2016 IL App (2d) 150086-U
No. 2-15-0086
Order filed February 19, 2016



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ARTUR L. PAWLINA,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of Du Page County.<br><br><br><br>No. 13-CF-243<br><br>Honorable Blanche Hill Fawell, Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The State proved defendant guilty (by accountability) of home invasion, as defendant suggested the crime, participated in its planning, and was to receive part of the proceeds; (2) defendant's statutory-minimum sentence of 21 years' imprisonment for home invasion (while armed with a firearm) did not violate the proportionate-penalties clause; home invasion while armed is obviously a serious crime, and, although defendant's sentence was higher than those of the principal offenders, this was merely because they were convicted of a less serious form of home invasion.

¶ 2 Following a bench trial, defendant, Artur L. Pawlina, was convicted of home invasion (720 ILCS 5/12-11(a)(3) (West 2010)) and sentenced to 21 years' imprisonment. He appeals, contending that (1) he was not proved guilty beyond a reasonable doubt under an accountability

theory; and (2) the sentence violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). We affirm.

¶ 3 On February 2, 2013, Hassan Khan was at home, working on his computer. Around midnight, the doorbell rang. When he opened the door, someone swung an object at him, which he blocked with his arm. Three men then pushed their way into the house. He fought with the assailants, striking one with a ceramic pitcher.

¶ 4 Detective David Chiesa was dispatched to Khan's home to investigate the incident. He arrived around 2 a.m. to find the kitchen in "disarray." He saw a large amount of blood, the barrel of a shotgun, and various knives scattered around the area. Khan told him that he was working at his computer when he heard his dog barking and the doorbell ringing. Khan asked who was at the door. He did not recognize the name, so he opened the door, and he was immediately struck with an object. Three people, two of them wearing bandannas, pushed their way into the home. During the ensuing struggle, Khan injured one of the assailants.

¶ 5 Chiesa located Andrew Cotton, who had been admitted to Good Samaritan Hospital with severe facial injuries. Cotton's shoes contained shards of glass that came from the object with which Khan struck one of the assailants. Cotton told the detective about his roommate, Ryan Berry, whom Chiesa suspected of being involved in the incident. A search of their residence uncovered various items related to the break-in.

¶ 6 Police interviewed Berry, who revealed that Anthony Nutoni was the third assailant. Based on his interviews with Cotton, Berry, and Nutoni, Chiesa concluded that defendant was also involved in the incident.

¶ 7 Chiesa then interviewed defendant. The interview was recorded, and the recording was played at trial. Defendant acknowledged that he told Berry that Khan's son, Ricardo Sanchez,

had a large amount of marijuana in his home. He initially denied that he knew that Berry and the others planned to rob Sanchez. He later admitted that he knew that Berry and his cohorts planned to commit a home invasion. Defendant acknowledged that he was to receive 10 % of the proceeds in exchange for providing the information.

¶ 8 Defendant related that he and another friend were watching a football game at Sanchez's house when Sanchez brought out some marijuana for them to smoke. Sanchez said that he had a large amount of it and showed them a black duffel bag. Sanchez asked if defendant knew anyone who wanted to buy such an amount. Coincidentally, at around the same time, Berry, who defendant knew sold marijuana, was repeatedly asking defendant if he knew where he could get a large amount of marijuana. Defendant told him that Sanchez had some at his home.

¶ 9 Defendant later met Berry and Cotton at a bar called Gulliver's. He rode with them to show them Sanchez's house. He pointed out the house, told them where the marijuana was located inside, and showed them what entrance to use. However, he denied being at another meeting at which the crime was planned.

¶ 10 Cotton testified that he knew defendant through Berry. In late January, he helped pull defendant's car out of the snow. Berry was also there, and he asked Cotton to talk to him and defendant. Defendant told them that he had a friend named Ricardo who had approximately 20 pounds of marijuana in a black bag in the basement. Defendant said that the family would be gone over the weekend. At one point, defendant took Cotton and Berry to show them where Sanchez's house was and which door to use. On February 2, defendant attended a party hosted by Berry and Cotton. There, Berry and Cotton recruited Nutoni to participate in the home invasion.

¶ 11 After hearing this evidence, the court found defendant guilty. The court noted that the incident would not have happened had not defendant provided the information to Berry. Particularly damaging in the court's view was the evidence that defendant was to share in the proceeds of the crime.

¶ 12 The minimum sentence for which defendant was eligible was 21 years in prison. See 720 ILCS 5/12-11(a)(3), (c) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). The trial court imposed that sentence, and defendant timely appeals.

¶ 13 Defendant first contends that the State did not prove beyond a reasonable doubt that he was accountable for the actions of Berry, Cotton, and Nutoni. Defendant argues that he did not personally participate in the home invasion, did not attend the meeting where it was planned, and did not provide any guns or masks for use in the crime. The State responds that defendant was the "mastermind" of the crime, noting that it would not have occurred had not defendant informed Berry about the drugs in Sanchez's home and showed him where Sanchez lived.

¶ 14 Where a defendant challenges on appeal the sufficiency of the evidence, we ask whether, after viewing all the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). We may not substitute our judgment for that of the trier of fact on questions involving the weight of the evidence, the credibility of the witnesses, or the resolution of conflicting testimony. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 15 A person is legally accountable for the conduct of another when, either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he or she solicits, aids, abets, or agrees or attempts to aid such other person in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2010). An accused may be deemed

accountable for acts performed by another pursuant to a common plan or purpose. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995); *People v. Furby,* 138 Ill. 2d 434, 456 (1990). The "common design" rule provides that, where two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that design or agreement 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. *In re W.C.*, 167 Ill. 2d 307, 337 (1995). Proof of the common design need not be supported by words of agreement but may be drawn from the circumstances surrounding the commission of the act. *Taylor*, 164 Ill. 2d at 141. " '[A]ctive participation has never been a requirement for the imposition of criminal liability upon the theory of accountability.' " *People v. Reid*, 136 Ill. 2d 27, 61 (1990) (quoting *People v. Ruiz*, 94 Ill. 2d 245, 254 (1982)).

¶ 16 Here, defendant told Berry that Sanchez had a large quantity of marijuana at his house. He participated in at least one meeting where the crime was discussed. He drove Berry and Cotton to Sanchez's house, showed them where to park, and told them what door to use to get in. He told them where the marijuana was located within the house. Moreover, critically for the trial court, he was to receive 10% of the proceeds. Receipt of proceeds from the actual perpetrator is a factor raising an inference that the defendant aided in the commission of a crime. *People v. Johnson*, 220 Ill. App. 3d 550, 555 (1991); *People v. Clayborn*, 194 Ill. App. 3d 1079, 1083 (1990). This evidence was sufficient to prove that defendant shared a common design with the others to invade Sanchez's home and steal the marijuana.

¶ 17 Citing *People v. Tillman*, 130 Ill. App. 2d 743, 750-51 (1971), defendant argues that evidence that a defendant received proceeds from the crime is insufficient to establish guilt by accountability. However, *Tillman* actually held that "the evidence does not establish beyond a

reasonable doubt that defendants shared in the proceeds of the crime." *Id*. at 751. *Tillman* does not hold that evidence that a defendant received proceeds is never sufficient to prove guilt by accountability. Defendant further contends that the evidence that he was to receive proceeds was nonspecific and "perfunctory." While the evidence was far from overwhelming, it was not so lacking that the trial court could not credit it.

¶ 18 Defendant next contends that his 21-year sentence violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). Defendant points out that Berry, Cotton, and Nutoni, who actually committed the crime, all received sentences of between 8 and 16 years while defendant, whose participation was much more limited, received a 21-year sentence due to his prior conviction. As noted, this was the statutory minimum.[1]

¶ 19 Article I, section 11 provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A proportionality challenge contends that the penalty in question was not determined according to the seriousness of the offense. A statute is presumed constitutional, and a party challenging the statute bears the burden of demonstrating its invalidity. *People v. Huddleston*, 212 Ill. 2d 107, 128-29 (2004). As relevant here, a statute violates the proportionate-penalties clause if the penalty " 'is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.' " *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005) (quoting *People v. Moss*, 206 Ill. 2d 503, 522 (2003)).

[1] According to the Department of Corrections' website, Berry, Cotton, and Nutoni were convicted of a different offense of home invasion, which carried a lower minimum. See 720 ILCS 5/12-11(a)(2), (c) (West 2010).

¶ 20 To decide if a penalty shocks the moral sense of the community, we must consider objective evidence as well as the community's changing standard of moral decency. *People v. Hernandez*, 382 Ill. App. 3d 726, 727-28 (2008). To determine the seriousness of a particular offense for purposes of the proportionate-penalties clause, we consider the degree of harm, the frequency of the crime, and the risk of bodily injury associated with it. *Huddleston*, 212 Ill. 2d at 129. The constitutionality of a statute is a matter of law, which we review *de novo*. *People v. Cornelius*, 213 Ill. 2d 178, 188 (2004).

¶ 21 We simply cannot say that defendant's 21-year sentence shocks the moral conscience of the community. Defendant was convicted of home invasion while armed with a firearm. Defendant's sentence properly reflects the obvious seriousness of the offense. As his codefendants were convicted of a less serious offense, their lesser sentences are irrelevant.

¶ 22 *People v. Miller*, 202 Ill. 2d 328 (2002), on which defendant relies, is clearly distinguishable. There, the 15-year-old defendant agreed to serve as a lookout while his codefendants shot and killed rival gang members. The defendant was convicted of murder on an accountability theory and, because two people had been killed, he was subject to a mandatory sentence of life imprisonment. However, the trial court declined to impose that sentence and, instead, sentenced the defendant to 50 years in prison.

¶ 23 The supreme court affirmed. The court noted that the youthful defendant had less than a minute in which to decide to participate in the offense and that his role was minimal. The court held that, under the circumstances, the imposition of a mandatory life sentence "distort[ed] the factual realities" of the case and was disproportionate to the degree of the defendant's personal culpability. *Id.* at 341.

¶ 24 Later courts have refused to extend *Miller*, noting that its facts " 'are unique and its holding limited to a situation where the convergence of the automatic transfer statute, the accountability statute, and the multiple-murder sentencing statute resulted in mandatory life imprisonment without the possibility of parole for a 15-year-old lookout because the court was precluded from considering the actual facts of the case during sentencing.' " *People v. Brown*, 2012 IL App (1st) 091940, ¶ 72 (quoting *People v. Salas*, 2011 IL App (1st) 091880, ¶ 74); see also *Hernandez*, 382 Ill. App. 3d at 729.

¶ 25 Clearly, none of the "unique" facts of *Miller* is present here. Defendant was 25 years old and had several days to contemplate his conduct. He was more intimately involved in the crime than was the defendant in *Miller*. Moreover, defendant was not facing mandatory life imprisonment, but rather a term of years, a term made lengthier by defendant's particular offense. Thus, *Miller* is not applicable.

¶ 26 The judgment of the circuit court of Du Page County is affirmed.

¶ 27 Affirmed.