2013 IL App (1st) 112514-U

FIRST DIVISION
March 4, 2013

No. 1-11-2514

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. 10 CR 1857
	)	
YSOLE KROL,	)	Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: There was sufficient evidence to convict defendant of first degree murder on an accountability basis, where she handed codefendant the gun he used to kill the victim, it could be reasonably inferred that they were angry with the victim, and defendant then assisted codefendant in fleeing the scene and attempting to conceal their involvement. The 15-year firearm enhancement for committing murder while armed with a firearm was valid because the charging instrument alleged that defendant or codefendant was armed with a firearm during the offense.

¶ 2 On December 18, 2009, defendant Ysole Krol's evening out with her boyfriend and father of her child, Sergio Martinez, went terribly wrong. While they were together in her car, she followed Martinez's instruction to hand him a nearby gun. Martinez, also her codefendant,

immediately used it to kill Christopher Rivera. Sometimes choices made in the blink of an eye, under stressful circumstances, are better than those made after due and careful consideration and study. Sometimes, when they are not, they result in tragic consequences. The instinctual choices Krol made that night produced a deadly result and resulted in her conviction for Rivera's murder.

¶ 3 Following a bench trial, Krol was convicted of first degree murder and sentenced to 35 years' imprisonment, including a 15-year enhancement for commission of the offense while armed with a firearm. 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2010). On appeal, she contends that there was insufficient evidence to convict her on an accountability basis. She also contends that the firearm enhancement was improper because she was not given notice of the enhancement as required by statute.

¶ 4 Defendant and codefendant Sergio Martinez were charged in relevant part with two counts of first degree murder, both alleging that "while armed with a firearm," "they" killed Christopher Rivera by shooting him on or about December 18, 2009. One count alleged that they did so "intentionally or knowingly" while the other account alleged that they did so "knowing that such act created a strong probability of death or great bodily harm."

¶ 5 At trial,[1] Isaac Sanchez testified that he was the brother of Christopher and Jonathan Rivera and lived with them and their mother in December 2009. Isaac knew codefendant and defendant as former neighbors who, as of December 2009, lived together in another neighborhood. At about 8 p.m. on the day in question, Christopher received a telephone call from codefendant; Isaac overheard that the brief call consisted of an argument. Christopher then told Isaac that codefendant was outside, grabbed a jacket, and ran out of the home into the street. Isaac did not see him grab a weapon as he left, though Christopher and codefendant had previous

[1]In a simultaneous jury trial, codefendant was convicted of first degree murder. His appeal is pending separately. *People v. Martinez*, No. 1-12-0002.

"altercations." Isaac followed Christopher outside, as did Jonathan a short time later. Isaac admitted that he also "didn't have a good relationship" with codefendant, but denied grabbing a weapon as he went out. While there had been a BB gun in their home, it was no longer there on the day in question.

¶ 6 Across the street from their home, Christopher ran towards a black Mitsubishi Lancer that Isaac knew to be owned by defendant. Codefendant was driving, with his window down, and two unknown men were in the back seat; the three men were yelling and gesturing for Christopher to join them. Isaac did not see defendant in the car. Christopher did not throw anything at the car or do anything threatening towards its occupants, and Isaac specifically denied that he threw a brick at, or that Christopher fired a BB gun towards, the car. However, Isaac saw a flash and heard a gunshot from the driver's side of the car, and Christopher immediately fell to the ground. The Lancer fled, and Isaac went to his brother, who had been shot in the head.

¶ 7 Jonathan Rivera testified that, on the evening in question, he heard Christopher briefly on the telephone and then saw him "rushing out" of their home. Isaac, and then Jonathan, followed him outside; none of them grabbed a weapon as they left. Jonathan saw Christopher running towards a car he knew to be owned by defendant. While Jonathan and his brothers had been friends with defendant, they were no longer friends as of December 2009. The occupants of the car, none of whom Jonathan recognized at first, were beckoning Christopher towards them. Jonathan saw a flash and Christopher dropping to the ground, then recognized codefendant as the driver just before the car sped away. Jonathan denied that he, Christopher, or Isaac threw anything at the car or fired a BB gun towards it, and denied that there was a BB gun in their home. He did not see defendant in the car that night.

¶ 8 Jose Martinez, codefendant's brother, testified that defendant was codefendant's girlfriend. On the evening in question, Jose was with defendant, codefendant, and Joshua

Bzdusek in a car driven by codefendant, with defendant in the front passenger seat, Jose in the middle rear seat and Bzdusek in the passenger-side rear seat. They all had been, but were no longer by December 2009, friends with Christopher and his brothers. As they were driving to a certain mall to buy presents, they stopped at a gasoline station for codefendant to put air in the tires. There, Jose saw Christopher, but not Isaac or Jonathan, walking in the direction of his nearby home. Neither defendant nor codefendant made any sign that they saw Christopher. When they left the gas station, codefendant phoned Christopher and, using a "normal" tone, told Christopher that he had just seen him and reminded him that he owed him money. Until that point in the trip, nobody had mentioned Christopher or discussed any plan to go to his home.

¶ 9 After the call, they went to Christopher's home. After a short time, Jonathan, Isaac, and Christopher came outside, in that order, and ran towards codefendant's car. Jose denied that anyone in the car beckoned them. One of them threw something at the car, and defendant told codefendant to "get the hell out of here," but he could not do so because another car was in the way. Jose saw Christopher holding up his arm and pointing his hand with something that appeared to be a gun, then heard repeated popping noises. Codefendant told defendant to give him a gun, and a few seconds later Jose heard codefendant fire a gunshot through the car's open window. Jose did not see defendant hand codefendant a gun because he was "ducked down" at the time. By now the other car was no longer blocking their path, and codefendant drove off. They discussed the incident as they drove away, and codefendant expressed his belief that "the gun was fake." They all went to defendant's home, and defendant parked the car in her garage. Jose denied that any of them wiped the car.

¶ 10 Assistant State's Attorney Tracy Senica testified that she interviewed Jose on the day after the shooting and he gave a written statement. In that statement, Jose stated that he agreed with codefendant's opinion that Christopher's gun was not real because they did not hear bullets

striking the car, though Jose did hear something strike the car with a "thud." Jose also said in his statement that defendant and codefendant were angry because the car was damaged.

¶ 11 Joshua Bzdusek testified that he was a friend of codefendant and Jose and knew defendant in December 2009. They all had been, but were no longer by that time, friends with Christopher and his brothers. On the evening in question, Bzdusek and Jose were picked up by defendant and codefendant in their black sedan. Codefendant was driving, defendant was in the front passenger seat, and a baby seat was behind the driver, so Jose and Bzdusek sat in the back seat with Jose in the middle and Bzdusek in the passenger-side seat. As they were "cruising," without mentioning Christopher at all in conversation, they saw Isaac and Jonathan but not Christopher. Knowing that the Sanchez home was nearby, codefendant stopped at a gasoline station to put air in the tires. While there, codefendant phoned someone to say he was "trying to come get my money," in a "firm" but not yelling tone without making threats, and then drove to the Sanchez home.

¶ 12 As they arrived there, Christopher, Isaac, and Jonathan ran towards them. Christopher was pointing his hand towards them, and Bzdusek presumed that Christopher had a gun in hand though he did not see one. Bzdusek heard something heavy – which he did not see but presumed to be a brick – strike the rear of the car and heard repeated popping noises. Bzdusek and defendant urged codefendant to leave, but he could not do so immediately as their car was "boxed in" at that moment by another car. Codefendant instead told defendant to "pass me the gun" and then fired a shot. Though Bzdusek had closed his eyes by this point, and thus did not see defendant pass a gun to codefendant, he heard what he believed to be a body falling to the pavement. Codefendant then drove away. As they fled, they discussed whether Christopher's gun had been "real" or not, but Bzdusek denied recalling that codefendant opined that it "was a fake gun." Nobody in the car phoned the police. As they drove to defendant and codefendant's

home, defendant took over the driving of the car. Defendant parked the car in the garage, and codefendant left carrying the gun. Bzdusek denied that they cleaned the car.

¶ 13 Bzdusek was brought to the police station the day after the shooting, where he was interviewed; he read and signed a statement prepared from his interview. He told the police that, near the gasoline station, codefendant pointed someone out to defendant as "Chris" (which Bzdusek explained to police was a reference to victim Christopher) and referred to him with a vulgar insult. He also told police that the Martinezes and the Sanchez-Riveras "stopped hanging out" due to a fight about a year earlier. During the phone call to Christopher, codefendant used a vulgar insult and implied that "Chris didn't have the guts to come out and fight." In his statement, Bzdusek stated that codefendant asked defendant to give him a gun, that one of the Sanchez-Rivera brothers had "something in his hands," that he heard popping noises, and that some object struck the back of the car. Only then did codefendant point the gun out the window of the car and fire "in the direction of the three guys," with one of them falling to the ground. Bzdusek admitted that he said in his statement that, as they fled the scene, codefendant opined that "that thing was rubber" rather than a real gun. Bzdusek told police that defendant directed codefendant where to drive, then took over driving herself. Bzdusek testified that he had given grand jury testimony similar to his statement, except that he testified that codefendant asked defendant for the gun after the object had struck the car.

¶ 14 Police detective Gavin Zarbock testified that he separately interviewed Jose, Bzdusek, and defendant on the day after the shooting, and Detective Robert Arnony testified that he participated in the interview of defendant. Defendant was informed of her *Miranda* rights, which she waived in writing, and her interview was recorded on video.

¶ 15 In the interview, defendant said that she and codefendant had been receiving harassing phone calls and text messages from Christopher and Isaac at all hours of the day. On the evening

in question, she was in her car with codefendant, Jose, and Bzdusek, with codefendant driving. They were in Christopher's neighborhood – which was defendant and codefendant's former neighborhood – to go shopping. She saw three people including Christopher running after their car and heard repeated popping noises like gunshots and the sound of something striking the car. The latter sound was louder than the pops, defendant saw no flashes though it was night, and she stated that she had never heard a gunshot before. Someone in the car may have remarked that the pops were from a BB gun rather than a firearm. Christopher had something in hand, and defendant presumed he threw it at the car though she did not see him do so. At first, defendant claimed that codefendant had the gun on his person and that she never touched the gun, but she later admitted that he asked her to take a gun out of the glove compartment. She did so and gave him the gun. She did not know whether it was loaded, and codefendant told her that he was going to "scare" Christopher and his brothers. However, codefendant fired a shot through the open window. As codefendant drove away, he and defendant both put the gun back in the glove compartment, and she closed it. After he had driven a few miles, codefendant switched seats with defendant and she drove the rest of the way to her home, as he suggested. Codefendant left with the gun, and defendant, Jose, and Bzdusek cleaned the outside of the car so that it would appear to have been in her garage all along. Defendant at first stated that cleaning the car was codefendant's idea, but then expressed uncertainty over whether he or someone else suggested it.

¶ 16 Medical examiner Dr. Hilary McElligott testified that she conducted the autopsy of Christopher Rivera on December 19, 2009, and concluded that he died of a single gunshot wound to the forehead that had been fired from more than three inches away.

¶ 17 Police evidence technician Michelle Stewart testified that, in processing the scene of the shooting, she found on or near the street a wrench, a BB gun, a piece of the handgrip of a BB gun, and a spent shell casing from a 9-millimeter Luger. She also found a three-inch-long piece

of black plastic under Christopher's body when the paramedics moved him. She went to the hospital and recovered Christopher's personal effects including a mobile phone.

¶ 18 Police officer Richard Novotny testified that he investigated the Rivera shooting, and particularly the black sedan with its license number beginning with "A" described as the shooter's car. His investigation led him to a particular home, where he saw such a car parked in an open garage. With the consent of the homeowner, Rosa Krol, the car was searched and then towed to the police station. Officer Novotny noticed that the car was clean, as if it had been wiped down, though its black paint would have highlighted the snow, road salt, and the like that would have been on its exterior at that time of year. Later inspection at the station found a small dent and "small scuff mark on the rear left pillar between the rear window and the left driver's rear window." On cross-examination, he testified to seeing a BB gun on the street when he first arrived at the shooting scene.

¶ 19 The parties stipulated that Rosa Krol is the registered owner of a Mitsubishi Lancer and that, when the black Lancer sedan recovered by police was inspected, the steering wheel cover was removed and sent for forensic testing. Forensic scientist Scott Rochowicz testified that he tested the cover for gunshot residue and concluded that the steering wheel cover had been in "close proximity" to the discharge of a firearm. He also microscopically examined the recovered wrench and BB gun for trace evidence, finding none.

¶ 20 The parties stipulated to the effect that there was a call from codefendant's mobile phone to Christopher's at 7:48 p.m. on December 18, 2009. The parties also stipulated to the effect that no useable fingerprints were found on the shell casing recovered from the scene and that the firing marks on the casing did not match any firearm in the ballistics database.

¶ 21 Defendant's motion for a directed finding was denied, with the court finding "that this defendant gave the gun to [codefendant], that it was her car, that she may have put the gun back,

that she switched positions with the [co]defendant after the shooting, and that further she cleared off the car[,] possibly in an attempt to make it seem as if the car had always been in the garage."

¶ 22 Defendant rested her case without presenting evidence.

¶ 23 Following closing arguments, the court found defendant guilty of first degree murder under an accountability theory. The court found that "defendant took the gun from the glove compartment and gave it to the codefendant. After the shooting, she put the gun back in the glove compartment – or touched it as she said – switched seats with the codefendant, drove the codefendant, and dropped him off, and then cleared off the car." Defendant facilitated codefendant's escape, with no evidence that she reported the crime to the police. As to *mens rea*, the court found that "[w]hile there is no evidence of any participation in the discussion of a plan to shoot and kill the victim, when defendant handed the gun to the codefendant, defendant knew or should have known that her codefendant intended to shoot at the victim and that such conduct created a strong possibility of death or great bodily harm."

¶ 24 Defendant's post-trial motion, arguing that there was insufficient evidence to convict her of first degree murder on an accountability basis, was denied. Following evidence and arguments in aggravation and mitigation, the court sentenced defendant to 35 years' imprisonment including the 15-year firearm enhancement. This appeal timely followed.

¶ 25 On appeal, defendant first contends that the State presented insufficient evidence to convict her of first degree murder on an accountability basis.

¶ 26 A person commits first degree murder if he "kills an individual without lawful justification" and while "performing the acts which cause the death:

> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9-1(a) (West 2010).

¶ 27 "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 2010).

> "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. Mere presence at the scene of a crime does not render a person accountable for an offense; a person's presence at the scene of a crime, however, may be considered with other circumstances by the trier of fact when determining accountability." 720 ILCS 5/5-2 (West 2010).

¶ 28 Words of agreement are not necessary to establish a common purpose to commit a crime, as a common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct. *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 23. Similarly, while presence at the crime scene with knowledge that a crime was being committed is by itself insufficient to establish accountability, active participation has never been a requirement for guilt under an accountability theory. *Id*. Proof that a defendant was present during the perpetration of the offense, that she fled the scene, that she maintained a close affiliation with her companions after

the commission of the crime, and that she failed to report the crime are all factors that the trier of fact may consider in determining her legal accountability. *Id*.

¶ 29 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id*. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Beauchamp*, at 8.

¶ 30 Here, taking the evidence in the light most favorable to the State as we must, we find sufficient evidence to convict defendant of first degree murder on an accountability basis. First and foremost, she handed codefendant the gun he used to kill Christopher Rivera, so that she was not merely present at the scene of the crime but participated in the crime. Her statement admitting to doing so was corroborated by Jose and Bzdusek. As to her intent, it is undisputed that there was hostility between defendant and codefendant on one hand and their former friends Christopher and his brothers on the other. In particular, it is reasonable to infer that defendant and codefendant were angry with Christopher that evening beyond their general animosity, whether from the debt Christopher allegedly owed codefendant or that Christopher and his brothers were attacking them and damaging their car. Regarding the latter, there is evidence

supporting the inference that defendant and codefendant knew, from the popping sounds and the lack of bullet strikes, that a BB gun rather than a firearm was being discharged. Her assertions that codefendant told her the gun was in the glove compartment and professed to want to merely scare Christopher and his brothers were contradicted, or at least not corroborated, by Jose and Bzdusek. A reasonable trier of fact could infer that, in giving codefendant a gun under such circumstances, defendant knew that she and codefendant were creating a strong probability of death or great bodily harm to Christopher or one of his brothers. Her actions after the shooting, in driving for part of the flight from the scene and attempting to support a false alibi by washing the car, reinforce her active role in the incident and corroborate her consciousness of guilt.

¶ 31 Defendant also contends that the 15-year firearm enhancement to her prison sentence was improper because she was not given notice of the enhancement as required by statute. In particular, she notes that the indictment does not allege that she personally discharged a firearm.

¶ 32 Section 5-8-1 of the Code of Corrections provides that, for first degree murder:

> "(i) if the person committed the offense while armed with a firearm, 15 years shall be added to the term of imprisonment imposed by the court;
>
> (ii) if, during the commission of the offense, the person personally discharged a firearm, 20 years shall be added to the term of imprisonment imposed by the court;
>
> (iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the

> term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d) (West 2010).

"Unlike subsections (d)(ii) and (iii), subsection (d)(i) does not contain any language that limits its application to persons who personally discharge a firearm," so that "an unarmed defendant who is convicted, under a theory of accountability, of committing the offense of first degree murder while armed with a firearm is subject to subsection (d)(i)'s 15–year sentence enhancement." *Flynn*, ¶ 35.

¶ 33 Section 111-3 of the Code of Criminal Procedure requires that an indictment or other formal charge must allege a criminal offense by stating the name and statutory citation of the offense and "[s]etting forth the nature and elements of the offense charged." 725 ILCS 5/111-3(a)(3) (West 2010). Section 111-3 also provides that,

> "if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111-3(c-5) (West 2010).

This statute "clearly states that the defendant is entitled to written pretrial notice of the *alleged fact* that would be used to increase his sentence. There is no requirement that the defendant must also be given written pretrial notice about the potential increased sentence he could receive." (Emphasis in original.) *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 38.

¶ 34 Here, the State sought, and the court imposed, a 15-year extended term for committing first degree murder while armed with a firearm. The enhancements for personal discharge of a firearm were neither sought by the State nor imposed by the court and are thus irrelevant. Because the fact triggering defendant's extended term – commission of the offense while armed with a firearm – was expressly alleged in both charges of first degree murder, there was no error.

¶ 35 Accordingly, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.