

FOURTH DIVISION  
September 26, 2013

No. 1-11-0232

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 12569 (01)
	)	
DAVID HILL,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOWSE delivered the judgment of the court.  
Justices Palmer and Taylor concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for aggravated battery on a theory of accountability is affirmed and his conviction for first degree murder is reversed and the cause remanded for a new trial. The evidence at trial was sufficient to prove defendant's accountability for aggravated battery for the injury to one shooting victim. However, where there was some evidence that a deceased victim was shot by defendant during a struggle for control of a firearm rather than as a result of an intentional shooting by his codefendant, the trial court erred in failing to instruct the jury on the lesser offense of involuntary manslaughter.

¶ 2 The State charged defendant, David Hill, with three counts of first degree murder, one count of first degree murder while using a firearm, and one count of aggravated battery with a firearm as a result of the shooting death of Romaz Lucas and the shooting of Charles Barrows. Following a jury trial, the circuit court of Cook County convicted defendant of first degree murder and aggravated battery with a firearm. The court sentenced defendant to 43 and 10 years' imprisonment, respectively, and ordered the sentences to run consecutively. Defendant also received a 15-year sentence enhancement for committing the murder with a firearm. For the following reasons, we affirm in part, reverse in part, and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Police arrested defendant a few weeks after the shooting, when defendant returned from out of state. Police arrested codefendant Arsenio Willis less than 2 weeks after defendant's arrest. The case proceeded to a trial before a jury.

¶ 5 At defendant's trial, Demurio Williams testified that on May 16, 2008, he was accompanied by Arsenio Willis on his way home from school when they encountered defendant. Defendant informed Williams of a dice game being played in Williams's backyard. The three went to Williams's backyard through a gate at the front of Williams's residence on Race street in Chicago. There they discovered the game. One of the players was Romaz Lucas. Williams testified that he was listening to music through headphones when Lucas asked Williams about a debt Williams owed him. Williams paused his music to hear Lucas. Williams told Lucas he did not have the money he owed, but he would pay Lucas when he (Williams) got some money.

Williams testified he saw Lucas approach defendant, and Lucas and defendant exchanged words. Defendant removed a gun from his pants and pointed it downward toward the ground.

¶ 6 Williams testified that Lucas asked defendant why he needed a gun when they could just fight. Williams testified to seeing Lucas attempt to grab defendant's gun and then the two men began to fight. Williams immediately began to leave the backyard. As Williams was leaving the backyard he heard a gunshot but he did not see what happened when the shot was fired.

¶ 7 Charles Barrows testified that he suffered a gunshot wound during the incident on May 16, 2008. Barrows saw Williams, Willis, and defendant enter the backyard and heard something said regarding a debt and that Williams owed Lucas money. According to Barrows, defendant interceded in that conversation, removed a gun from his pocket, and pointed the gun toward the ground. Barrows testified Lucas said to defendant they could fight without guns. Barrows testified Lucas then grabbed defendant by the wrist and attempted to take the gun away. Lucas and defendant began wrestling over the gun, then a gunshot went off. Barrows testified that when he heard the shot defendant's gun appeared to be pointed toward the ground or Lucas's legs as Lucas was trying to take the gun. Barrows told police that after the first gunshot defendant's gun fell to the ground. Barrows testified that after the initial gunshot, everyone in the backyard began to run, and Willis began shooting at people in the yard. Defendant ran away while Willis remained in the yard shooting. A bullet struck Barrows in his side as Barrows tried to flee. At trial, Barrows testified he did not see Willis shoot Lucas but assumed that he did, and did not recall telling police that he saw Willis shoot at Lucas. Barrows also told police that Willis was trying to help defendant to get out of the backyard.

¶ 8 Romeo McCollum is Lucas's cousin and was in the backyard with Lucas, Barrows, and 6 or 7 others prior to the incident. McCollum saw Williams, Willis, and defendant enter the backyard. McCollum heard Lucas ask Williams for \$100 Williams owed Lucas. McCollum testified Williams was not listening to music. Defendant interjected and told Lucas he would get nothing. Then defendant pulled out a gun. McCollum testified Lucas told defendant he should put his gun down and the two should "fight like men." McCollum testified defendant then pointed the gun at Lucas and fired. Lucas attempted to grab defendant's gun. When Lucas attempted to grab defendant's gun, a fight over the gun ensued. As the two wrestled on the ground, McCollum testified the gun "went off again." When defendant's gun went off a second time, Willis approached from the back-porch stairs near the gate, where he had been sitting during the fight between defendant and Lucas, and started firing his own gun at the two of them on the ground. McCollum saw Willis fire multiple shots. McCollum assisted Lucas and they ran toward the back of the yard to the fence. Defendant and Willis ran out of the backyard. McCollum testified he continued to hear gunshots after Willis and defendant left the backyard but did not know who was shooting.

¶ 9 McCollum gave police a handwritten statement in which he wrote that after Lucas demanded his money from Williams, Williams was disrespectful by "talking trash." McCollum had also testified before the grand jury that defendant fired a shot at Lucas before he and Lucas started wrestling. McCollum told the grand jury defendant's first shot missed Lucas, defendant and Lucas began fighting over the gun, Lucas was grabbing for the gun when the second shot was fired, and that is when Willis started firing his gun.

¶ 10 Williams's mother, Sheila Williams, had been sitting on the front porch. She saw her son, Willis, and defendant enter the backyard. A short time later, she heard a single gunshot, went toward the backyard, and saw her son walking toward her. At trial, Sheila Williams testified she looked back toward the yard as she and her son approached the house, and saw Willis "falling out" of the gate to the backyard with a gun in his hand. She gave a handwritten statement that she saw Willis firing his gun as he backed out of the gate. She could see the handle of the gun and it looked like a revolver. Sheila Williams heard at least four shots before seeing Willis backing out of the gate. She also testified before a grand jury that she had seen Willis firing his gun toward the back of the yard. She did not see defendant again after her son, Willis, and defendant arrived and went to the backyard.

¶ 11 Rosie Elam was also in the front of the house when Willis and defendant arrived, but she testified she did not see Demurio Williams. Elam testified that when Willis and defendant approached, Willis had a gun. In multiple statements before trial, Elam never stated she saw Willis with a gun. In Elam's statements before trial, she did not state she saw defendant with a gun prior to the date of the incident. At trial, Elam testified to seeing defendant with a gun earlier in the week. Elam did give a statement in which she said the gun defendant possessed was a semi-automatic. Elam testified she saw one person wearing a black "hoodie" and that person had a gun. In court Elam identified the person she had seen on May 16, 2008 in the black "hoodie," with the gun, as defendant. Elam testified that after the shooting, she saw Willis and defendant run past her east on Race street. Willis and defendant were together. Defendant left the backyard first followed closely by Willis. Elam testified she saw another person, this one

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wearing a red jersey, with a gun, and saw defendant tucking a gun into his pants. Elam testified codefendant Willis was the person in the red jersey. Sheila Williams testified that she never saw anyone running down the street after the shooting and that Rosie Elam was in the alley with Barrows after the shooting, not on the street. Elam misidentified Willis as defendant in court. A police detective, if called to testify, would state that when he interviewed Elam, she said that defendant was wearing the red jersey.

¶ 12 Frederick Williams is Sheila Williams's brother and was also in the front of the house at the time of the shooting. Frederick Williams did not testify at trial, but did testify before the grand jury. The parties stipulated to his grand jury testimony at trial. Before the grand jury, Frederick Williams testified that he saw Demurio Williams, Willis, and defendant enter the backyard, where some people were playing dice. A few minutes later, he heard gunshots and saw people running. Frederick Williams entered the backyard and saw Willis backing toward the gate and Barrows attempting to get past Willis to exit the gate. Frederick Williams heard a shot as Barrows pushed past Willis. Willis continued to fire toward the back of the backyard after Barrows shoved past Willis. Frederick Williams testified he saw Willis fire two shots and heard a total of three gunshots. He did not see anyone else with a gun and did not see defendant at all when Frederick entered the backyard. He did find a gun on the ground in the backyard, picked it up, and disposed of one spent shell casing that was inside the gun. He later attempted to remove his fingerprints from the gun with oil. He removed 4 or 5 live rounds of ammunition and kept them and the gun in a Crayola box.

¶ 13 Police recovered one spent shell casing from the backyard, the gun and four live rounds

Frederick Williams saved, after he informed police where to find the box. The gun had five chambers.

¶ 14 Lucas died from multiple gunshot wounds to the chest and thigh. The State did not recover the bullet fired into Lucas's thigh because the shot produced a "through and through" wound and was not in his body. The State recovered the bullet fired into Lucas's chest from his stomach. The State compared the gun Frederick Williams found on the ground with the bullet fired into Lucas's chest. Both the gun and the bullet were .38 caliber, but the bullet was not fired from the gun. A forensic scientist testified the gun required 4-1/2 to 5 pounds of pressure to pull the trigger, or 12-13 pounds for a double action trigger. He could not determine if a single action or a double action fired the single round from the gun. The shell casing police recovered from the backyard was .22 caliber and was not fired from the gun police recovered and was not fired by the same gun that was used to fire a bullet into Lucas's chest.

¶ 15 Defendant did not testify.

¶ 16 During the instruction conference, defendant's attorney requested the trial court instruct the jury on self defense, second degree murder, and involuntary manslaughter. The court denied counsel's request for an involuntary manslaughter instruction. After trial and during deliberations, the jury asked three questions, each related to the instructions pertaining to accountability. The jury ultimately returned a verdict of guilty on the charges of first degree murder and aggravated battery with a firearm, and found that defendant was armed with a firearm during the commission of the first degree murder. The trial court denied defendant's posttrial motions and sentenced defendant to 28 years' imprisonment for first degree murder with a 15-

year firearm enhancement and 10 years for aggravated battery with a firearm. The court denied defendant's motion to reconsider sentence.

¶ 17 This appeal followed.

¶ 18 ANALYSIS

¶ 19 Defendant argues that his convictions must be reversed because he was convicted on a theory of accountability for Willis's conduct but the State failed to prove he was legally accountable beyond a reasonable doubt. Defendant also argues that the trial court committed reversible error in failing to instruct the jury on the offense of involuntary manslaughter.

¶ 20 Defendant's first argument raises a challenge to the sufficiency of the evidence to prove him legally accountable.

“When the sufficiency of the evidence is challenged, a criminal conviction will not be set aside unless the evidence, when viewed in the light most favorable to the prosecution, is so improbable or unsatisfactory that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The reviewing court may not retry the defendant. [Citation.] The trier of fact determines the credibility of the witnesses, the weight given to their testimony, and the reasonable inferences drawn from the evidence.” *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 22 (2012).

¶ 21 Defendant's second contention on appeal challenges the trial court's decision not to instruct the jury on the lesser-included offense to first degree murder of involuntary manslaughter. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). “The appropriate standard of review in determining whether a trial court's decision whether to give an instruction on a lesser-included offense is abuse of discretion.” *People v. Perry*, 2011 IL App (1st) 081228, ¶ 27 (2011).



¶ 22 Defendant’s final argument on appeal challenges the constitutionality of a statute.

“The constitutionality of a statute is purely a matter of law, and we review that question *de novo*. [Citation.] As our supreme court has held:

All statutes carry a strong presumption of constitutionality. To overcome that presumption, the party challenging the statute must clearly establish that it violates the constitution. We generally defer to the legislature in the sentencing arena because the legislature is institutionally better equipped to gauge the seriousness of various offenses and to fashion sentences accordingly. [Citations.]” (Internal quotation marks omitted.) *People v. Harris*, 2012 IL App (1st) 092251, ¶ 12 (2012).

¶ 23 1. Accountability

¶ 24 “A person is legally accountable for the conduct of another if either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. [Citation.]” (Internal quotation marks omitted.) *Flynn*, 2012 IL App (1st) 103687, ¶ 23.

¶ 25 “A defendant may be deemed accountable for acts performed by another \*\*\* if there was a common criminal plan or purpose. Words of agreement are not necessary to establish a common purpose to commit a crime.” *Flynn*, 2012 IL App (1st) 103687, ¶ 23 (quoting *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995)).

¶ 26 Defendant argues the evidence presented at trial is insufficient to prove that defendant and Willis had a preconceived plan or common design to commit a crime when they entered Williams’s backyard on May 16, 2008. Defendant argues there is no evidence defendant was

aware of any plan to commit any crime. Rather, defendant argues, the evidence supports finding that the confrontation that evolved between Williams, Lucas, and defendant was unanticipated and unplanned. Defendant also argues he did not solicit, aid, abet, agree, or attempt to aid Willis.

¶ 27 “The common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct.” *Flynn*, 2012 IL App (1st) 103687, ¶ 23 (quoting *Taylor*, 164 Ill. 2d at 140-41). “Where one attaches himself to a group bent on illegal acts which are dangerous or homicidal in character, or which will probably or necessarily require the use of force and violence that could result in the taking of life unlawfully, he becomes accountable for any wrongdoings committed by other members of the group in furtherance of the common purpose, or as a natural or probable consequence thereof even though he did not actively participate in the overt act itself. [Citations.]” (Internal quotation marks omitted.) *Flynn*, 2012 IL App (1st) 103687, ¶ 23.

¶ 28 Defendant asserts that to prove defendant legally accountable for Willis’s conduct, the evidence must prove that defendant aided Willis, not that Willis aided defendant. However, implicit in that argument is the assumption that defendant and Willis did not have a common design to commit a criminal offense. For reasons discussed more fully below, we find that the jury could reasonably infer that Williams, Willis, and defendant did have a common criminal design when they entered the backyard. Defendant also argues the evidence is insufficient to prove beyond a reasonable doubt that defendant had the concurrent specific intent to promote or facilitate the shooting. Defendant argues that the testimony of the sole witness to testify defendant actually fired at Lucas, McCollum, was rebutted by the physical evidence that the gun

believed to be defendant's only fired one shot rather than two as McCollum testified.

¶ 29 In *People v. Phillips*, 2012 IL App (1st) 101923 (2012), this court held that because “[t]he State sought to prove defendant guilty by way of accountability for [the] crimes of aggravated battery with a firearm and aggravated discharge of a firearm, \*\*\* the State ultimately had to prove that defendant intended to help \*\*\* commit those particular offenses.” *Id.* at ¶ 30. The *Phillips* court reversed the defendant's conviction reasoning that, even if the evidence showed that the defendant plotted to commit some crime against the victims, there was no evidence the defendant intended to help the codefendant attack the victims with a firearm. *Id.* The court concluded that “[w]ithout some evidence that defendant knew that [the codefendant] had a gun \*\*\* the State cannot prove beyond a reasonable doubt that defendant intended to help \*\*\* commit offenses that required the use of a firearm.” *Id.*

¶ 30 *Phillips* is distinguishable. The *Phillips* court quoted the common design rule and noted that “[a] defendant may be deemed accountable for acts performed by another \*\*\* if there was a common criminal plan or purpose.” *Id.* at ¶ 13 (quoting *Taylor*, 164 Ill. 2d at 140-41). However, the court then found that “individuals can *only* be guilty by accountability under the common-design rule if they (1) intend to help the principal plan or commit the offense, (2) do some act that helps the principal plan or commit the offense, and (3) both form the requisite intent and perform the requisite act before or during the commission of the offense itself.” (Emphasis added.) *Id.* at ¶ 15. Under that standard, the court found a lack of evidence about the defendant's knowledge of whether the codefendant was armed with a gun crucial, because the defendant was found to be accountable for offenses that involved a firearm. *Phillips*, 2012 IL

App (1st) 101923, ¶¶ 21, 22. The court held that “[e]ven if we were to assume that defendant intended to help \*\*\* commit some crime against the victims, he cannot logically have intended to help \*\*\* commit a crime that he does not know is possible.” *Id.* at ¶ 22.

¶ 31 Our supreme court has held that “[u]nder the common-design rule, \*\*\* any acts in the furtherance of [a] 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.” *People v. Williams*, 193 Ill. 2d 306, 338-39 (2000). The *Phillips* court did not address whether the shooting in that case was in *furtherance* of a *common* criminal design. The *Phillips* court focused on whether the State proved that the defendant intended to help commit a particular offense. *Phillips*, 2012 IL App (1st) 101923, ¶ 30. The court may have believed that absent knowledge of the codefendant’s gun, the shooting of the victims in that case could not have been in furtherance of whatever common design the defendants may have shared. See *Id.* (“there is no evidence that he intended to help Sanders attack them with a firearm.”) (Emphasis omitted.) Here, there is evidence of a common criminal design involving firearms. Defendant initiated the confrontation with Lucas by brandishing a firearm. Therefore, in this case, the use of a firearm by Willis was in furtherance of the common design.

¶ 32 The evidence supports the inference that Williams, Willis and defendant expected a confrontation. The testimony established that defendant and Williams approached Lucas while Willis did not, defendant and Willis were both armed, and defendant immediately inserted himself into the verbal confrontation between Lucas and Williams regarding Williams’s debt and displayed a gun. This evidence is especially indicative of an expectation of a confrontation when

viewed in context of the testimony that it was defendant who informed Williams and Willis of the people gambling in Williams's backyard. It is reasonable to infer that Williams and defendant purposefully approached Lucas. Although Williams testified he did not hear Lucas when Lucas first started speaking because he was listening to music, the jury could reasonably infer that Williams saw Lucas and was aware of his presence when he entered the backyard, and Williams was aware of his debt to Lucas, because he told Lucas he would pay him when he (Williams) got some money. The evidence does not reveal any apparent reason for defendant's escalation of the incident by displaying a weapon. There is no evidence Lucas initiated a violent confrontation beyond asking for the money Williams owed him. Based on the fact defendant joined Williams and Willis after informing them of the dice game and defendant's sudden and unprovoked response to Lucas's demand, a reasonable jury could infer that defendant came to Williams's backyard looking for a confrontation.

¶ 33 “When 2 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 common design or agreement and all are equally responsible for the consequences of those further acts.” *Phillips*, 2012 IL App (1st) 101923, ¶ 12 (quoting 720 ILCS 5/5-2 (West 2010)). The shooting by Willis was in furtherance of the common design to engage in a confrontation with Lucas, the natural consequence of which was the use of deadly physical force. That conclusion, as well as the inference of a common criminal design, is abundantly supported by evidence that defendant inserted himself between Lucas and Williams without being asked for assistance and having no apparent connection to Williams's debt, and immediately, without any

apparent threat or provocation, displayed a weapon, which resulted in the escalation of the incident and a shot being fired. Then, in furtherance of the confrontation between Lucas and defendant, which the jury could reasonably infer was the purpose behind defendant's inserting himself between Lucas and Williams, Willis, whom the jury could infer defendant knew to be armed, came to defendant's assistance as he struggled on the ground with Lucas. Therefore, defendant is equally responsible for Willis's conduct.

¶ 34 In addition to finding that the testimony is sufficient to raise a reasonable inference that Williams, Willis, and defendant entered Williams's backyard with a common design for a confrontation, we also find that the evidence is sufficient to support a finding that defendant knew that design would probably result in the use of deadly force. Defendant argues the State did not present evidence anyone knew who was in the backyard playing dice and specifically that they did not know Lucas would be in the backyard of Williams's home. Defendant also argues that their conduct is not indicative of a group "on a mission to confront anyone." While defendant's proffered inferences from the evidence are reasonable, a reasonable trier of fact could also infer that the three of them went to Williams's backyard expecting a confrontation, as evidenced by defendant's unprovoked intercession and immediate use of a firearm to confront Lucas. In an appeal from a criminal conviction challenging the sufficiency of the evidence, "all reasonable inferences from the evidence must be allowed in favor of the State." *People v. Baskerville*, 2012 IL 111056, ¶ 31 (2012).

¶ 35 Defendant argues that Willis's conduct was entirely independent and unsolicited, therefore he cannot be held legally accountable for Willis's actions. We disagree. "Evidence

that defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design also supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another. [Citation.]” *Flynn*, 2012 IL App (1st) 103687, ¶ 23 (quoting *Taylor*, 164 Ill. 2d at 140-41). The fact that defendant was armed is sufficient to support a reasonable inference that when defendant entered the backyard expecting a confrontation, he knew the design would probably result in the use of force. That inference is bolstered by evidence that when defendant confronted Lucas, defendant, for no other apparent reason, drew a weapon. The jury could reasonably infer that Willis’s assistance once the expected violent confrontation went beyond defendant’s control was part of that design. Accordingly, defendant is accountable for Willis’s wrongdoings even though defendant did not actively participate in shooting Barrows and may not have actively participated in killing Lucas. *Flynn*, 2012 IL App (1st) 103687, ¶ 23.

¶ 36 Moreover, the State aptly argues it proved a common criminal design with evidence of defendant’s presence during the shooting, his continued close affiliation with Willis after the shooting, defendant’s failure to report the crime, and his flight. “Proof that defendant was present during the perpetration of the offense, that he maintained a close affiliation with his companions 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 the defendant’s legal accountability. Defendant’s flight from the scene may also be considered in determining whether defendant is accountable.” *Flynn*, 2012 IL App (1st) 103687, ¶ 23 (quoting *Taylor*, 164 Ill. 2d at 140-41). Defendant was present during, and in fact instigated, the violent altercation with Lucas which

escalated into the shootings by Willis. There was some evidence that Willis and defendant maintained a close affiliation after the shootings. Elam testified the two fled together. Although much of her testimony was impeached, it is within the province of the trier of fact to judge the credibility of witnesses, and it “is free to accept or reject as much or as little of a witness’s testimony as it pleases.” *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22 (2011). There is no dispute defendant fled from the scene and the jurisdiction, and did not report the crime.

¶ 37 For all of the foregoing reasons, we find there is sufficient evidence of defendant’s accountability.

¶ 38 2. Jury Instructions

¶ 39 Next, defendant argues that the trial court committed reversible error in failing to instruct the jury on the lesser-included offense of involuntary manslaughter. “The offenses of involuntary manslaughter and first degree murder require different mental states, such that involuntary manslaughter requires a less culpable mental state than first degree murder. Particularly, involuntary manslaughter requires that a defendant unintentionally kill an individual by recklessly performing acts that are likely to cause death or great bodily harm.” *People v. Jones*, 219 Ill. 2d 1, 31 (2006). The State argues that defendant was not entitled to an instruction on involuntary manslaughter because his intent is not relevant. The State argued defendant’s intent is not relevant because the State proved defendant guilty based on accountability for Willis’s conduct. Therefore, it is only Willis’s intent that is relevant and Willis’s conduct that would need to support an instruction on recklessness. In this case, the State argues, the record contains no evidence Willis acted recklessly.



¶ 40 The State's argument is premised on its conclusive assertion that it affirmatively proved that it was Willis's gun that fired the fatal shot. However, when the State asked the medical examiner for her opinion to a reasonable degree of medical certainty as to the cause of death, the medical examiner responded that the cause of death was "multiple gunshot wounds." During its rebuttal argument, the State suggested that defendant intentionally shot Lucas in the leg while they were struggling. The jury may have reasonably concluded that Lucas died as a result of defendant shooting him in the leg. To sustain a murder conviction, "[t]he injury inflicted by an accused need not be the sole or immediate cause of death in order to constitute the legal cause of death." *People v. Mars*, 2012 IL App (2d) 110695, ¶ 16 (2012). The evidence did not establish conclusively if one or the other gunshots, or both, caused Lucas's death.

¶ 41 Based on the evidence adduced at trial, it was possible the jury convicted defendant upon finding that defendant's gun caused the gunshot wound to Lucas's leg and the injuries that resulted from that gunshot caused Lucas's death. Therefore, the evidence could have led the jury to convict defendant based not on Willis's conduct, but on defendant's own conduct. Defendant argued on appeal that, although the State argued at trial that defendant was legally accountable for Willis's act of shooting and killing Lucas, the State also argued at trial that it did not matter whose gun fired the fatal shot.

¶ 42 During closing arguments, the State described the evidence as proving to the jury that "the Defendant and his partner are the only two guys with the guns that day and the only two \*\*\* that fired them, shot and killed Romaz Lucas \*\*\*." As to the law of accountability, the prosecutor stated: "[Defendant] is responsible not only for his conduct that day, but for Arsenio

Willis's conduct that day just as if he had done it \*\*\*." The prosecutor argued as follows:

"MS. OLSON [Assistant State's Attorney]: The propositions,  
what we must prove  
for first degree  
murder:

First, that the Defendant, or one for whose conduct he is  
legally responsible, performed the acts which caused the death of  
Romaz Lucas. How do you know that that guy or his partner  
whose acts he is responsible for caused the death? You know that  
from the evidence in this case, the testimony from that stand.

The Defendant and his partner were the only two guys with  
guns that day and the only two people shooting, and that's how  
Romaz Lucas was shot, twice, and died."

¶ 43 After arguing that the trigger of defendant's gun required too much force to have just  
"gone off" the prosecutor argued: "[Assistant State's Attorney]: You know who shot Romaz,  
and you know why, because the law tells you whether it was his finger on the trigger, or whether  
it was Willis's [finger on the trigger], in the eyes of the law, they are the same guy."  
Additionally, although the gun thought to be defendant's was excluded as the weapon that caused  
Lucas's chest wound, the State argued it caused Lucas's leg wound. The assistant state's  
attorney stated: "[Assistant State's Attorney]: The thigh wound, which was the one that he put  
into him when they were tussling \*\*\*." Following an objection to the state's characterization of  
the possible results of the jury's deliberations, the prosecutor argued as follows: "[Assistant  
State's Attorney]: It's first degree murder because he did it knowingly, intentionally. It's first  
degree murder because he acted accountably with Arsenio Willis."

¶ 44 We find that the record supports finding that the State invited the jury to convict

defendant based on either his own conduct or based on his accountability for Willis's conduct.

We also find that the evidence was such that the jury may have convicted defendant based on his on conduct in shooting Lucas.

¶ 45 Defendant argues that the evidence was that his conduct included displaying a gun during an argument over a debt and struggling over the gun. The evidence also supports finding that the gun discharged during the struggle with Lucas. Defendant argues this is evidence of recklessness that could have resulted in Lucas's death sufficient to support giving an instruction on involuntary manslaughter. We agree.

¶ 46 Although McCollum's testimony suggests defendant intentionally fired at Lucas, both Williams and Barrows testified that the gun discharged after a struggle began, while the gun was pointed toward the ground. The jury could accept or reject any of the witnesses's testimony, but it is possible the jury accepted evidence that the gun only discharged after defendant and Lucas began to fight over the gun. This court has found that pointing a gun at someone is a reckless act regarding the offense of involuntary manslaughter. *People v. Watkins*, 361 Ill. App. 3d 498, 501-02 (2005) (citing *People v. Lemke*, 349 Ill. App. 3d 391 (2004)). The *Lemke* court found that the defendant's conduct in that case "fit within a pattern in which a person with a weapon confronts another and the weapon discharges." *Lemke*, 349 Ill. App. 3d at 396-97. The court found that the defendant was denied the effective assistance of counsel based on counsel's failure to present the possibility of a conviction for involuntary manslaughter. *Lemke*, 349 Ill. App. 3d at 398-99. The court ordered that on remand, the trial court was to consider whether the defendant committed involuntary manslaughter. *Id.* at 402.

¶ 47 The State’s authorities in support of its argument that defendant’s intent is irrelevant are inapposite to the case at bar. In *People v. Jefferson*, 260 Ill. App. 3d 895, 912-13 (1994), the court held that the defendant was not entitled to an involuntary manslaughter instruction when his codefendant deliberately fired a gun in the direction of a group of people with the result that a 13-year-old girl was killed. The *Jefferson* court held that the codefendant’s act of “intentionally firing into a crowd cannot be reckless.” *Id.* at 912. The *Jefferson* court did not discuss any conduct by the defendant, other than the shooter’s conduct, that might have resulted in the tragic loss of life. See *Id.* at 898-99. In *People v. Grimes*, 386 Ill. App. 3d 448 (2008), the defendant argued that he presented sufficient evidence that his codefendant’s conduct was reckless, rather than intentional, which justified an instruction on involuntary manslaughter. *Id.* at 451. In support of that argument, the defendant in *Grimes* also contended that the evidence was enough to suggest that his own actions were reckless. *Id.* The *Grimes* court held that the defendant’s intent was irrelevant because the focus should be on the codefendant’s intent, which the court found could not have been reckless under the circumstances. *Id.* at 452. However, unlike this case, there was no evidence discussed to suggest that the defendant engaged in conduct that could be reckless and which also may have caused the victim’s death. See *Grimes*, 386 Ill. App. 3d at 453. Instead, the court looked only to the codefendant’s conduct to determine whether a lesser included offense instruction on involuntary manslaughter was justified. *Id.*

¶ 48 In this case, defendant does not argue that Willis’s conduct of firing into the backyard supports giving an involuntary manslaughter instruction. Unlike *Jefferson* and *Grimes*, here the jury may have convicted defendant based on conduct, independent of Willis’s conduct, that (a)

could be reckless and (b) may have resulted in Lucas's death and, consequently, defendant's conviction. "An instruction on a lesser offense is justified when there is some credible evidence to support the giving of the instruction." *People v. Jackson*, 372 Ill. App. 3d 605, 613 (2007).

"Even slight evidence may warrant an instruction on a lesser-included offense." *People v. Smith*, 402 Ill. App. 3d 538, 545 (2010). Since there was evidence of recklessness by defendant resulting in Lucas being shot, and the evidence does not foreclose finding that (1) the shot from defendant's gun struck Lucas or (2) the injury caused by defendant's gunshot caused Lucas's death, defendant was entitled to an instruction on involuntary manslaughter.

¶ 49 "Where there is evidentiary support for an involuntary manslaughter instruction, the failure to give the instruction constitutes an abuse of discretion." *Jackson*, 372 Ill. App. 3d at 613. The trial produced at least slight evidence that defendant acted recklessly and that his reckless conduct resulted in Lucas's death. Therefore, defendant was entitled to an instruction on involuntary manslaughter, and the trial court's failure to so instruct the jury was an abuse of discretion.

¶ 50 3. Constitutionality of Automatic Transfer Provision

¶ 51 Finally, defendant argues that the automatic transfer provision of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-130 (West 2008)) is unconstitutional.

Specifically, defendant argues that the automatic transfer provision: (1) violates due process by subjecting 15 and 16 year old defendants to transfer to adult court without a hearing to determine who should be transferred and who should not; (2) violates the Eighth Amendment by subjecting juveniles to a sentencing scheme which requires the court to treat juveniles as adults without

considering their mental culpability; and (3) violates the Proportionate Penalties Clause of the Illinois Constitution.

¶ 52 Defendant argues the automatic transfer provision is unconstitutional under principles stated by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541 (1966), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). Defendant argues these cases stand for the proposition that due process requires a hearing before a juvenile defendant may be transferred to adult court to determine if transfer is appropriate considering legitimate penological justifications for adult sentencing practices to apply to juvenile offenders in light of the juvenile defendant's youthfulness and capacity for rehabilitation.

¶ 53 The rational basis test is the appropriate standard for determining whether the automatic transfer statute comports with substantive due process. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 75 (2011) (citing *People v. J.S.*, 103 Ill. 2d 395, 402-04 (1984)). "Under the rational basis test, the statutory classification passes constitutional muster if it is rationally related to a legitimate state interest." *Id.* Our supreme court has held that "this statute, which creates a limited exception to juvenile court jurisdiction, is rationally based on the age of the offender and the threat posed by the offense to the victim and the community because of its violent nature \*\*\*." *J.S.*, 103 Ill. 2d at 404. This holding remains good law after the United States Supreme Court's decisions in *Roper* and *Graham*. *Salas*, 2011 IL App (1st) 091880, ¶ 76. Our supreme court also rejected the argument that automatic transfer deprives juvenile defendants of the procedural due process to which they are entitled under the United States Supreme Court's decision in *Kent*. *J.S.*, 103 Ill. 2d at 405. Accordingly, we must reject defendant's argument that

the automatic transfer provision violates his right to substantive or procedural due process.

*Salas*, 2011 IL App (1st) 091880, ¶¶ 76, 79.

¶ 54 Defendant also argues that automatic transfer violates the Eighth Amendment and the Proportionate Penalties clause of the Illinois Constitution because it results in subjecting juveniles to adult sentences without any consideration of their youthfulness, potential for rehabilitation, or mental culpability. This court rejected a similar Eighth Amendment argument in *Salas*, 2011 IL App (1st) 091880, ¶ 66. There, this court held as follows:

“[T]he automatic transfer statute at issue here does not impose any punishment on the juvenile defendant, but rather it only provides a mechanism for determining where defendant’s case is to be tried, *i.e.*, it provides for the forum in which his guilt may be adjudicated. The punishment imposed on defendant \*\*\* was made pursuant to the Unified Code of Corrections and not pursuant to the automatic transfer statute. As the automatic transfer statute does not impose any punishment, it is not subject to the eighth amendment.” *Id.*

¶ 55 The *Salas* court also held that its “analysis of [the] eighth amendment challenge also applies to [the] proportionate penalties challenge. The Illinois Supreme Court has held: the proportionate penalties clause is coextensive with the cruel and unusual punishment clause. Both clauses apply only to the criminal process--that is, to direct actions by the government to inflict punishment. [Citation.] The automatic transfer statute imposes no penalty or punishment and so neither the proportionate penalty clause nor the *Roper* and *Graham* analysis applies here.” *Id.* at ¶ 70. Defendant argues *Salas* was incorrectly decided. We disagree and adhere to this court’s prior judgment that the automatic transfer provision of the Juvenile Court Act is not subject to an Eighth Amendment or proportionate penalties analysis.

¶ 56 Finally, defendant's argument that subjecting him, a juvenile with a chaotic family background and history of mental illness, to adult sentencing under the automatic transfer statute serves no legitimate governmental purpose, is unpersuasive. As previously noted, "[t]he punishment imposed on defendant here \*\*\* was made pursuant to the Unified Code of Corrections and not pursuant to the automatic transfer statute." *Salas*, 2011 IL App (1st) 091880, ¶ 66. Under the Unified Code of Corrections, the trial court is permitted to consider the defendant's mentality and social environment. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). There are legitimate penological justifications for adult sentencing practices to apply to juvenile offenders. See *Graham*, 560 U.S. at \_\_\_, 130 S. Ct. 2011, 2028 (2010) ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate--retribution, deterrence, incapacitation, and rehabilitation, [citation]--provides an adequate justification."). The automatic transfer provision and attendant sentencing requirements did not violate defendant's constitutional rights.

¶ 57 CONCLUSION

¶ 58 The automatic transfer of defendant's case to adult court under the Juvenile Court Act did not violate any of defendant's constitutional rights. The evidence was sufficient to prove accountability. Defendant's conviction of aggravated battery on a theory of accountability for Willis's act of shooting Barrows is, accordingly, affirmed. However, the trial court invaded the province of the jury by only giving the instruction for the greater offense of first degree murder and by failing to give the instruction for the lesser offense of involuntary manslaughter, where the evidence could have supported a conviction based on defendant's own conduct and where the



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jury could have found that defendant's own conduct was reckless. While we find the evidence was sufficient to convict the defendant on a theory of accountability, a new trial is required on the charge of murder because the defendant did not receive a fair trial. Therefore, we reverse the murder conviction and remand for a new trial on that charge and direct the trial court to instruct the jury on the lesser-included offense of involuntary manslaughter.

¶ 59 Affirmed in part, reversed in part, and remanded.