SIXTH DIVISION
December 30, 2011

2011 IL App (1st) 091670-U
No. 1-09-1670

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. 06 CR 9243
	)	
TAMARA WOODS,	)	Honorable
	)	Marcus R. Salone,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant was properly found guilty of first degree murder based on a theory of accountability by the trial court. The evidence demonstrates that defendant knowingly, intelligently, and voluntarily waived her *Miranda* rights and that defendant's confession was voluntary. We affirm the trial court.

¶ 2 After a bench trial, defendant Tamara Woods was found guilty of first degree murder and sentenced to twenty years in the Illinois Department of Corrections.

¶ 3 On appeal, defendant contends that: (1) the State failed to prove her guilty of murder beyond a reasonable doubt under a theory of accountability because the only person to whom she spoke about the crime - David Hanes - was never identified or charged and the shooter was never identified nor was defendant linked to the actual shooter; (2) defendant did not voluntarily, knowingly, and intelligently waive her *Miranda* rights; and (3) the trial court erred in ruling that defendant's confession was voluntary.

¶ 4 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 5 I. BACKGROUND

¶ 6 On March 10, 2006, at around 9:45 p.m., the deceased, McKinley Walker, was shot once in the back of his head and killed on the street outside of 5319 West Ohio Street in Chicago. Walker had recently been released from prison after his conviction in the 1980's for the murder of Michael Spencer, a member of the New Breeds street gang. The police investigation revealed that the victim had been at the home of defendant, located at 5335 West Ohio, shortly before he was murdered. Defendant spoke with the police briefly on March 10, 2006, and was allowed to go home. She came back to the station on March 14, 2006, and thereafter gave recorded statements inculpating herself in the murder, and was charged accordingly.

¶ 7 Defendant filed a motion to suppress statements. The following evidence, in summary, was elicited by the State.

¶ 8 On March 13, 2006, police left a message that they wanted to talk to defendant again. She called them on March 14, 2006, around 2:45 a.m. and agreed to talk to them, but requested a ride to the station. The police agreed to pick her up and she and Detectives Adams and Landando arrived back at the station at approximately 4:20 a.m., at which time she was placed in

an unlocked homicide office and was not cuffed.

¶ 9 After getting coffee, Detectives Adams, Landando, and Balodimas began talking to defendant around 4:45 a.m. They confronted defendant with information that they had received from Larissa Battles, the sister of the deceased, that defendant knew members of the New Breeds street gang that were friends of Michael Spencer and that was the possible motive for the Walker killing. This conversation lasted for about an hour. After this conversation, the detectives left the room and attempted to find more information to connect defendant to the New Breeds street gang. Defendant was left in the unlocked office, was taken for bathroom breaks, and was given something to drink. During that time, the detectives did not talk to her regarding the homicide.

¶ 10 A little before 7:30 a.m., defendant began crying and making inculpating statements in the presence of all three detectives. Detective Landando stopped her and advised defendant of her *Miranda* warnings. She immediately was taken into an interview room and the electronic recording of interrogation (ERI) equipment was activated. This was around 7:30 a.m. Both Detective Adams and Detective Landando testified defendant never invoked her *Miranda* rights, never asked to use a phone to call an attorney, and that no one ever hit, threatened, or abused defendant or made offers of leniency to her.

¶ 11 Detective Adams was not sure if he ever entered the ERI room. Detective Landando did enter and he testified that the ERI button was activated immediately at about 7:30 a.m. and it ran continuously. The State played a clip of the recording showing Detective Landando administering defendant's *Miranda* rights and defendant's responses. Detective Landando denied ever: (1) writing down 20-120 on a piece of paper and showing it to defendant; (2) telling defendant to help them and she will probably get 5 years; (3) threatening defendant with losing

her child; (4) calling defendant a lying b***; or (5) ever shaking his finger in defendant's face and hitting her lip.

¶ 12 Defendant testified that in March 2006 she was 28 years old and a high school graduate. On March 10, 2006, after Walker was shot, she went to the hospital and spoke with the police briefly. She then went to the police station where police asked her a couple of questions for 20 to 30 minutes, after which time she left.

¶ 13 Two or three days later, a friend of defendant called and told her that the victim's family wanted her to go to the police station to pick up the belongings of the deceased and to review pictures to see if she could help the police. Defendant called the police and asked them to pick her up because she did not have a ride. Defendant first said the police arrived around 2:45a.m. Defendant later said the police picked her up between 3 a.m. and 4 a.m. and transported her to the station. Defendant had been drinking and smoking. Police officers put her in a room and they did not talk to her right away. When the police showed her photographs, defendant identified photos of some people she knew from the neighborhood and some she grew up with. The police confronted her with what the victim's sister had said and defendant expressed shock.

¶ 14 Defendant testified that the police took her to the bathroom a couple of times and that when she returned from the bathroom one of those times she was crying because police showed her an envelope with 20 to 120 written on it and told her that was how much time she was going to get. According to defendant, they also threatened to charge her with accountability, conspiracy, and first degree murder, and said that she was going to be gone for a long time without being able to see her son. The police, however, said that if defendant cooperated she would get five years because she did not have a background.

¶ 15 Defendant identified "Officer Mike," later identified as Detective Landando, as the officer who called her a lying son of a b***, pointed his finger at her, and hit her in the mouth with his finger causing injury. She identified a photo depicting the injury to her lip which she said was taken by her lawyer three days later. The court asked her to point to where she was injured. The trial court indicated that defendant pointed to the left side of her lower lip.

¶ 16 Defendant testified that, although the police read her the *Miranda* rights, they did so after "all the coercion and intimidation." Defendant said she really did not understand the *Miranda* warnings because she had never heard them before. When she looked at the walls in the room and read the rights that were posted, she finally realized the police had violated them. She then accused Detective Landando of violating her rights. According to defendant, Detective Landando said he did not want to hear it, asked her a couple more questions about David Hanes, and then walked out. She said Detective Landando also brought in a sergeant who told her he did not believe anything she was saying. Detective Landando kept calling her a liar. When asked why she gave a statement, defendant said "basically because I was coerced and intimidated." She then accused Detective Landando of coaching her, adding that "because he basically, you know what I'm saying, scared me into saying everything that I said ***."

¶ 17 On cross-examination, defendant testified that everything she said on the two-day video was a result of coaching by Detective Landando. When the State asked her if the officer gave her a script and also questioned how she could remember two days worth of statements, defendant then said "basically Officer Mike didn't tell me exactly what to say ***." She then admitted Detective Landando did not give her a script, but told her that she would get five years if she went "along with what was supposed to been happening." Defendant again said she gave a

statement because she was "coerced and intimidated." Defendant, however, admitted that the statement she gave on the video was her statement and when questioned again about whether Detective Landando told her what to say she said "no, he did not actually tell me what to say ***." Defendant admitted that some things in the statement were her words. Defendant testified that she told the police she had sex with the victim prior to him leaving her house and that she called David Hanes right after the victim left her house. She said those statements were true. She also admitted telling the police on the video that she knew David Hanes and his friends wanted to kill the victim and that the police never told her to say that. She again admitted the police read her the *Miranda* warnings, but claimed she did not understand them because she was under the influence of alcohol and drugs. Defendant testified that during prior arrests, one in 2000 and one in 2004, police "probably read my rights." Additionally, defendant admitted she understood what it meant to have the right to remain silent. The trial court then made a record that when asked how many times the police officer hit her and to demonstrate the hit, defendant indicated that she was hit by the knuckles of the entire left hand. Defendant also said that her lip bled, that she did not ask for anything to wipe the blood, that she had water, and that she licked the blood off her lip.

¶ 18 On redirect examination, defendant said she told the police that she had been with the victim, that they had sex, that the victim left her apartment, and that he was shot and all of that was true. She said the part of the statement that was made up was that David Hanes, a.k.a. Black, did the shooting and that she knew about it. She accused Detective Landando of wanting her to say David Hanes was the one who committed the crime and that she had something to do with it. According to defendant, she made up those statements due to coercion and intimidation.

¶ 19 After defendant completed her testimony, the parties proceeded by way of stipulation that the lockup keeper made a visual inspection of defendant on March 16, 2006, at 8:29 a.m., and spoke with her. He noted that she was not in obvious pain nor was there an injury to her person. The lockup keeper also noted in his report that defendant was not under the influence of alcohol or drugs.

¶ 20 On rebuttal, Detective Landando denied pointing his finger at defendant, striking defendant on her lip, or causing any injury to her. He also denied ever calling defendant's friend to ask defendant to come to the station to pick up the victim's belongings or that the victim's belongings were at the station. He testified further that defendant did not appear to be under the influence of any drugs or alcohol when he picked her up where there was no odor of alcohol on her breath and she was coherent and lucid. Further, Detective Landando said that he never told defendant to say David Hanes committed this offense and, in fact, on the video she never said David Hanes was the shooter. Detective Landando also denied promising a lighter sentence or that she had to say she was a participant. Finally, the detective said that once defendant realized she was being recorded, when she was alone in the ERI room, she spoke to the camera saying a whole bunch of things. The parties further stipulated that a photo of defendant taken when she was in the lockup on March 16, 2006, at 8:38 p.m., truly and accurately depicted defendant.

¶ 21 After hearing arguments, the trial court denied defendant's motion to suppress statements. In so doing, the trial court found that defendant's willpower was not overborne in an effort to extract her statement. The court concluded that there was no evidence of psychological, physical, or emotional coercion, distress, or intimidation.

¶ 22 Immediately thereafter the parties answered ready for trial. The defendant waived a jury trial and both sides made opening statements. The parties stipulated that the trial court could consider all the evidence presented by both sides on the motion to suppress statements as evidence in the bench trial.

¶ 23 The State recalled Detective Landando, who testified that he turned on the ERI device on March 14, 2006, at approximately 7:36 a.m. The first conversation lasted about 30 minutes. He also spoke with defendant at 1 p.m. that same date and the conversation lasted 30 to 40 minutes. The recordings were true and accurate recordings of the conversations he had with defendant. The recorded conversations were then published to the court without objection.

¶ 24 Detective Landando testified, that after defendant identified David Hanes, the police located and arrested him. Hanes stood in a lineup where he was not identified by eyewitnesses. A white hat that supposedly was worn by the shooter was processed for DNA. The DNA on the hat did not match Hanes' DNA. Hanes was released without charging. Another suspect, Kidonne Smith, was arrested one or two months later. According to Detective Landando, Smith admitted the white hat was his. The DNA on the hat was a partial match to Smith and two other unidentified males. No one identified Smith in a lineup and he was released.

¶ 25 Detective Adams testified that he responded to 5319 West Ohio at 10 p.m. on March 10, 2006. He observed a pool of blood, a black knit hat with apparent brain matter inside the hat, one shell casing from a 9 millimeter handgun, and a white hat further east from the 5319 address. At the time, the victim was inside an ambulance. Detective Adams approximated that 5335 West Ohio was a half block from 5319 West Ohio. Eyewitnesses described the shooter as a black male between 17 to 20 years old, who ran out of the white hat. Detective Adams' police

report described the offender as 5 feet 6 inches tall, 160 pounds, and wearing a long white shirt with a white baseball cap.

¶ 26 The parties stipulated that the cause of Walker's death was a gunshot wound to the back of the right side of the head with no evidence of close-range firing. They also stipulated that the recovered cartridge case had no latent prints suitable for comparison and that the agreed upon portions of the DVD recordings, that were viewed by the court, be marked as Exhibit #13 and that they be admitted into evidence.

¶ 27 Both sides rested and the case was given a date for closing arguments. After closing arguments were completed, the court found defendant guilty of first degree murder on a theory of accountability. Several months later, the court conducted a hearing on defendant's motion for new trial based on alleged error and newly discovered evidence. The court denied the motion. After hearing arguments in aggravation and mitigation, the court sentenced defendant to 20 years in the Illinois Department of Corrections. This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 A. Sufficiency of the Evidence

¶ 30 The Due Process Clause of the United States Constitution imposes on the government the requirement to establish guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970); U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2.

¶ 31 The parties dispute the applicable standard of review. Defendant argues that because the pertinent facts in this case are not in dispute, the issue concerns whether these uncontested facts establish the elements of murder under an accountability theory and that the interpretation of Illinois' accountability statute is a question of law subject to *de novo* review. Defendant cites

People v. Maggette, 195 Ill. 2d 336, 747 N.E.2d 339 (2001), and *People v. Chirchirillo*, 393 Ill. App. 3d 916, 913 N.E.2d 635 (2009), in support of her contention. In contrast, the State submits that we should consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational fact finder could have found defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Pollock*, 202 Ill. 2d 189, 217, 780 N.E.2d 669 (2002).

¶ 32 We agree with the State. In *Maggette*, the court actually applied the rational trier of fact standard (195 Ill. 2d at 353) and *Chirchirillo* is inapplicable. In *Chirchirillo*, the defendant was charged with unlawful use of a weapon by a felon under an accountability theory. The evidence demonstrated that the defendant was a convicted felon, but no evidence was introduced that the co-defendant principal was a convicted felon. Because the relevant facts were uncontested and the issue concerned whether those uncontested facts established the *elements* of unlawful possession of a weapon by a felon under an accountability theory, *de novo* review was appropriate. *Chirchirillo*, 393 Ill. App. 3d at 921. Here, defendant is raising a question of fact, that is, whether she aided, agreed, or attempted to aid another person in the planning or commission of first degree murder. This is a question of fact and the *Jackson* standard applies. *People v. Williams*, 193 Ill. 2d 306, 338, 739 N.E.2d 455 (2000) (applying the *Jackson* standard of review to the issue of whether the evidence proved the defendant guilty of first degree murder under an accountability theory).

¶ 33 A person commits the offense of first degree murder if "in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual *** or knows that such acts will cause death to the individual ***." 720 ILCS 5/9-1(a)(1) (West 2006). Under

Illinois law, 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 that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2 c) (West 2006).

¶ 34 To demonstrate that defendant possessed the requisite intent to promote or facilitate the crime, the State must present evidence that establishes beyond a reasonable doubt that: (1) the defendant shared the criminal intent of the principal; or (2) there was a common criminal design. *Williams*, 193 Ill. 2d at 338. "A defendant's intent may be inferred from the nature of her actions and the circumstances accompanying the criminal conduct." *Id.* Under the common-design rule, if " 'two or more persons 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.' " *Id.* at 338-39 (quoting *In re W.C.*, 167 Ill. 2d 307, 337, 657 N.E.2d 908 (1995)). "Words of agreement are not needed to establish a common design; rather, like intent, a common design may be inferred from the circumstances surrounding the commission of the crime." *Id.* "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." *In re W.C.*, 167 Ill. 2d at 338. Moreover, "[a]ccountability 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." *Id.*

¶ 35 Defendant argues that the State failed to prove her guilty beyond a reasonable doubt of first degree murder under a theory of accountability. Defendant posits that because the actual shooter was never identified and because the only person defendant allegedly spoke to about the crime, David Hanes, was *not* the shooter, the State failed to prove defendant aided, abetted, agreed, or attempted to aid the person who actually committed the crime. Defendant's argument fails because even though the identity of the principal is unknown, a defendant may still be found guilty under an accountability theory. *People v. Cooper*, 194 Ill. 2d 419, 435, 743 N.E.2d 32 (2000). In fact, Illinois statutory law provides that a person can be legally accountable for the conduct of another person which is an element of an offense even if "the other person claimed to have committed the offense has not been prosecuted or convicted." 720 ILCS 5/5-3 (West 2006). Additionally, "the disposition of an accomplice's case is generally irrelevant, even when the defendant is being tried on an accountability theory, and when the defendant is the party seeking to introduce the evidence." *People v. Walker*, 392 Ill. App. 3d 277, 291-92, 911 N.E.2d 439 (2009) (citing *People v. Martinez*, 242 Ill. App. 3d 915, 925-26, 611 N.E.2d 1027 (1992); *People v. Pryor*, 170 Ill. App. 3d 262, 269-70, 524 N.E.2d 700 (1988)). As this court recognized in *Walker*, "the State's opinion of the strength of its case against one offender is completely irrelevant to the jury's determination of the guilt or innocence of another offender, where evidence may be admissible against one that is not admissible against the other." *Walker*, 392 Ill. App. 3d at 292.

¶ 36 We have reviewed the stipulated portions of defendant's videotaped statement which include four clips on one disc. These clips reveal, in summary, that defendant had known Hanes all her life, had dated Hanes, a.k.a. Black, in the past, that Hanes had kept his clothes in her

apartment while they were dating, and that defendant had broken up with Hanes. In the week prior to the murder, Hanes had repeatedly called defendant trying to come back into her life. According to defendant, that same week she found out through a friend that the victim was out of jail. On the Wednesday before the murder, defendant "got with" the victim and "took him to the crib." On Thursday, while defendant was at work, Hanes called her and said he heard that she was "f*** around" with Walker. She responded, "yes, I'm f*** around with him, that's my Ba Ba." Hanes said, "cool," and that he would call her back. When Hanes called back, defendant asked him "what was up?" Hanes told defendant that he was standing by her 8 year old son and when defendant asked him "what's up?" he told her "you know I know you f*** around with dude." Defendant knew Hanes was talking about the victim. Hanes then told defendant "if you don't cooperate with *us*, *we* gon kill you and your son." (Emphasis added.) According to defendant, she said "what the f*** you talking about cooperate? What is you on?" Hanes went on to say "*they* wanted to kill him [the victim] for killing Mike." (Emphasis added.) When the detectives asked were they speaking about the murder of Michael Spencer that had occurred years prior, defendant replied in the positive. Defendant went on to state that when she protested and pleaded with Hanes to leave her child alone, Hanes said, "you heard what I said." Defendant then agreed to do whatever Hanes wanted her to do. Defendant stated Hanes told her he wanted defendant to get the victim over to her house. Defendant agreed because of the threat to her child.

¶ 37 Defendant lured the victim over to her house the next day, Friday, in the evening hours. Hanes called defendant around 8:30 p.m. and asked her who she was with. She told him she was with her "Ba Ba." Hanes knew that meant she was with the victim. Hanes said "alright, I'm a

call you back." According to defendant's statement, she and the victim were "f*** and s***" when the phone ran so she did not answer. When it was time for the victim to leave, a "little scuffle" was going on outside from a party nearby. When the victim got ready to leave, there was a missed call on defendant's phone. After the victim left, defendant watched him out of her window, but lost sight of him by a tree. Meanwhile, defendant returned Hanes' call. Hanes asked her "What's up? Where was he?" Defendant said "he just left." Defendant first said that from the time the victim left until she called Hanes was "like a minute or two." Defendant then said that the time after she told Hanes that the victim had left until the time she knew that the victim was shot was "*** everything happened so quick, it seemed like it was back to back." Defendant demonstrated the time lapse by clapping her hands together quickly. When questioned by Detective Landando about when she next talked to Hanes, defendant said she thought it was Monday, but then said she saw Hanes on Sunday.

¶ 38 A later clip showed Detective Landando and a sergeant in the ERI room. Detective Landando accused defendant of lying about her child's whereabouts and the fact that Hanes threatened her child's life. Detective Landando told her that they had talked to defendant's mother and learned that defendant had taken her son to the Abla Homes, which was in the New Breeds street gang territory; therefore, her claim that her child's life was threatened made no sense. The sergeant asked defendant to just tell the truth. Defendant then admitted she was lying and said "it wasn't never my son they threatened, it was always me."

¶ 39 Defendant said when Hanes talked to her again he said "he had kilt the man. He had whacked him and I [defendant] need to get low." Defendant said this phone conversation occurred maybe 1 a.m. or 2 a.m. the day following the murder. When the sergeant asked

defendant what Hanes said, was it "I" or "we," defendant replied that Hanes said "*we* just shot him and you need to get low." (Emphasis added.) Defendant then said either Hanes said "I just kilted the man" or "we just kilted the man." After the sergeant again confronted defendant with her inconsistencies and evasions, defendant said Hanes reported, "I shot him and you need to get low." Defendant admitted that she then took her son to her mother's house in the Abla Homes because she knew the police were coming to look for her.

¶ 40 Defendant also said she talked to Hanes at 9:30 p.m., the same day she found out that the police wanted to talk to her again. Hanes tried to get her to meet him at "1119 on Roosevelt." Defendant did not go to meet him. Instead, defendant met with the police. Defendant concluded her statement by saying that, although Hanes never said on the phone to her or in person that he was "gon kill the mother f***," she knew he meant he was going to "shoot the s*** out this mother f***."

¶ 41 All of the evidence established both that defendant shared the criminal intent of the principal, David Hanes, to kill the victim and that there was a common criminal design. Hanes told defendant *they* wanted to kill the victim. Hanes then asked defendant to lure the victim to her house and to tell Hanes when the victim left. Defendant knew Hanes wanted her to help set up the killing of the victim in retaliation for the victim's involvement in the homicide of a fellow gang member. In accordance with the intent to kill the victim and in furtherance of the common criminal design, defendant lured the victim to her house and called Hanes within, at most, 1 to 2 minutes after the victim left. And, according to the plan, the victim was shot and killed. The killing took place within one half block of defendant's home almost immediately after the victim left defendant's home. Hanes later called defendant and told her "I killed" or "we killed" the

victim, "I whacked him" or "we whacked him," and that defendant needed "to get low." Defendant continued to cooperate with Hanes by leaving her home and going to the Abla Homes to "get low" as instructed. All of this evidence, when viewed in the light most favorable to the State, proved defendant guilty beyond a reasonable doubt of first degree murder based on the theory of accountability.

¶ 42 Defendant insists that the shooter was never identified and that the State's own witnesses testified to eyewitness accounts, DNA evidence, and police lineups that demonstrate that Hanes, the only person defendant spoke to about the crime, was not the shooter. Defendant characterizes this evidence as undisputed. Defendant also argues that the trial judge apparently and mistakenly believed the identity of the shooter was irrelevant. Defendant mischaracterizes the evidence and the trial judge's belief.

¶ 43 Initially, we note that there was no substantive evidence elicited by the State that Hanes was not the shooter. During cross-examination of the detectives, defendant elicited the hearsay statements by unnamed purported eyewitnesses of a description of the alleged shooter, that unnamed eyewitnesses said the shooter wore a white hat, that the DNA evidence on the hat was "negative" as to Hanes, and that Hanes was not identified in a lineup. These statements hardly amount to undisputed evidence that Hanes was *not* the shooter.

¶ 44 Defendant goes on to represent that the identity of the shooter was never determined, "prompting the trial judge to comment at the close of the evidence that neither he nor the police knew who the shooter was." This is also an incomplete and misleading account of the court's ruling. The court made a lengthy statement regarding its decision, recounting the State's evidence and the defense position. Prior to its ruling the court asked defense counsel "*** do

you think that the evidence would have to show that Black was the shooter?" Defense counsel responded, "*** it would have to show some nexus between what she [defendant] said and what happened to Walker McKinley other than the fact that somebody walked up to him [the victim] in the middle of a fight and shot him ***." The court then continued the case until another date to review defendant's statement again and read the testimony of one witness.

¶ 45 On the continuance date, the court, discounting the defense theory that some person unrelated to defendant could have killed the victim, stated as follows:

> "This matter was continued from time to time for the Court's ruling.
>
> The testimony in this matter was concluded on December 13th of 2007. After the testimony and after being advised, Ms. Woods chose to rely on a presumption of innocence and not testify on her own behalf.
>
> After the testimony we heard argument, and part of the argument that was made by the Defense was the possibility that the victim in this matter was a victim of circumstances in that he may have walked upon or into an unrelated fight that was occurring on the street.
>
> Now, the Defense has absolutely nothing to prove, and I take that seriously, but perhaps I think I should take a moment to respond to that argument by simply saying that I find it hard to believe that a person who has survived a number of years in the

Illinois Department of Corrections would walk into or in the middle of a fight in which guns were present.

I dare say that anyone who has the kind of background that I understand our victim to have had, by that I mean having been raised in or around public housing in an urban area, I find it hard to believe that that person would foolhardily walk into the middle of an altercation in which weapons were being used.

This defendant is charged with two counts of murder, and it is undisputed that Ms. Woods never touched the victim or a weapon.

The State's theory, I think, is also undisputed, that Ms. Woods facilitated the murder of the victim and thus is accountable for the murder as if she had inflicted the fatal wound.

To that end, the State presents the testimony of a number of police officers and the video recorded interview of this defendant. I watched that video recording when it was published and again twice today or what I believe to be the relevant portions twice today.

In her statement defendant says a person named Black told her to get the victim over to her house, and at that time that the victim was there or during his time there Black called, and according to her statement, the defendant said, I am here with my

honey, my sugar, my baby, or some words of affection to that effect.

The defendant has also said that when the victim left her home, she called Black and told Black that the victim had left some one or two minutes before.

This defendant is seen in the video recording saying Black told her that *they* wanted to kill the eventual victim, that *they* wanted to kill him because of a matter that had happened years earlier. The defendant can be heard saying that she would do whatever Black wanted.

The testimony is that it was a white cap found near the crime scene and that there were strands of hair recovered from that cap and DNA analysis of Black known as Mr. [Hanes] or [Hanes] known as Mr. Black or known as Black, were negative.

Black had been detained by the police in relation to the shooting and released. There is a third party who had also been detained by the police and released.

I don't know if the lay person can appreciate this whole notion of accountability. Indeed, we professionals argue about it at length.

The question is not whether Black was the actual shooter or the third party, whose name escapes me, was the actual shooter.

> The question is whether the State has proven beyond a reasonable doubt that this defendant attempted to aid, promote or facilitate the murder of the victim. By her own words, she did.
>
> I don't know who shot the victim, and it appears that the police are convinced that neither Black or this other party that they held in custody was traced to the cap, to the white cap, was the shooter, but by her own statements this witness advised Black that - - this defendant advised Black that the victim was present at her home and told Black - - she says within one to two minutes after the victim left her home she called Black. I don't think that's the case. I think it was a lot shorter than that.
>
> My recollection is this defendant's address was 5335 and the victim was found at 5319. So it is a distance of some six, eight or ten city lots. In that period of time the victim was gunned down.
>
> Accordingly, the Court finds on the theory of accountability that the defendant is guilty of first degree murder. Bond is revoked. Presentence investigation shall be ordered." (Emphasis added.)

¶ 46 A review of the trial court's ruling establishes that the court never indicated that the identity of the shooter was irrelevant to establishing defendant's legal responsibility. What the court, in fact, found was that the victim died, not at the hands of someone involved in some

unrelated altercation, but that the victim died as a result of defendant's complicity with Hanes. In effect, the court ruled someone associated with defendant killed the victim. That conclusion is supported by the evidence.

¶ 47 After viewing the evidence in the light more favorable to the State, we find that any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. Using this standard, it was the responsibility of the trier of fact to, "fairly *** 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. It is not the function of this court to retry the defendant when considering a sufficiency of the evidence challenge. *People v. Hall*, 194 Ill. 2d 305, 329-30, 743 N.E.2d 521 (2000). Evidence may be found insufficient under the *Jackson* standard only "where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280, 818 N.E.2d 304 (2004). "[T]he reviewing court *must* allow all reasonable inferences from the record in favor of the prosecution." (Emphasis added.) *Id.* Importantly, "the trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229, 920 N.E.2d 233 (2009).

¶ 48 Finally, approximately 11 months after the trial court's ruling, the court heard argument on a motion for new trial based on allegations of error and newly discovered evidence. The defense again raised the argument that the evidence failed to connect defendant to the shooter, but that it demonstrated someone involved in the fight was the shooter.

¶ 49 After hearing the State's response, the court stated the following:

"You raise a question, and it is a good question, has the evidence proved that Miss Woods' phone call to this other party resulted in the shooting of or the murder of Mr. Walker. I have answered that in my findings.

Did anyone come forward and say Miss Walker called Black and Black shot Mr. Walker? Did anyone come forward and say Miss Woods called Black and Black went out and shot Mr. Walker? No. The circumstances are overwhelming, [defense counsel]. And it is buttressed by Miss Woods' video recorded statements.

We are here, we being Miss Woods and the victim. He is leaving now. Very soon thereafter he, the victim, is found shot in the head doors away from the location where he and Miss Woods just spent some time together.

There is a suggestion that there is a third party confrontation in which there was some gun play and shots being fired. I am struck by the fact that not one other person is injured by gunfire other than the victim, who according to her own statement is leaving my home now. You are right. Someone else could have shot him, the victim.

I would think, [defense counsel] that if I were engaged in an argument with you and I had a gun and you were six feet away

from me or ten feet away from me I would be able to shoot you. That's what I think.

There is no suggestion that anyone else was shot other than the person who Miss Woods informed the recipient of, he's leaving now.

The motion is respectfully denied."

¶ 50 The court's summary of facts demonstrates that the court rejected the notion that someone unconnected to defendant's plan with Hanes to murder the victim actually shot the victim. The court found the defendant guilty based upon her actions in aiding and abetting the actual shooter. We affirm the trial court's ruling because it is supported by the record.

¶ 51 Defendant cites *People v. Garrett*, 401 Ill. App. 3d 238, 928 N.E.2d 531 (2010), and *Fagan v. Washington*, 942 F.2d 1155 (7th Cir. 1991), to support her contention that the evidence failed to sufficiently connect her to the victim's murder. *Garrett* and *Fagan*, however, are distinguishable.

¶ 52 In *Garrett*, defendant was the getaway driver in an attempted armed robbery of a store. An employee of the store was found shot to death in the store and no gun was ever recovered. In summary, the evidence demonstrated that the defendant, his girlfriend who worked at the store, and three others made plans to rob the store. On the date of the robbery, the defendant dropped the three males off and waited in the car. One of the three ran back to the car and he, along with the defendant, fled. An employee standing outside the store gestured to an officer as if something was happening inside the store. The officer entered the store and the two co-defendants exited quickly. The officer called for them to stop, but they fled. The officer and

others pursued. One of the suspects was caught and a gun was found nearby. The second man got away. *Garrett*, 401 Ill. App. 3d at 239-42.

¶ 53 A detective testified that he went to the store to investigate the victim's murder. The body was located in the rear of the store. The detective spoke with the manager who told him that no one had demanded or threatened him with a gun for money. Nearly three months passed before the police went to speak to the defendant's girlfriend and, as they arrived at her home, they saw the defendant exiting the rear of the residence. He agreed to accompany the police to the station. The defendant eventually admitted that he agreed to drive three teens to the Family Dollar Store to rob it, that he dropped them off, that he waited in the parking lot for awhile, and that he left with one of the young men who had fled the store and jumped into his car. The defendant gave a videotaped statement consistent with his oral statement. The defendant did not mention that anyone had a gun or that they specifically planned to use a weapon. The jury found the defendant guilty of felony murder based on a theory of accountability. The underlying charge of attempted armed robbery was not put before the jury. *Id*.

¶ 54 This court reversed the defendant's conviction. *Id*. at 249. In doing so, the court reasoned that the defendant's murder charging document required the State to prove that one or more of the named defendant's shot and killed the victim *during the attempted armed robbery*. (Emphasis added.) *Id*. at 246. Looking at the evidence, the court held that the jury could not have found the requisite element of causation because there was a "total absence" of evidence proving or even suggesting who caused the victim's death. *Id*. at 247. Even though the evidence demonstrated that two co-offenders entered the store, one of which was in possession of a weapon, the court observed that there was no evidence suggesting that the recovered gun was the

murder weapon or that any weapon at all was fired contemporaneously with the entry or presence of the defendant's group within the store. *Id.* No one testified that they had even heard a gunshot. Indeed, the first officer who was patrolling the area before the employee gestured to him testified that he did not hear a gunshot. The court, therefore, held the proof lacked the missing link of causation. *Id.*

¶ 55 The court said, "it is not that there is conflicting evidence of the murder (*which a trier of fact could resolve*), but instead a complete lack of evidence." (Emphasis added.) *Id.* The court pointed out that there was no physical evidence or testimony that linked any of the criminal confederates with the shooting death or that one of them had even fired a gun on the day of the incident. *Id.* The court reasoned that, even in light of the considerable deference afforded to the trier of fact, the evidence was insufficient to prove the defendant accountable. *Id.* at 249. Because there was no evidence that the victim died as a result of the predicate offense, there was thus no evidence that the defendant shared a common design with whoever shot the victim, leading to a fatal lack of proof of causation. *Id.* at 248. The evidence in *Garrett* only showed the defendant "shared a common design with those that committed the attempted armed robbery, for which he could have been held accountable, but not the murder." *Id.*

¶ 56 Unlike *Garrett*, where the defendant was charged with felony murder and where there was no evidence that a shot was even fired during a robbery attempt or that the fatal shot (whenever it occurred) was shot from the gun of the defendant's confederate, the evidence here demonstrates defendant shared the intent and the common design of Hanes to kill the victim and that their plan was executed accordingly. This case does not involve a charge of felony murder where accountability exists only if the defendant may be deemed legally responsible for the

felony that accompanies the murder. *People v. Burnom*, 338 Ill. App. 3d 495, 504, 790 N.E.2d 14 (2003).

¶ 57 The facts in *Fagan* also make it readily distinguishable. Fagan was a gang member who had been shot earlier by a rival gang. *Fagan*, 942 F.2d at 1156. Two nights later, Fagan met with members of his gang and they decided to seek revenge. Six to 13 gang members, including Fagan and Dede, went to a game room where the rivals hung out. Twelve to 15 people were standing outside the game room. When Fagan and his gang members were as much as 45 feet away, Fagan and Dede began shooting at the group. Fagan had a .22 rifle and Dede had a shotgun. *Id*. Both fired shots and fled. Three people were shot: two were wounded and one, Billy Green, was killed. The defendant was charged with murder and lesser crimes. He was convicted on all charges. But Green was killed, not by a .22 rifle or a shotgun, but by a single shot from a .38 caliber pistol that someone, obviously not Fagan, had pressed against Green's back before firing. The pistol was never found and no one knew who killed Green. Finding the evidence insufficient to support Fagan's guilt under an accountability theory, the court held that there was no evidence presented that: (1) Fagan shared a common design with whoever shot Green; (2) anyone with Fagan other than Dede was armed; (3) anyone in the defendant's group got close enough to poke a gun in Green's back; and (4) Green was even a member of the rival gang. *Id.* at 1159. The court opined that Green may have been a helpless bystander shot accidently by a rival gang member standing next to Green and trying to defend himself from the defendant. *Id*. The *Fagan* court noted that this evidence might be enough to establish Fagan's guilt of felony murder, but he was not charged with felony murder. *Id*.

¶ 58 Unlike the evidence in *Fagan*, where there was no proof whatsoever that anyone

connected with Fagan shot the victim, the evidence in defendant's case and reasonable inferences drawn therefrom support the trial court's finding that defendant aided and abetted the shooter in the planning and commission of Walker's murder.

¶ 59 B. Knowing, Voluntary, and Intelligent Waiver of *Miranda* Warnings

¶ 60 Defendant next contends this cause must be reversed and remanded for a new trial because her police statement was not voluntarily, knowingly, and intelligently made and, therefore, the court erred in denying her motion to suppress that statement. Defendant makes two arguments: (1) that she was tricked into giving her statement when Detective Landando contradicted her *Miranda* rights; and (2) that the totality of the circumstances demonstrated her statement was a product of coercion.

¶ 61 Defendant acknowledges that she did not object at trial or raise the first alleged error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988)) (a defendant forfeits appellate review where he fails to object to the alleged error at trial and fails to include it in a posttrial motion). Defendant, however, contends the trial court committed plain error by not suppressing her statement and, therefore, we may consider the contention despite forfeiture. The State responds that no error occurred and, in the alternative, any error was not reversible.

¶ 62 This court may review forfeited errors under the doctrine of plain error in two narrow instances:

> "First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so

> serious that defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467 (2005).

The burden is on the defendant to establish plain error. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403 (2010). We first must determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964 (2008).

¶ 63 In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that a person being questioned by law enforcement while in custody must, prior to the start of the interrogation, "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444. The supreme court has provided the relevant law for reviewing a trial court's decision on a motion to suppress, such that:

> "In determining whether a trial court has properly ruled on a motion to suppress, findings of fact and credibility determinations made by the trial court are accorded great deference and will be reversed only if they are against the manifest weight of the evidence. [Citations.] We review *de novo*, however, the ultimate question posed by the legal challenge to the trial court's ruling on a suppression motion. [Citation.] Further, it is proper for us to consider the testimony adduced at trial, as well as at the suppression hearing. [Citation.] Where a defendant challenges the admissibility of a confession through a motion to suppress, the State bears the burden of proving the confession was voluntary by

a preponderance of the evidence. [Citations.]" *People v. Slater*, 228 Ill. 2d 137, 149, 886 N.E.2d 986 (2008).

¶ 64 Defendant contends that her confession should have been suppressed because, after she was *Mirandized*, Detective Landando told her that the videotape of her interrogation would not be heard by the victim's family and that it was only for the detectives and state's attorneys. Defendant argues this representation directly contradicted the *Miranda* warning that everything defendant said could be used against her in court and, therefore, she could not have understood her rights and the consequences of waiver.

¶ 65 Defendant's argument relies on a portion of her videotaped statement that we have reviewed. In the videotaped statement, defendant was *Mirandized* and responded that she understood her rights. Defendant was then asked to tell the detective what happened. The following colloquy occurred on the video:

"DEFENDANT: Black called me a week ago.

(Voices can be heard outside the ERI room of several people talking.)

DEFENDANT (looking up and pointing toward the camera): What's that?

DETECTIVE LANDANDO: A light.

DEFENDANT: Yeah, so they, people hearing me in here?

DETECTIVE LANDANDO: Yeah.

DEFENDANT: So this is everybody, family, everybody hearing me?

DETECTIVE LANDANDO: The family? No. This is for police only and state's attorneys. That's it. Family don't listen to this. It is only the detective(s) and the state's attorney.

DEFENDANT: This s*** fittin to get me killed man.

DETECTIVE LANDANDO: Well, do you wanna tell us how this happened or not?

DEFENDANT: Yeah.

DETECTIVE: Alright what happened?"

¶ 66 It is clear from the videotape that defendant was concerned her statement would be heard by whomever was outside of the interview room. In response, Detective Landando said that only the police and state's attorneys would be listening to the statement, which in context referred only to the time during which the statement was being given. There is no question that defendant received her *Miranda* rights at least twice while in custody up until that point and she stated in the videotape that she understood those rights. Defendant's acknowledgment that she understood her rights was made *before* the exchange at issue. Accordingly, defendant had waived her *Miranda* rights prior to inquiring whether "family" could hear her while giving her statement. She, therefore, was aware that her statement could be used later as evidence and would not merely be heard by the police and the state's attorneys. Moreover, at the suppression hearing, defendant admitted that she understood the meaning of the right to remain silent. She was 28 years old at the time of the interview and was a high school graduate. In addition, defendant had been arrested on two prior occasions and admitted that she "probably" received her *Miranda* rights both times. We, therefore, conclude defendant voluntarily, knowingly, and

intelligently waived *Miranda*. Consequently, we find there was no error and we need not conduct a plain error analysis.

¶ 67 We note that the cases cited by defendant are distinguishable. Defendant was given her *Miranda* rights prior to being interrogated in contrast to the defendants in *People v. Lopez*, 229 Ill. 2d 322, 332, 892 N.E.2d 1047 (2008), and *People v. Alfaro*, 386 Ill. App. 3d 271, 299, 896 N.E.2d 1077 (2008). Further, unlike the defendant in *U.S. v. Montoya*, 632 F. Supp. 1069 (D. Del. 1986), our defendant affirmatively stated that she understood her rights and proceeded to waive them prior to the exchange in question whereas the defendant in *Montoya* made an inquiry regarding his rights after being *Mirandized* without having stated that he understood his rights. In *Hart v. Attorney General of State of Florida*, 323 F.3d 884 (11th Cir. 2003), the defendant demonstrated that he did not understand his right to counsel despite having signed a *Miranda* waiver when he asked the officer to explain the pros and cons of hiring a lawyer. *Hart*, 323 F.3d at 894. The *Hart* court concluded that the officer contradicted *Miranda* when he told the defendant that "honesty would not hurt" him and, therefore, the defendant could not have understood his rights and the consequences of waiving those rights. *Hart*, 323 F.3d at 894-95. In contrast, Detective Landando did not contradict *Miranda* by explaining that no one outside the interview room except other detectives and state's attorneys would hear what defendant said inside the room, which clearly referred to *at that time*. Moreover, *Hopkins v. Cockrell*, 325 F.3d 579 (5th Cir. 2003), which defendant cited in her reply brief, involved numerous subversive tactics made by the police officer during the interrogation which prohibited the defendant from the knowledge essential to his ability to understand his rights and the consequences of waiving them. *Hopkins*, 325 F.3d at 584-85.

¶ 68 Defendant briefly argues that her trial counsel was ineffective for failing to argue that her statement should have been suppressed pursuant to Detective Landando's trickery. We disagree.

¶ 69 To establish an ineffective assistance of counsel claim, the defendant must demonstrate the counsel's representation fell below an objective standard of reasonableness and he suffered resulting prejudice such that there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A defendant must overcome the strong presumption that the trial counsel's challenged actions were a matter of sound trial strategy. *Id*. at 689-90. Whether to file a motion to suppress is typically considered a matter of trial strategy. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70. A defendant must satisfy both prongs of the *Strickland* test; however, where prejudice has not been demonstrated, a court need not determine whether the counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 303, 794 N.E.2d 181 (2002). To establish prejudice for failure to file a motion to suppress, the defendant must demonstrate that the motion would have been granted and the outcome of trial would have been different if the evidence had been suppressed. *Snowden*, 092117, ¶ 70.

¶ 70 We have concluded already that defendant's statement was given voluntarily, knowingly, and intelligently. Consequently, defendant cannot establish that the motion would have been granted if raised by trial counsel and that the outcome of trial would have been different. We, therefore, find defendant received effective assistance.

¶ 71 Defendant's second argument regarding the voluntariness of her statement is that the totality of the circumstances demonstrate the statement was coerced.

¶ 72 To determine whether a confession is voluntary, we look to the totality of the

circumstances, including the defendant's age, intelligence, background, experience, mental capacity, education, physical condition, experience with the criminal justice system, the legality of the detention, the duration of questioning and any promises, threats, deceit, and physical or mental abuse by the police. *People v. Clark*, 391 Ill. App. 3d 596, 615, 915 N.E.2d 1 (2009).

¶ 73 Defendant contends her police statement was involuntary because she was subjected to police coercion and intimidation, was deceived regarding her rights, was physically and emotionally subjected to adverse conditions, and was inexperienced in the criminal justice system.

¶ 74 We conclude the totality of the circumstances demonstrate that defendant's statement was voluntary. As stated, defendant was 28 years old when she gave the statement and had graduated high school. Although she had no criminal background and had never been interrogated by the police, defendant had been arrested twice and "probably" received her *Miranda* rights both times. On the videotape, defendant affirmatively stated that she understood her rights. As we previously determined, defendant voluntarily, knowingly, and intelligently waived her *Miranda* rights prior to giving her statement. In addition, during the hearing on her motion to suppress, defendant eventually testified that her statement was not coached and that she understood her right to remain silent. Defendant ultimately testified that the portion of her statement that was untrue was that Hanes was the shooter. Defendant, however, was inconsistent during her statement as to whether Hanes was the shooter or was a part of the "we" that carried out the shooting.

¶ 75 Defendant made her statement approximately three hours after voluntarily arriving at the police station. When she first arrived around 4:45 a.m., defendant was interviewed for about one

hour. Thereafter, defendant remained in a homicide office and was not interrogated again until after she began making a statement on her way back from using the bathroom at approximately 7:30 a.m. Prior to the interrogation, defendant was brought into an interview room where she was *Mirandized* again and gave an inculpatory statement. Defendant's first statement took about 30 minutes Defendant made another statement at approximately 1 p.m., at which time she retracted her allegation that Hanes had threatened her son's life in order to get her to lure the victim to her house. The second statement took about 30 to 40 minutes. Throughout her time at the police station, defendant was not handcuffed and was given bathroom breaks, drinks, and cigarettes. During the suppression hearing, defendant contradicted her allegation that she was physically abused by Detective Landando where she said he cut her lip with his finger, but then demonstrated to the court that she was punched. Notably, defendant has abandoned her abuse allegation on appeal.

¶ 76 Our review of the videotaped statements does not reveal that defendant's confession was a product of intimidation or offers of leniency. Instead, the videotapes demonstrate that Detective Landando and the sergeant implored defendant to tell the truth about the circumstances surrounding the victim's death. Defendant was reminded that she essentially held the keys to her own destiny because she was the only person that spoke to Hanes prior to and in the aftermath of the victim's death. Detective Landando and the sergeant were careful to ask defendant not to gloss over any details.

¶ 77 To the extent defendant argues, for the first time on appeal, that she was left in a cold room while anemic and sleep deprived and that she recanted her statements, those arguments are forfeited and not supported by the record. See *Enoch*, 122 Ill. 2d at 186 (to preserve an error for

review, a defendant must object at trial and include the alleged error in a posttrial motion). Our review of the record demonstrates that four "clips" of defendant's statements were played for the trial court and entered into evidence. The remaining videotape of defendant's time spent in custody was not entered into evidence. As a result, we may not consider those portions of videotape cited for support by defendant, which were *de hor* of the trial record. *People v. Dunn*, 326 Ill. App. 3d 281, 285, 760 N.E.2d 511 (2001) (citing *People v. Bounds*, 36 Ill. App. 3d 330, 336, 343 N.E.2d 622 (1976)). At the suppression hearing, defendant attempted to recant her statement by testifying that it was a product of coercion and intimidation. Defendant, however, later testified that the statement contained her own words and that she was not coached. The trial court concluded that defendant's willpower was not overborne and that the motion failed on the issue of psychological, physical, mental, or emotional coercion, distress, or intimidation. We agree.

¶ 78 In conclusion, we find defendant voluntarily, knowingly, and intelligently waived her *Miranda* rights and that her statements were not coerced.

¶ 79 III. CONCLUSION

¶ 80 Based on the foregoing, we affirm the judgment of the trial court in finding defendant guilty under a theory of accountability of first degree murder.

¶ 81 Affirmed.