SIXTH DIVISION
November 16, 2012

No. 1-10-1913

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. 08 CR 3769
	)	
JAVIER FERNANDEZ,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice LAMPKIN concurred in the judgment.
Justice GORDON specially concurred.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated discharge of a firearm in the direction of a peace officer based on the theory of accountability is affirmed where the State proved defendant guilty beyond a reasonable doubt.

¶ 2 Following simultaneous but severed bench trials, defendant Javier Fernandez and codefendant John Gonzalez, who is not a party to this appeal,[1] were convicted of two counts of

[1] Codefendant's conviction was affirmed in a separate direct appeal. *People v. Gonzalez*, 2012 IL App (1st) 101912-U (unpublished order under Supreme Court Rule 23).

aggravated discharge of a firearm in the direction of a peace officer and one count of burglary to a vehicle. The trial court merged defendant's convictions into one count of aggravated discharge of a firearm and sentenced him to 12 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because the evidence was insufficient to support an aggravated discharge of a firearm conviction under the accountability statute, the evidence against him was vague and contradictory, and the State failed to prove that defendant and codefendant knew Claudio Salgado was a police officer. We affirm.

¶ 3 At trial, Chicago police officer Claudio Salgado testified that at about 10:45 a.m. on Sunday, January 20, 2008, he arrived late to church and parked his car in a church parking lot underneath the Dan Ryan Expressway. He was off duty, but was wearing his police badge and gun. When he exited his vehicle, he heard the sound of breaking glass and walked toward the noise. Salgado approached the passenger's side of a green SUV parked in the lot and saw codefendant Gonzalez reaching into that vehicle with both of his arms through a broken driver's side window. Salgado displayed his badge and yelled "Chicago police" three times. Codefendant pulled himself out of the driver's window and faced Salgado, who was standing directly across from him on the passenger's side of the green SUV. Codefendant then walked backwards, still facing Salgado, to a maroon SUV driven by defendant. The maroon SUV slowly approached the back of the green SUV, with the driver's side of the maroon vehicle facing Salgado. The maroon SUV stopped, and codefendant ran around the back of that vehicle to the passenger's side, opened the door and stepped up onto the metal runner. Salgado moved away from the green SUV at this time and stood about 5 feet from the driver's side of the maroon SUV and 15 feet from the passenger's side of that vehicle. While standing on the runner with the passenger's door open, codefendant pointed a gun at Salgado over the hood of the SUV and fired three shots. Salgado immediately drew his weapon and returned fire aiming toward codefendant

as the SUV sped away. Salgado thought he fired four or five gunshots, but later learned he had fired seven. His shots struck the SUV's windows and windshield, and three shots hit defendant.

¶ 4 The defendants fled the scene in the maroon SUV. Officer Salgado returned to his car and chased after them. A few minutes later, Salgado saw a Cook County sheriff's vehicle. He identified himself to those officers, told them that he had been involved in a shooting, and gave them a description of the SUV. The sheriff's officers told Salgado to wait for back-up, and they then pursued the maroon SUV. When other Chicago police officers arrived, Salgado returned to the church parking lot with them. Later that afternoon, Salgado viewed a photo array and identified defendant and codefendant as the two offenders. The following evening, Salgado viewed a lineup and again identified defendant and codefendant. Salgado could not describe the gun codefendant fired at him, and acknowledged that he did not see or find any bullets fired from that gun. He also acknowledged that he did not see codefendant remove any items from the green SUV, nor did he see a weapon or burglary tool in codefendant's hands at that time. Salgado testified that, at the time of this shooting, he had been a police officer for about a year, and he previously served in the Chilean army for five years.

¶ 5 Chicago police detective Carlos Cortez testified that the day after the shooting, Officer Salgado viewed a lineup at the police station and identified codefendant as the person who shot at him, pointing directly at codefendant and stating, "I'll never forget his face." Salgado then pointed at defendant and said "he's the driver of the vehicle." Cook County sheriff's police investigator Enola Lera testified that he and his partner, Nikita Johnson, were sitting in their marked squad car writing a report shortly before 11 a.m. when they heard three to four rapidly fired gunshots. He could not tell if the gunshots were fired from one or two guns. They immediately called their dispatcher and reported hearing shots fired. About 20 seconds later, a burgundy SUV sped past them. A few seconds later, Officer Salgado drove up to them and said

that he had been involved in a shooting, and that he was chasing the burgundy SUV. The sheriff's officers drove around the area searching for the SUV, but could not find it. On cross-examination, Lera confirmed that Salgado told them that he had been shot at. He testified that Salgado told them "I was involved in a shooting. I was shot at. I exchanged fire back." Lera acknowledged that he never told his dispatcher, police detectives, or the police review authority investigators that Salgado expressly stated "I was shot at." Instead, he told them that Officer Salgado stated that he was "involved in a shooting." On redirect examination, Lera testified that he told the independent police review authority investigator James Lucas that the off duty police officer told them that he exchanged gunfire with a man in the SUV.

¶ 6 Defendant's sister, Marial Fernandez, testified that defendant borrowed her red Nissan Xterra at about 9:30 a.m. to run some errands. That afternoon, she called defendant and told him she needed her car. Shortly thereafter, he returned home without the car and told her some gangbangers had shot at him while he was driving it. Defendant was very pale, appeared ill, and was bleeding from his hand or finger. He told her that he left her car at 51st Street and Winchester Avenue. Marial and her sister Roxanna drove to that location, but her car was not there. Marial called police, who arrived at the location and spoke with her. The next day, Marial was called to police headquarters and learned that defendant had been arrested, that he underwent surgery for being shot, and that her car had been recovered. When she retrieved her car, it had five or six bullet holes to the front windshield, the driver's side, and the rear hatch. Marial confirmed that defendant was friends with codefendant.

¶ 7 Florencio Diaz testified that defendant called him about noon and asked to meet him at Diaz's house at 5002 South Winchester Avenue. Diaz arrived at his home 10 minutes later and found defendant waiting for him with codefendant. The tricep area of defendant's arm was hanging open and defendant said he had been in a shootout with some gangbangers. Defendant

said he was not going to go to the hospital because he did not want to get involved with police. Diaz saw defendant's sister's burgundy car parked in his backyard. Defendant left the car there, did not say anything to Diaz about it, and left with codefendant. After they left, Diaz saw several bullet holes in the back of the car. Later that day, the police came to Diaz's house and took him to the police station where he viewed a photo array and identified defendant and codefendant as the men who had been at his house earlier that day.

¶ 8 Chicago police forensics investigator Edward Parez testified that he arrived at the church parking lot underneath the expressway at about 11:40 a.m. and investigated the scene for evidence related to the shooting. He saw a green SUV with a broken driver's side window and dusted it for fingerprints. The broken glass from that window was on the ground. There was a second area of broken automobile glass in the center of the parking lot about 10 to 15 feet away from the green SUV. Officer Parez recovered seven shell casings from the ground. The casings were recovered from various distances of 3 feet to 15 feet away from the pile of broken glass in the center of the lot. The officer also retrieved Officer Salgado's gun from him and found 8 bullets remaining in the 15-bullet magazine. Parez did not recover any bullets from the scene, nor did he see any bullet damage to any of the other cars or the concrete pillars in the parking lot. He testified that revolvers do not eject shell casings, and that if a revolver was fired during the shooting, there would not be a shell casing on the ground from that gun for him to collect.

¶ 9 The parties stipulated that forensic ballistics analyst Justin Barr of the Illinois State Police crime laboratory analyzed two bullets recovered from the driver's side of the maroon SUV and one bullet recovered from defendant's body and found that all three bullets were fired from Officer Salgado's gun. Barr also determined that the seven cartridge casings recovered from the parking lot were all fired from Salgado's gun.

¶ 10 Chicago police detective Paul McDonagh testified that he and his partner, Detective Patrick Deenihan, responded to a call of an officer involved in a shooting at the church parking lot and found a green SUV with a broken driver's side window and seven shell casings on the ground. All of those shell casings came from Officer Salgado's gun. No physical evidence from any other firearm was recovered. Detectives McDonagh and Deenihan later went to 51st Street and Winchester Avenue and interviewed defendant's sisters, Marial and Roxanna Fernandez. After that interview, the detectives were looking for defendant, codefendant and Diaz. At police headquarters, the detectives showed Salgado a photo array, and the officer identified codefendant as the man who shot at him and defendant as the man driving the maroon SUV. Detective McDonagh further testified that he and Detective Deenihan interviewed defendant after he was taken into custody. Defendant stated that someone shot at the car, but he did not remember who did it. McDonagh then arranged for defendant to be transported to the hospital due to his injuries.

¶ 11 Chicago police detective Patrick Deenihan testified substantially the same as Detective McDonagh regarding their investigation on the day of the shooting, adding that he later went to Diaz's house with two other detectives and saw the maroon SUV parked in the backyard. The SUV had multiple bullet holes and broken glass. Deenihan asked Diaz to come to the police station where Diaz viewed a photo array and identified defendant and codefendant as the men that came to his house earlier that day and left the SUV parked in his yard.

¶ 12 After defendant was released from the hospital, Assistant State's Attorney Aiden O'Connor testified that she interviewed defendant while Detective Deenihan was present, and defendant made a handwritten statement. In the statement, defendant indicated that after codefendant came over to his residence, they left in a red Nissan Xterra, which belonged to defendant's sister, Marial. Defendant drove codefendant to the Maxwell Street flea market where

codefendant said he wanted to break into parked cars to get money. There were no cars parked at the flea market, so they continued driving and saw cars parked in a church parking lot under the Dan Ryan expressway. After defendant pulled into the parking lot, codefendant got out of the car, ran to a green Ford Explorer, broke the Explorer's driver's side window, and attempted to get the radio.

¶ 13 At the same time, a man, holding a silver semi-automatic gun, approached the Explorer. Codefendant got out of the Explorer and started to run around the back of the Xterra. Although the man with the gun yelled, "police, stop," defendant started to pull out of the parking lot. Defendant heard gunshots and ducked as he drove. When he reached the street, he noticed codefendant was in the front seat. As they drove away, defendant realized he was shot and the two men went to get codefendant's car. Codefendant told defendant not to go to the hospital, and, after they obtained codefendant's car, they drove to the residence of defendant's cousin, Diaz. Defendant then called his sister and told her that gang members shot at him, which was a lie, and that the car was parked at 51st Street and Winchester Avenue, which was inaccurate. Codefendant drove defendant home where defendant repeated to Marial the same lie he told her before, and Marial called the police. Defendant borrowed his mother's van, and, while he was driving, codefendant called him and said he would pick him up so Mylene could treat his wounds, which she did at an apartment at Foster and Damen Avenues.

¶ 14 Celestino Martinez testified that he owned the green Ford Explorer SUV involved in this case. Martinez parked his vehicle in a parking lot underneath the Dan Ryan Expressway while he attended church. When he returned to his vehicle after the service, he discovered that his driver's side window had been broken and that his daughter's I-Pod had been taken from inside the vehicle. Martinez denied that he gave anyone permission to enter or damage his vehicle that day.

¶ 15 Following closing arguments, the trial court expressly found that Officer Salgado's testimony was credible. The court stated "a person knows when he's being shot at, and a person who is a Chicago police officer, a person that had military experience, as I've heard the evidence, ought to really know if he's been shot at." The court stated that it found no import in the fact that no ballistic evidence was recovered from the scene of the shooting. The court explained that there was no testimony that the type of weapon fired at Salgado was the kind that would leave shell casings at the scene. The court further stated that the fact that investigators could not find bullets at the scene, which could have traveled anywhere, had no impact on the credibility of Salgado's testimony that he was shot at. The court also found that the physical evidence corroborated Salgado's testimony regarding the identity of the people involved in this case. The court noted that the bullets recovered from defendant and the maroon SUV matched Salgado's gun. In addition, the court stated that it did not believe that Salgado needed to justify his use of force by claiming he was shot at when he was not, and concluded "I believe that he was shot at." The trial court found both defendant and codefendant guilty of two counts of aggravated discharge of a firearm in the direction of a peace officer and one count of burglary to a vehicle. The court subsequently merged defendant's convictions into one count of aggravated discharge of a firearm and sentenced him to 12 years' imprisonment.

¶ 16 On appeal, defendant contends that the evidence against him was insufficient to support an aggravated discharge of a firearm conviction under the accountability statute.

¶ 17 Relying on *People v. Smith*, 191 Ill. 2d 408, 411 (2000), defendant argues that *de novo* review should apply here because the facts in this case are not in dispute. However, defendant is in fact challenging the sufficiency of the evidence because he is contesting the evidence presented at trial, as well as the inferences drawn therefrom, when he argues that the evidence testified to at trial was insufficient to convict him under the accountability statute. See *People v.*

Curtis, 296 Ill. App. 3d 991, 1001 (1998) (stating that proof that the defendant was present during the perpetration of an offense, that he maintained a close affiliation with his companion after the commission of the crime, and that he failed to report the crime are all factors that the trier of fact may consider in determining a defendant's legal accountability).

¶ 18 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 19 A defendant may be deemed legally accountable for another's conduct when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he or she solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2008); *People v. Jones*, 364 Ill. App. 3d 740, 747 (2006). Factors which raise an inference that an accused aided in the commission of a crime include flight from the scene and continued association with the perpetrator after the criminal act. *People v. Williams*, 324 Ill. App. 3d 419, 435 (2001).

¶ 20 Although mere presence at the scene of a crime is insufficient to sustain a conviction based on accountability, a defendant may be held accountable for the actions of another performed under a common plan. *People v. Cooper*, 194 Ill. 2d 419, 434 (2000). The "common design" rule provides that where two or more people engage in a common criminal design, any

acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common agreement. Therefore, all the involved parties are equally responsible for the consequence of the further acts. *Cooper*, 194 Ill. 2d at 434-35.

¶ 21 Here, viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found defendant accountable for shooting at Officer Salgado. Defendant acknowledged in his written statement that he agreed to drive codefendant around the neighborhood so that codefendant could burglarize parked cars. By agreeing to codefendant's plan, driving him to the church parking lot, waiting in the parking lot while codefendant broke into a vehicle, and admitting that he knew that codefendant was attempting to remove the radio, defendant participated in burglarizing the car. Moreover, under the common design rule, defendant was responsible for codefendant's acts in furtherance of the plan to burglarize the car, including shooting at Salgado. Even after the shooting, defendant assisted codefendant by driving him away from the scene in their attempt to escape Salgado, agreed to codefendant's request not go to the hospital to treat defendant's gunshot wounds, lied to his sister regarding how the vehicle was damaged, and when the police knocked at the apartment where defendant and codefendant were hiding, defendant, along with the other people there, pretended that they were not present. This result does not change even if defendant did not have the specific intent to facilitate the discharge of the firearm offense. See *People v. Garrett*, 401 Ill. App. 3d 238, 244 (2010) ("one can be held accountable for a crime different than the one that was planned").

¶ 22 Defendant also contends that the evidence was insufficient to convict him of aggravated discharge of a firearm where Officer Salgado's testimony was vague, doubtful, and contradictory. Defendant also maintains that no physical evidence was found to corroborate Salgado's testimony that codefendant shot at him. We disagree.

¶ 23 As relevant to this case, a person is guilty of aggravated discharge of a firearm, where the State proves that he intentionally or knowingly discharged a firearm in the direction of a person he knew to be a peace officer, while that officer was executing his official duties. 720 ILCS 5/24-1.2(a)(3) (West 2008). The positive and credible testimony of a single witness is sufficient to support a conviction. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Physical evidence connecting a defendant to an offense has never been required to establish his guilt. *People v. Williams*, 182 Ill. 2d 171, 192 (1998). On review, this court will not reverse defendant's conviction simply because he claims that a witness was not credible or that the evidence was contradictory. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 24 Despite defendant's contentions to the contrary, Officer Salgado's testimony was not vague or doubtful. Salgado testified that after he announced that he was a Chicago police officer, codefendant stood on the metal runner of the maroon SUV with the passenger's door open, pointed a gun at him over the hood of that SUV, then fired three gunshots at him. This action caused Salgado to immediately draw his weapon and fire several shots back toward codefendant. The trial court expressly stated that it found Salgado's testimony credible, explaining "a person knows when he's being shot at, and a person who is a Chicago police officer, a person that had military experience, as I've heard the evidence, ought to really know if he's been shot at." As stated above, it is the responsibility of the trier of fact to make credibility determinations (*Campbell*, 146 Ill. 2d at 375), and we find no reason in the record to upset the trial court's finding that Salgado was a credible witness.

¶ 25 In so finding, we note that although there was no physical evidence of another gun at the scene, such evidence was not required to find defendant guilty. The record shows that in rendering its decision, the trial court considered the lack of physical evidence and found it of no import. Forensics investigator Parez had testified that some firearms, such as revolvers, do not

eject shell casings, and if a revolver was fired during this shooting, there would not be a shell casing on the ground from that gun for him to recover. The trial court noted that there had been no testimony regarding the type of weapon that defendant fired at Officer Salgado, and therefore, no evidence that the gun defendant used was a type that would have ejected a shell casing at the scene. The court further found that the bullets fired from defendant's gun could have traveled anywhere, and that the absence of such evidence had no impact on the credibility of Salgado's testimony that defendant fired a gun at him. Moreover, the trial court found that the bullets that were recovered from the maroon SUV and defendant's body matched Salgado's gun, thereby corroborating his testimony identifying defendant and codefendant as the offenders involved in this case.

¶ 26 We reject defendant's argument that Officer Salgado's testimony that he was shot at was contradicted by the initial radio call sent out about the incident which stated, "shots fired by police." Officer Lera testified that he heard three to four rapidly-fired gunshots, and 20 seconds later, a burgundy SUV sped past him. Lera further testified that a few seconds later, Salgado drove up to him, said that he had been involved in a shooting, and that he was chasing the burgundy SUV. On cross-examination, Lera expressly confirmed that Salgado told him that he had been shot at. Lera testified that Officer Salgado told him "I was involved in a shooting. I was shot at. I exchanged fire back." The fact that Lera did not tell detectives or investigators that Salgado specifically stated "I was shot at" is of no import. We find that the testimony from Lera substantially corroborated Officer Salgado's testimony.

¶ 27 We further find no merit in defendant's argument that Officer Salgado's testimony was incredible because he was unable to describe the gun used by defendant. At the close of Salgado's testimony, it was the trial court that asked him if he could describe the gun he saw defendant fire at him. Salgado said that he could not. The record discloses no reason for his

inability to do so. Sitting as the trier of fact, it was the trial court's responsibility to determine the credibility of the witnesses and to weigh the evidence. The trial court stated that it did not believe that Salgado needed to justify his use of force by claiming he was shot at when he was not. The court expressly concluded, "I believe that he was shot at."

¶ 28 We finally reject defendant's argument that the evidence was insufficient to prove that he or codefendant knew that Officer Salgado was a police officer. Salgado testified that he screamed "Chicago police" three times and displayed his badge while codefendant was reaching into the driver's side of the green SUV and Salgado was standing by the passenger's side. In addition, defendant subsequently gave a statement to police acknowledging that he heard Salgado announce that he was a police officer when Salgado stated, "police, stop." Salgado testified that after he announced his office, he observed codefendant run to the passenger side of the SUV and pull out a weapon. The record thus contradicts defendant's statement in his brief that codefendant calmly walked back to the vehicle defendant was driving.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 30 Affirmed.

¶ 31 JUSTICE R. GORDON, specially concurring:

¶ 32 For the following reasons, I must write separately in the case at bar.

¶ 33 BACKGROUND

¶ 34 The State's evidence established that codefendant asked defendant for a ride and then told defendant that he wanted to go to a parking lot to burglarize a vehicle. They drove to a parking lot, where codefendant smashed the window of a parked vehicle. Codefendant was then surprised by the presence of an off-duty Chicago police officer who shouted "police, police." Codefendant shot at the officer before fleeing in defendant's vehicle.

¶ 35 After a bench trial, defendant was convicted of both aggravated discharge of a firearm and burglary to a vehicle. At sentencing, the trial court merged the burglary count into the aggravated discharge count and sentenced defendant to 12 years on the aggravated discharge count alone.

¶ 36 ANALYSIS

¶ 37 For both charges, defendant was convicted solely under an accountability theory. There's no question that defendant could be held accountable for burglary, but the trial court merged that count. However, accountability does not work for the discharge count, where the off-duty police officer surprised them and there was no intent or planning to shoot an officer, and no aiding or abetting when it happened. *People v. Phillips*, 2012 IL App (1st) 101923, ¶¶ 22-23 (defendant could not be held accountable for the aggravated discharge of a firearm, although he drove the shooter to and from the scene, where there was no evidence that defendant knew before the shooting that the shooter had a firearm). See also *People v. Taylor*, 186 Ill. 2d 439, 448 (1999) (defendant could not be held accountable for the aggravated discharge of a firearm, although he drove the shooter to and from the scene and although he knew that the shooter had a firearm, where "defendant neither had knowledge that [the shooter] intended to fire his gun upon exiting the vehicle nor made any effort to aid [the shooter] in the discharge of the weapon"). Simply driving someone away is not accountability. *Taylor*, 186 Ill. 2d at 448 ("guilt under accountability is not supported where one merely facilitates the escape"); *People v. Dennis*, 181 Ill. 2d 87, 107 (1998) ("escape is not 'conduct, which is an element of an offense' for which defendant may be held accountable"); *Phillips*, 2012 IL App. (1st) 101923, ¶¶ 18, 20 (since "accountability is determined only by a defendant's actions before or during an offense," the fact that defendant drove the shooter away is "not something that the trier of fact is legally entitled to consider" with respect to aggravated discharge of a firearm).

¶ 38 The State argues that there is accountability for the discharge count based on a common design. However, there was no common design to shoot an officer; there was no evidence at all that defendant knew codefendant was armed. *Phillips*, 2012 IL App (1st) 101923, ¶ 22 (where defendant did not know that the shooter had a gun, "he cannot have intended to commit a crime that necessarily requires a firearm, and he therefore cannot be held accountable for it"). See also *Taylor*, 186 Ill. 2d at 447-48 (where defendant did not know that the shooter intended to fire his gun, defendant cannot be held accountable for aggravated discharge of a firearm).

¶ 39 For the reasons explained below, what I would do is merge the discharge count into the burglary count, instead of the other way around, and remand for resentencing.

¶ 40 I. Standard of Review

¶ 41 The law of accountability is governed by statute (720 ILCS 5/5-2 (West 2008)), and this statute is interpreted as we would any other statute.

¶ 42 The rules of statutory interpretation are familiar and often repeated. Interpreting a statute is a question of law, which we review *de novo*. *People v. Carter*, 213 Ill. 2d 295, 301 (2004); *People v. Davis*, 199 Ill. 2d 130, 135 (2002). If the statute's language is plain and ambiguous, it must be read exactly as written. *Carter*, 213 Ill. 2d at 301; *Davis*, 199 Ill. 2d at 135. "It is a cardinal rule of statutory construction that we cannot rewrite a statute and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." *People ex. rel. Birkett v. Dockery*, 235 Ill. 2d 73 (2009) (citing *In re Michelle J.*, 209 Ill. 2d 428, 437 (2004)). See also *Carter*, 213 Ill. 2d at 301 (" ' The most reliable indicator of legislative intent is the language of the statute, which if plain and unambiguous, must be read without exception, limitation or other condition.' " (quoting *Davis*, 199 Ill. 2d at 135)).

¶ 43 "Criminal or penal statutes must be strictly construed in the defendant's favor, 'and nothing should be taken by intendment or implication beyond the obvious or literal meaning of

the statute.' " *Carter*, 213 Ill. 2d at 301 (quoting *Davis*, 199 Ill. 2d at 135). "Where a criminal statute is capable of two or more constructions, courts must adopt the construction that operates in favor of the accused." *Carter*, 213 Ill. 2d at 302.

¶ 44 II. Accountability Statute

¶ 45 Adopting – as we must – the construction that operates in favor of the accused, I find that the plain and unambiguous language of the accountability statute does not provide accountability for the discharge count.

¶ 46 The accountability statute is divided into three sections, and it provides only three ways in which a defendant may be held accountable. 720 ILCS 5/5-2 (West 2008). The introductory lines of the statute state: "When accountability exists. A person is legally accountable for the conduct of another *when*: ***." (Emphasis added.) 720 ILCS 5/5-2 (West 2008). These introductory lines are then followed by three subsections, each labeled "a," "b" and "c" which denote the three different ways that a person may be held accountable. 720 ILCS 5/5-2 (West 2008). The first way, which is described in subsection a, occurs when a person causes someone without legal incapacity to act. 720 ILCS 5/5-2(a) (West 2008). The second way, which is described in subsection b, is when the particular statute governing an offense makes the person accountable. 720 ILCS 5/5-2(b) (West 2008).

¶ 47 The third way, which is the only subsection at issue here, provides that "a person is legally accountable for the conduct of another when *** (c) 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." (Emphasis added.) 720 ILCS 5/5-2(c) (West 2008). As stated before, we are governed by the plain language of the statute. *Carter*, 213 Ill. 2d at 301; *Davis*, 199 Ill. 2d at 135. The plain language of subsection c concerns only one offense that was intended, planned

and committed. As subsection c provides, accountability occurs when, before or during the commission of "*an*" offense and with the intent to promote "*that*" offense, the offender aids another in the planning or commission of "*the*" offense. (Emphasis added.) 720 ILCS 5/5-2(c) (West 2008). *People v. Stanciel*, 153 Ill. 2d 218, 233 (1992) ("Accountability, tied as it is to the crime charged, must comport with the requirements of that crime.")

¶ 48 After providing the three ways that accountability may occur, the accountability statute also states, in an unlettered paragraph, that:

> "When 2 or more persons engage in a common 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 common design or agreement and all are equally responsible for the consequences of those further acts." 720 ILCS 5/5-2 (West 2008).

When interpreting a statute, courts must consider a statute "in its entirety." *Davis*, 199 Ill. 2d at 135. "Since all provisions of a statutory enactment are viewed as a whole, words and phrases should not be construed in isolation, but should be interpreted in light of other relevant provisions of the statute." *Crittenden v. Cook County Comm'n on Human Rights*, 2012 IL App (1st) 112437, ¶ 81 (citing *People v. Lieberman*, 201 Ill. 2d 300, 308 (2002)). The structure of the statute indicates that "common design" was not intended as a fourth or additional way for accountability to occur. Thus, the common design paragraph must be read in harmony with the paragraphs above it.

¶ 49 When read in harmony with subsection c which immediately precedes it, the common design paragraph means that, when two or more people engage in a common criminal design or agreement to commit *"an"* offense, any acts in the furtherance of the common design for *"that"*

offense are considered to be the acts of all parties to the common design or agreement for "*the*" offense. (Emphasis added.) 720 ILCS 5/5-2(c) (West 2008).

¶ 50 The State argues that, where a defendant intended to promote one crime, namely, burglary, he can be held accountable for a completely different crime, namely, discharge of a firearm. I cannot agree. *Taylor*, 186 Ill. 2d at 447-48 (without any prior knowledge that the shooter intended to discharge his firearm, defendant cannot be held accountable for aggravated discharge of a firearm); *People v. Perez*, 189 Ill. 2d 254, 268-69 (2000) ("Without knowledge of any common criminal design to harm [the victim], defendant could not intentionally aid in the scheme's commission" and defendant could not be held accountable for the victim's murder) (citing *People v. Estrada*, 243 Ill. App. 3d 177 (1993) (in the absence of any evidence that defendant was aware that his companion intended to shoot the victim or direct evidence tying defendant to a common design to shoot the victim, defendant's murder conviction on a theory of accountability was reversed)); *Phillips*, 2012 IL App (1st) 101923, ¶ 23 (where "there [was] not a shred of evidence that prove[d] defendant knew that [the shooter] had a gun," we reversed defendant's conviction for aggravated discharge of a firearm, which had been based solely on an accountability).

¶ 51 In essence, the State wants to rewrite the accountability statute so that it reads the same as the felony murder statute, but for all crimes, not just murder. In other words, the State wants to expand the felony murder statute to encompass all crimes. The State wants to rewrite the accountability statute to say that if you commit Felony #1 and, during the commission of Felony #1, a cofelon commits Felony #2, you are liable for Felony #2.

¶ 52 But that is not what the accountability statute says. The accountability statute says that, if you aid or abet someone in the commission of Felony #1, you're liable for Felony #1. *Phillips*, 2012 IL App (1st) 101923, ¶ 30 (since "[t]he State sought to prove defendant guilty by way of

accountability for [the shooter's] crimes of aggravated battery with a firearm and aggravated discharge of a firearm, so the State ultimately had to prove that defendant intended to help [the shooter] commit those particular crimes").

¶ 53 Our supreme court has repeatedly emphasized that the felony murder statute and the accountability statute have different purposes and serve different goals. In *People v. Klebanowski*, 221 Ill. 2d 538, 551-52 (2006), our supreme court stated: "As explained by the court in *People v. Dennis*, felony murder and accountability have theoretically different underpinnings:

> 'Felony murder seeks to deter persons from committing forcible felonies by holding them responsible for murder if a death results. [Citation.] Because of the extremely violent nature of felony murder, we seek the broadest bounds for the attachment of criminal liability. For that reason, in felony murder, a defendant's liability is not limited to his culpability for commission of the underlying felony. A defendant may be found guilty of felony murder regardless of a lack of either intent to commit murder [citation], or even connivance with a codefendant [citation]. Our continued adherence to a proximate cause approach is further exemplary of how broadly we seek to extend the reaches of criminal liability in the case of felony murder.
>
> Unlike felony murder, accountability focuses on the degree of culpability of the offender and seeks to deter persons from intentionally aiding or encouraging the commission of offenses. Holding a defendant who neither intends to participate in the commission of an offense nor has knowledge that an offense has been committed accountable does not serve the rule's deterrent effect. Further, the attachment of liability in such situations contravenes the general concepts of

criminal liability.' " *People v. Klebanowski*, 221 Ill. 2d 538, 551-52 (2006) (quoting *People v. Dennis*, 181 Il. 2d 87, 105-06 (1998)).

If we find that, when a defendant intended to promote burglary, he can also be found liable for discharge of a firearm, then what are the limits? If a doctor intends to commit Medicare fraud with his patient and, during a conversation with his patient, he hits his secretary who walks in on the conversation, is the patient liable for the assault?

¶ 54 It is a far cry to go from looking to burglarize a parked, unoccupied vehicle in a deserted area, to shooting at a police officer. The former is a nonviolent economic crime; and the latter is an armed, dangerous and very violent crime. This distinction is particularly clear where, as here, there is no evidence that defendant knew or suspected that the other person was armed. In these difficult economic times, there are people who are motivated to commit nonviolent, economic crimes. Although we do not condone these crimes, should we also hold them responsible for violent crimes which they did not intend and could not forsee? *Taylor*, 186 Ill. 2d at 447 (in order to convict a defendant under accountability, the State must show that the defendant had, either before or during the commission of the offense, the intent to aid or abet an offender in conduct that constitutes an element of the offense); *Phillips*, 2012 IL App (1st) 101923, ¶ 30 (we held that it was an "insurmountable hurdle" for the State in a prosecution for aggravated discharge "that there [was] no evidence that defendant knew before the shooting that [the shooter] was armed").

¶ 55 Since I cannot concur with the rewriting of the accountability statute from "the" offense to "any" offense, I must write separately here. Any ambiguities in a penal statute must be resolved in favor of the accused. *Carter*, 213 Ill. 2d at 302.

¶ 56 This is purely a question of law, so our review of this issue is *de novo*. Defendant argues that our review of this issue is *de novo*, but the majority finds that it is not. For this point in

defendant's brief, defendant argues that, even if you assume that the State's evidence proves what the State says, it still does not establish the elements of the accountability statute, as a matter of law. I find that is a purely legal question that we must review *de novo*.

¶ 57 For the foregoing reasons and exercising *de novo* review, I must specially concur.