them that a black vehicle sped up to the intersection of St. Louis and Walnut and then slowed down; Roman heard loud reports; and then the vehicle sped eastbound on Walnut. At that time O'Shea and Camarillo were crossing over onto Homan going west, so they performed a U-turn and proceeded eastbound on Fulton. They saw a black vehicle, later determined to be a Buick Regal, speeding north on Homan. It was turning eastbound on Fulton at a high rate of speed, and they followed it. The officers' unmarked police vehicle did not have lights on the top or hood of the car, but it had oscillating lights and a siren going at that time. The Buick kept going east on Fulton, then northbound on Kedzie, and turned left into the north alley of Fulton. It stopped at about 3244 West Fulton in the alley because it could not go around a

large garbage truck. Camarillo's vehicle stopped behind it. There were two occupants. Defendant Markalle Nellem, the driver, and Romain Oatis, the passenger, exited the Buick and ran in opposite directions. O'Shea pursued defendant; Camarillo pursued Oatis and detained him in a stairwell behind 3242 West Carroll. Officer Roman arrived at the scene and identified the Buick as the one about which he had communicated to Camarillo. Another officer notified Camarillo that a gun had been found inside a white minivan.

¶ 7 Officer Angelo Marconi, an evidence technician, testified that at about 1:20 p.m. on July 24, he observed a white medical transport van that was parked at 3315 West Fulton. The rear glass windshield of the white minivan had been shattered. Marconi observed a firearm and broken glass between the rear storage area and the seat. He recovered the firearm, a 9-millimeter semi-automatic weapon. The weapon's magazine contained eight live rounds of ammunition.

¶ 8 Marconi went to Walnut and St. Louis where Armstrong had been shot. Marconi observed and photographed nine 9-millimeter spent casings of various brands scattered in the intersection. He then went to the rear yards of 3244 Fulton and 3242 West Carroll where he took photographs of the locations where defendant and Oatis had been captured. He also went to an alleyway at 3246 West Fulton, where he saw and photographed the black four-door Buick. Marconi also went to West Lake Street where he saw, photographed and processed Armstrong's black conversion van. Marconi found a fired bullet fragment in the rear seat, but no spent casings.

¶ 9 Detective John Salemme testified that on July 24, 2012, after learning of a shooting at St. Louis and Walnut, he and his partner went to 3313 West Fulton where a gun was found in a white Dodge Caravan that had a broken rear window. The owner of the residence at that address

showed them the gun in the Caravan and gave the detectives a videotape from video equipment on the outside of his house. The detectives viewed and later inventoried the videotape. They also went to the scene of the shooting at Walnut and St. Louis.

¶ 10 A DVD disc containing the contents of the videotape from the camera at the 3313 Fulton residence was played in court, with Salemme describing what was depicted.[1] The videotape portrayed the white Dodge Caravan parked at the curb at that address on Fulton, a two-way street. It showed the black Buick that defendant was driving, traveling east on Fulton. As the Buick passed the Caravan, the rear window of the Caravan shattered as the weapon was thrown from the Buick into the Caravan. The Buick continued down the street. It was followed by a light-colored vehicle, and then by the unmarked police car containing Camarillo and O'Shea who had initiated a chase of the Buick.

¶ 11 On July 25, 2012, Salemme went to Area North where he and Assistant State's Attorney (ASA) Heather Kent spoke with defendant. After they advised him of his *Miranda* rights, he waived his rights and gave a written statement. Salemme read the statement at trial, which contained defendant's version of the occurrences on July 24.

¶ 12 In his statement, defendant said he was 26 years old. He was not a gangbanger, but his cousin, Romain Oatis, was a Gangster Black Soul. On the previous day, July 24, defendant was driving a black Buick Regal. He picked up Oatis from St. Louis and Walnut and drove him to Walgreen's on Madison and Western to buy bandages and pain pills for a gunshot wound Oatis had sustained the previous day. During the ride, defendant noticed Oatis had a gray handgun

[1] The DVD disc is included in the record on appeal and has been viewed in preparing this decision.

with a clip in the gun. When they arrived at Walgreen's, Oatis gave the gun to defendant and entered the store. Defendant placed the gun under his driver's seat. Oatis exited Walgreen's and entered the front passenger seat of defendant's car, and defendant drove off. While stopped for a red light at Madison and California, defendant gave the handgun back to Oatis. He did not see what Oatis did with the gun.

¶ 13 Oatis asked defendant to drive him back to St. Louis and Walnut. As defendant was driving, Oatis pointed out a black van with tinted windows at Fulton and Homan. Oatis told defendant, "[T]hat's that van right there." Defendant "thought that was the black van that shot Oatis the day before or something." Defendant stated he "put two and two together." He was following behind the black van down St. Louis toward Walnut and could tell Oatis was upset. The black van drove past Walnut toward Lake Street, looking like it was just "going about its business." Defendant turned the Buick left from St. Louis onto Walnut. The next thing he remembered was that he heard gunshots. The van was then about 10 feet away. The Buick's windows were down, but he did not see if Oatis was shooting or if someone in the van was shooting at them. Oatis remained in the car. As soon as defendant heard the gunshots, he "took off driving" down Walnut to Homan. He turned left onto Homan and then right onto Fulton. He saw a car speeding behind them but did not know who was driving that car. Defendant turned left at Sacramento and drove into an alley behind Fulton where he parked the Buick "and took off running." He ran because he was scared. He was about 10 or 15 feet from the Buick when he saw a cop coming toward him, and he lay down on the ground.

¶ 14 Detective Salemme testified that defendant never said he knew a shooting was going to take place on July 24, 2012. Defendant never told Salemme that he was looking for a van or

anyone that had shot his cousin the day before. Defendant told Salemme he was aware that it was the police chasing behind him at Fulton and Sacramento, but defendant refused to include that information in his written statement.

¶ 15 The State introduced a certified copy of conviction in case number 09 CR 18703, showing defendant's previous conviction for aggravated unlawful use of a weapon inside of a vehicle. The State also introduced a certification from the Illinois State Police that defendant did not have a valid FOID card as of July 24, 2012.

¶ 16 After the State rested, defendant's motion for a directed finding was denied. Defendant rested without presenting any evidence.

¶ 17 The court found that on the day Armstrong was shot, defendant was in the presence of his cousin, Romain Oatis, a gangbanger. Defendant knew Oatis had been shot the day before and took Oatis to Walgreens to get palliatives for his wound. Defendant saw that Oatis had a gun. He held the gun while Oatis was in Walgreens and later gave it back to Oatis. While defendant was driving Oatis from Walgreens, he noticed Oatis was getting upset. He saw the reason was that Oatis observed the van containing the man responsible for the shooting the day before. The court found that defendant "knows that his cousin is armed and angry and upset and apparently looking for some kind of revenge." Defendant drove the Buick to a spot where Oatis fired shots toward the van. "When the shooting is done, when there are no more bullets to be fired, [defendant] drives away from the scene." There was a chase, the gun was thrown out the window, and defendant was taken into custody.

¶ 18 The court concluded there was insufficient evidence to find defendant guilty of count one, attempted first-degree murder, or to find him guilty of any of six counts of unlawful use of a

weapon. "As to counts three and four, aggravated battery with a firearm and aggravated discharge of a firearm, there is no way in the world that Mr. Oatis could have fired these shots but for the help of Mr. Nellem. They were in a vehicle together. The evidence appears that they were stalking together, and as soon as they saw that car, Mr. Nellem made it possible and [doable] as he possibly could to help Mr. Oatis be in a position to fire shots towards the van and anybody in the van. I find the Government has met their burden of proof as to Count 3 and 4, he is found guilty of those two counts only, discharged as to all other counts."

¶ 19 Defendant's posttrial motion was denied. The court sentenced defendant to the minimum six years in prison for the Class X offense of aggravated battery with a firearm and a concurrent term of six years on the Class 1 offense of aggravated discharge of a firearm.

¶ 20 On appeal, defendant contends that his conviction, which was based on accountability because Oatis shot Armstrong, must be reversed because defendant never intended to aid or abet Oatis in the commission of a crime. The State responds that it proved all elements constituting defendant's guilt under the theory of accountability because the evidence established defendant's active and knowing participation in the shooting and his flight from the scene without reporting the crime to the police.

¶ 21 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). In reviewing the evidence, it is not the function of this court to retry the defendant, nor will we substitute our judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). A reviewing

court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). Moreover, the trier of fact bears the responsibility for determining the reasonable inferences to be drawn from the evidence. *People v. Banks*, 260 Ill. App. 3d 464, 472 (1994). The deferential standard of review is based on the reality that the trial judge is in a superior position to determine and weigh the credibility of the witnesses, observe their demeanor, and resolve conflicts in their testimony (*People v. Richardson*, 234 Ill. 2d 233, 251 (2009)), and we may not reverse the judgment merely because we might have reached a different conclusion (*People v. Love*, 404 Ill. App. 3d 784, 787 (2010)). A conviction will be overturned only where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 22 The accountability statute, section 5-2(c) of the Criminal Code of 1961 (720 ILCS 5/5-2(c) (West 2012)), provides in pertinent part that a person is legally accountable for the crime of another when: "(c) Either 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."

¶ 23 In *People v. Fernandez*, 2014 IL 115527, ¶ 13, the supreme court reaffirmed "that the underlying intent of [section 5-2(c)] is to incorporate the principle of the common-design rule." The accused may be deemed accountable for acts performed by another pursuant to a common plan or purpose. *People v. Cooper*, 194 Ill. 2d 419, 434 (2000). The "common design" rule provides that 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. *Id.* at 434-35, citing *In re W.C.*, 167 Ill. 2d 307, 337 (1995). Proof of the common purpose or design need not be supported by words of agreement, but may be drawn from the circumstances surrounding the commission of the unlawful conduct. *Id.* at 435, citing *People v. Taylor*, 164 Ill. 2d 131, 141 (1995); *People v. Reid*, 136 Ill. 2d 27, 62 (1990). Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another. *Id.*, citing *W.C.*, 167 Ill. 2d at 338; *Taylor*, 164 Ill. 2d at 141. A conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts of the group. *Id.*, citing *W.C.*, 167 Ill. 2d at 338. A trier of fact may base his finding of accountability on proof that the defendant (1) was present during the perpetration of the crime, (2) maintained a close affiliation with his companion after the commission of the crime, (3) failed to report the crime, and (4) fled the scene of the crime. *Taylor*, 164 Ill. 2d at 140-41. Arguably, all four factors are present in the instant case. Defendant refutes this, asserting that his arrest shortly after the crime precluded any opportunity for him to report the crime. However, although undisputed at trial and on appeal that Oatis shot Armstrong, defendant failed to report that fact to detectives and the ASA, claiming that he did not know whether the gunshots came from his car or from the black van.

¶ 24 Defendant contends he cannot be held accountable for the attack on Armstrong because the State did not prove beyond a reasonable doubt that he aided and abetted Oatis in the latter's plan of retaliation against the individual who had shot him the previous day. Defendant suggests that *People v. Phillips*, 2012 IL App (1st) 101923, is instructive. In response to defendant's reliance on *Phillips*, the State observes that the supreme court in *Fernandez* overruled *Phillips* by

holding that, "where one aids another in the planning *or commission* of an offense, he is legally accountable for the conduct of the person he aids." (Emphasis added.) *Fernandez*, 2014 IL 115527, ¶ 21. We find that defendant's reliance on *Phillips* is unavailing in light of *Fernandez* and because the facts in the instant case indicate that even before the shooting, defendant and Oatis pursued Armstrong's black van with the common purpose of settling the score with the black van's driver.

¶ 25 Defendant puts an innocent spin on the events surrounding the shooting and argues that he lacked knowledge of Oatis's purpose, raising a reasonable doubt that he intended to aid and abet Oatis. Defendant summarizes his actions as follows: he drove Oatis to Walgreens, he drove Oatis back to where he had picked him up at Walnut and St. Louis, he stopped the car at that intersection merely to let Oatis out, "and got swept up in the consequences of his cousin's bad decisions." However, the same trial evidence also supports the alternative inference that defendant aided Oatis in stalking Armstrong's black van, knowing before the shooting that Oatis intended to retaliate for having been shot the previous day, and assisted Oatis in carrying out that intent. "The decision as to which of competing inferences to draw from the evidence is the responsibility of the trier of fact." *People v. Green*, 339 Ill. App. 3d 443, 451-52 (2003). Accord, *People v. Petermon*, 2014 IL App (1st) 113536, ¶¶ 43-44.

¶ 26 We conclude that the trial evidence supported the inference drawn by the trial judge, that defendant and Oatis acted in concert to stalk the black van and shoot the driver. Defendant knew that Oatis was a member of the Gangster Black Soul street gang. Defendant was aware that Oatis had been shot the previous day. The entire time that defendant drove Oatis, he was aware of the presence of the gun in the car. In fact, defendant had handled the gun when Oatis was in the

Walgreens store. Defendant was also aware as to whom they were looking for with respect to the shooting of Oatis. Defendant admitted in his statement that when Oatis told him, "[T]hat's that van right there," he knew the van he was following was the same black van with tinted windows involved in the shooting of Oatis a day earlier. Defendant "put two and two together," he was aware that Oatis was upset, and he followed the van all the way to Walnut and St. Louis where the shooting occurred. Coming from the Walgreens at Madison and Western, south of Walnut, defendant could have driven directly to St. Louis and Walnut by way of Lake Street but instead he drove north to Fulton where they spotted the black van. When defendant reached St. Louis and continued to follow the van south toward Walnut, Officer Roman saw defendant driving his Buick at a high rate of speed toward Walnut. From this the trial court reasonably concluded that defendant and Oatis were stalking the black van.

¶ 27 When the black van reached the intersection of Walnut and St. Louis, it stopped at the stop sign and then proceeded to cross Walnut southbound on St. Louis toward Lake Street. Defendant, whose Buick was immediately behind the van, turned left in the same intersection and then came to a stop. The position of the Buick at that point would have given Oatis an angle to fire at the driver's side of the black van. According to Roman, the Buick stopped just before the shots were fired. At that moment, Oatis fired at least nine rounds at the black van which was about 10 feet away. Defendant's claim that he could not see who was shooting is incredible, given that he could see his passenger side window was open and that Oatis was between him and that window. Immediately after Oatis finished firing his semi-automatic weapon, defendant started up the Buick again and fled east on Walnut at a high rate of speed. He drove to Homan, turned north to Fulton, and then east in the 3300 block of Fulton where Oatis threw his gun

through the rear window of the Dodge Caravan parked at 3313 West Fulton. Defendant continued east on Fulton, then north and west in the alley running behind the north side of Fulton. When defendant's progress in the alley was blocked by a garbage truck, defendant stopped and both he and Oatis fled from the Buick.

¶ 28 The reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *People v. Stanciel*, 153 Ill. 2d 218, 235 (1992). Here, the evidence justified the trial court drawing inferences resulting in the conclusion that defendant assisted Oatis in pursuing the black van for several blocks with nefarious intent, knowingly provided the opportunity, the proximity, and the ability for Oatis to get a clear shot at the black van, and fled from the scene with the guilty knowledge that he had assisted Oatis in the shooting. The trial court, as the trier of fact, was not required to accept any possible explanation compatible with defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 230 (2009). Rather, our standard of review requires that we "must allow all reasonable inferences from the record in favor of the prosecution." *Beauchamp*, 241 Ill. 2d at 8 (quoting *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)). Viewing the evidence in the light most favorable to the State, as we must, we believe that a rational trier of fact could find defendant guilty by reason of accountability.

¶ 29 Defendant next contends, and the State properly agrees, that his conviction and sentence for both aggravated battery with a firearm and aggravated discharge of a firearm was error, as it violated the one-act, one-crime doctrine. We concur. Multiple convictions are barred where more than one offense is carved from the same physical act. *People v. Artis*, 232 Ill. 2d 156, 161 (2009); *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 46. Defendant's claim, that his

conviction on both counts was error, raises a question of law that we review *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 47. For purposes of the one-act, one-crime rule, an "act" is defined as any overt or outward manifestation that will support a separate conviction. *Id.*; *People v. Crespo*, 203 Ill. 2d 335, 342 (2001). Here, defendant was convicted on an accountability theory for Oatis's act of shooting Darryl Armstrong with a firearm, and that act formed the basis for both the counts on which defendant was convicted. Under the one-act, one-crime rule, only the more serious offense--here, aggravated battery with a firearm--should have survived. *People v. Fuller*, 205 Ill. 2d 308, 346-47 (2002). Thus, the conviction for aggravated discharge of a weapon must be vacated. *People v. Cortes*, 181 Ill. 2d 249, 281-82 (1998).

¶ 30 For the foregoing reasons, we affirm defendant's conviction for aggravated battery with a firearm and vacate his conviction for aggravated discharge of a weapon,

¶ 31 Affirmed in part and vacated in part.