2014 IL App (1st) 121444-U

FIRST DIVISION
April 7, 2014

No. 1-12-1444

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LUIS PENA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 08 CR 19003 Honorable Kenneth Wadas, Judge Presiding.

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

ORDER

¶ 1 ***Held:*** The evidence amply supported defendant's conviction beyond a reasonable doubt both as a principal and under an accountability theory. In addition, defendant was not denied his confrontation rights when the State elicited a police detective's testimony that a codefendant allegedly identified defendant, where no such identification occurred, and in any event, any error was harmless beyond a reasonable doubt. The State's rebuttal closing argument did not deny defendant a fair trial. The trial court was correct to provide the jury an accountability instruction, where there was at least "slight" evidence in support of that theory. Finally, the cumulative effect of these alleged errors did not deny defendant a fair trial. Accordingly, the judgment of the trial court is affirmed.

¶ 2 Following a jury trial, defendant Luis Pena was convicted of first degree murder (720 ILCS 5/9-1 (West 2008)) and sentenced to 60 years' imprisonment. On appeal, defendant contends that: (1) he was denied his confrontation rights when the State elicited a police detective's testimony that a codefendant identified defendant, (2) the State's rebuttal closing argument denied him a fair trial, (3) the trial court erred in providing the jury an accountability instruction, (4) the evidence was insufficient to support his conviction beyond a reasonable doubt; and (5) the cumulative effect of these claimed errors denied him a fair trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant Luis Pena and codefendants Raymond Jones, Antoine Lacy, and Joseph Chico were charged by indictment with, *inter alia*, first degree murder in connection with the shooting death of 10-year-old Nequiel Fowler.[1] Count I of defendant's multicount indictment alleged that defendant and codefendants intentionally or knowingly (and without lawful justification) shot and killed Fowler while armed with a firearm. Defendant and codefendants Jones and Lacy were tried simultaneously before three separate juries. Codefendant Chico agreed to plead guilty to conspiracy to commit murder with a 14-year sentence in exchange for his testimony against defendant and the other codefendants.

¶ 5 The following evidence was adduced at trial. Chico testified that he, defendant, and Lacy were members of the "Latin Dragons" gang. Lacy was "first in command," and defendant was merely a "soldier" or "shooter." According to Chico, the Latin Dragons controlled the general area of East 87th Street and South Escanaba Avenue in Chicago, but a rival gang, the "Latin Kings," controlled the area near East 87th and South Exchange Avenue, one block east of Escanaba. Chico added the Latin Dragons would kill "on sight" any member of the Latin Kings.

[1] The victim's first name is also spelled "Niquiel," "Nicole," and "Nequell."

¶ 6 On Monday, September 1, 2008, Chico said that there was a "mandatory Monday" assembly in which the Latin Dragons had to converge in the Escanaba area in a show of strength. As Chico drove to the area with Lacy and defendant, Chico heard Lacy call another gang member to ask who had the gang's gun for that area. After the call, Lacy said that "Raymond" had the gun.

¶ 7 Chico then saw Lacy and defendant in front of Jones's house, which was located in the area of 87th and Escanaba. Lacy left with another individual, and Chico later learned that Lacy had gone to 87th and Exchange and had seen some members of the Latin Kings there. Lacy told Chico he had "some Niggers in the[] dip," which Chico interpreted to mean that Lacy had arranged for some armed individuals to be in the gangway near 87th and Exchange. Chico knew the individuals were defendant and Jones. Chico and Lacy then walked to Jones's backyard and met with defendant and Jones, and Lacy told defendant to go "fire the Kings up." Jones went into his house to change his clothes, and Chico and Lacy left when Jones came back outside. Defendant and Jones remained in Jones's backyard.

¶ 8 As Chico and Lacy were leaving the gangway, Chico heard about five gunshots coming from the alley between Exchange and Escanaba behind defendant's home. Chico said he ducked down and started walking to his car with Lacy. They entered Chico's car, and Chico started to leave, but Lacy told Chico to wait for defendant when Chico turned the corner at 87th and South Muskegon Avenue. Defendant got into Chico's car, and the group drove to Lacy's home. Chico noted that defendant was wearing a white T-shirt instead of the blue shirt he had on earlier. While en route, Chico learned that someone had been injured. After dropping Lacy off, Chico left Lacy's home with defendant. Defendant said that he "fucked up" and that he had a "bad feeling." Chico admitted that he was subsequently charged with the first-degree murder of the

victim, but that he entered into a plea agreement in which he agreed to testify against his codefendants and plead guilty to conspiracy to commit first-degree murder in exchange for a 14-year prison sentence.

¶ 9 Jones's father, Joseph Slomka, testified that, at the time of the shooting, he was sitting on the front porch of his house and heard gunshots coming from the alley behind his house. Slomka looked down the gangway and saw defendant walking from the alley to the backyard of Slomka's house. Defendant then walked up to Jones and "shoved" what appeared to be a blue rag into Jones's chest. Although Slomka added that defendant threatened Jones if Jones refused it, Slomka conceded that the transcript of his grand jury testimony indicated that defendant only said, "I'll see you later." In addition, Slomka could not recall what his son, Jones, said about the shooting, but Slomka conceded that it was "possible" that he had testified to the grand jury that Jones stated, "He popped him," and "Lou popped him."

¶ 10 Kenneth Holmes testified that, at the time of the shooting, he was standing in front of the gate leading to the gangway of his house at 8728 South Exchange. He was holding his two-year-old son by the hand, while his other children were playing with the ten-year-old victim and the victim's blind five-year-old sister. Holmes said he heard a male voice from the gangway leading to the rear of his house shout, "King killer." Holmes turned, but did not get a good look at the shooter because he said he heard shooting and fled the area with his son. On cross-examination, Holmes said that the shooter was a light-skinned individual, but he could not recall if he had given that description to the police.

¶ 11 Detective Michele Moore-Grose of the Chicago Police Department testified that she and her partner, Detective Pat Ford, were assigned to investigate the shooting death of Nequiel Fowler at around 4:40 p.m. on September 1, 2008. They arrived at the scene, and a sergeant

brought Jones over to them. Jones told Moore-Grose and Ford that the shooter was a black male with braids who was 5 feet 9 inches tall and weighed 200 pounds. Moore-Grose said she and her partner returned to Area 2, at which point they were told by a sergeant that an officer had an individual who could provide information "regarding who was responsible for shooting [the victim]." Moore-Grose confirmed that the individual was Lacy and that they spoke to Lacy for about 15 minutes. When the State asked, "After you had that conversation with Antoine Lacy, what did you guys do?," Moore-Grose replied, "We now have a different description of who was responsible for [the] shooting of [the victim]." Defendant objected, and following a sidebar discussion, the trial court overruled the objection and the State continued its questioning. Moore-Grose agreed that, when she and her partner left after their conversation with Lacy, they had the names of "two other people that [they] did before that [*sic*]": defendant and Chico.

¶ 12 With the information they obtained from Lacy, Moore-Grose confronted Jones and told him she had received conflicting information. Jones then broke down, began crying, and said that he had the gun that was used in the shooting. Jones was arrested, read his *Miranda* rights, and after waiving his rights, told the officers where to find the gun. Jones's mother consented to a search of her house, and the gun was found along with a blue shirt. Jones's fingerprints, but not defendant's or Lacy's, were found on the gun. A test of the blue shirt revealed a DNA profile that was consistent with defendant's.

¶ 13 At the close of the evidence, the parties presented their closing arguments. Defendant challenged the credibility of Holmes, arguing that Holmes did not provide police with a description of a "light-skinned" shooter and that "He [Holmes] knows who is on trial." Defendant further pointed out that, although there were "all those people out on Labor Day [the day of the shooting]," "Nobody has come to court and *** identified Luis Pena."

¶ 14 The State responded in its rebuttal argument as follows:

> "Where is everybody else from the neighborhood? Where is [*sic*] all those other people who were out there? ***
>
> How about the other neighbors that lived there, the residents? You really think people want to come into a courtroom as you have gang members sitting all over the place, as it's going to get out in the neighborhood that you came into court and identified and testified?"

The State also addressed defendant's argument regarding Holmes's credibility, noting that "[t]hose interviews take place out there on the street in that neighborhood where the Latin Kings are at, where the Latin Dragons are at." Finally, the State recalled Chico's testimony regarding the consequences of testifying against gang members: "It's a death sentence." Defendant objected to each of those arguments, but the trial court overruled the objections.

¶ 15 The State subsequently concluded its rebuttal closing argument, and the trial court then instructed the jury, *inter alia*, that opening statements and closing arguments are not evidence, and that any statement or argument made that was not based upon the evidence should be disregarded. After being instructed, the jury retired to deliberate. The jury later found defendant guilty of first-degree murder. It did not, however, find that the allegation that defendant used a firearm during the commission of the offense had been proven. The trial court later sentenced defendant to 60 years' imprisonment on Count I.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant does not present his challenge to the sufficiency of the evidence as his first contention. Since this contention will aid in disposing of his other claims, we elect to consider that claim first.

¶ 19 A. The Sufficiency of the Evidence

¶ 20 In this appeal, defendant challenges the sufficiency of the evidence. Specifically, defendant argues that, since the jury found that the allegation that he personally discharged a firearm during the commission of the offense was not proven, the State's evidence is *ipso facto* insufficient to establish his guilt as a principal. With respect to his guilty under an accountability theory, defendant argues that the evidence merely shows that he was present at the scene and then fled shortly after the shooting.

¶ 21 When presented with a challenge to the sufficiency of the evidence, this court must determine "whether, after viewing 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." (Emphasis in original.) *People v. De Filippo*, 235 Ill. 2d 377, 384-85 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). It is not the function of this court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Id.* at 211. As a result, mere allegations that a witness was not credible will not justify reversal. *Id.* at 211-12; see also *People v. Manning*, 182 Ill. 2d 193, 211 (1998) (rejecting a similar challenge based upon "speculation that another person might have committed the offense"). In essence, this court will not reverse a

conviction unless the evidence is "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Evans*, 209 Ill. 2d at 209.

¶ 22 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 ***." 720 ILCS 5/9-1(a) (West 2008). With certain exceptions not relevant here, section 5-2(c) of the Criminal Code of 1961 provides that a person is legally accountable for the conduct of another when "[e]ither 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." 720 ILCS 5/5-2(c) (West 2008). "To prove that the defendant possessed the intent to promote or facilitate the crime, the State must present evidence which establishes beyond a reasonable doubt that either: (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design." *People v. Perez*, 189 Ill. 2d 254, 266 (2000). " 'Words of agreement are not necessary to establish a common purpose to commit a crime. The common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct.' " *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 23 (quoting *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995)). 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.* Among the factors that the trier of fact may consider in determining a defendant's legal accountability are proof that the defendant: (1) was present during the perpetration of the offense; (2) fled the scene; (3) maintained a close

affiliation with his companions after the commission of the crime; and (4) failed to report the crime. *Id*.

¶ 23 In this case, the evidence overwhelmingly established defendant's guilt as both the principal offender as well as under an accountability theory. Codefendant Chico testified that defendant, a "soldier" or "shooter" in the "Latin Dragons" gang, was ordered by codefendant Lacy (the "first in command") to shoot at some members of a rival gang, the "Latin Kings." On the day of the shooting, Chico learned from Lacy that "Raymond" had the gang's gun. Lacy told Chico he had "some Niggers in the[] dip," which meant to Chico that Lacy had arranged for defendant and Jones to be in the gangway near where Lacy had seen some members of the Latin Kings. Lacy told defendant to go "fire the Kings up." Chico and Lacy left, and defendant and Jones remained in Jones's backyard. As they left, Chico heard about five gunshots coming from the alley between Exchange and Escanaba behind defendant's home. Codefendant Jones's father, Slomka, heard gunshots coming from the alley behind his house while he was sitting on the front porch of his house. Slomka looked down the gangway and saw defendant walking from the alley to Slomka's backyard. Slomka conceded that it was "possible" that he had testified to the grand jury that his son, codefendant Jones, said, "He popped him," and "Lou popped him." Slomka then saw defendant walk up to Jones and shove a blue "rag" into Jones's chest. When defendant got into Chico's car, Chico noted that defendant was wearing a white T-shirt instead of the blue shirt he had on earlier. Detective Moore-Grose testified that Jones's mother consented to a search of her house, and the gun was found along with a blue shirt. Although Jones's fingerprints, but not defendant's or Lacy's, were found on the gun, DNA recovered from the blue shirt revealed a profile that was consistent with defendant's.

¶ 24 Viewing these facts in the light most favorable to the State, as we must (see *Filippo*, 235 Ill. 2d at 384-85), the evidence overwhelmingly established defendant's liability either as the principal offender or under an accountability theory. Regarding principal liability, Chico testified that defendant, the shooter, had been ordered by Lacy to shoot at some rival gang members and defendant was in the area from which five gunshots originated. Immediately after the shooting, Slomka saw defendant walking up his gangway, shove a blue "rag" into codefendant Jones's (Slomka's son's) chest and Jones later told Slomka that "Lou popped him." Chico further testified that, when defendant got into Chico's car after the shooting, defendant was wearing a white T-shirt and not the blue shirt defendant was previously wearing. These facts were sufficient to establish Chico's liability as a principal. Regarding accountability, Chico's testimony also established that Lacy had arranged for defendant (again, the shooter) and Jones (the purported custodian of the gun) to carry out their gang's standing policy to shoot on sight members of a rival street gang. Jones supplied defendant with the gun, and after the shooting, defendant was seen shoving something wrapped in a blue fabric into Jones's chest. A blue shirt, containing a DNA profile consistent with defendant's, was found with the gun in Jones's home. Chico and Lacy picked up defendant shortly after the shooting and left the scene. These additional facts (along with the previously discussed facts) established defendant's liability under an accountability theory.

¶ 25 Defendant, however, claims that the evidence was insufficient to support his conviction under either theory. Regarding principal liability, defendant challenges the credibility of the various witnesses. We may not, however, retry defendant; it is the responsibility of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *Evans*, 209 Ill. 2d at 209-11. Again,

viewing the evidence in the light most favorable to the State, we cannot say that the evidence is "so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *Id.* at 209. Defendant's argument on this point is therefore unavailing.

¶ 26 With respect to both principal liability and liability under an accountability theory, defendant relies upon the jury's answer to the special interrogatory that the State had not proven that defendant personally discharged a firearm during the commission of the offense. The jury's answer on the special interrogatory, however, related to defendant's eligibility for an enhanced sentence (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)) and not his guilt as to the offense (720 ILCS 5/9-1(a)(1) (West 2008)). The jury's negative answer to the special interrogatory was therefore not fatal to the verdict. See generally, *People v. Reed*, 396 Ill. App. 3d 636, 644-48 (2009) (holding that a guilty verdict may not be challenged based upon an inconsistent answer to a special interrogatory "absent a statute providing such"), *appeal denied*, 236 Ill. 2d 534 (2010), *cert. denied sub nom. Reed v. Illinois*, ___ U.S. ___, 131 S. Ct. 485 (2010); *United States v. Powell*, 469 U.S. 57, 65 (1984) ("Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored."). Defendant's claim as to this point is thus meritless.

¶ 27 B. Defendant's Confrontation Rights

¶ 28 Defendant contends that, under *Bruton v. United States*, 391 U.S. 123 (1968), and *Crawford v. Washington*, 541 U.S. 36 (2004), he was denied his constitutional right to confront and cross-examine witnesses when the trial court allowed the State to elicit Moore-Grose's testimony that, after speaking with a Lacy, Lacy "implicated" defendant. Defendant asserts that this was an "overwhelming" error resulting in a denial of his right to a fair trial and that we must therefore reverse his conviction.

¶ 29 "The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted." *People v. Mims*, 403 Ill. App. 3d 884, 897 (2010). It is well established, however, that a police officer may testify as to a conversation with an individual and that the officer subsequently acted on the information received in order to explain the officer's course of conduct. *People v. Johnson*, 199 Ill. App. 3d 577, 582 (1990). Regardless, the officer cannot testify as to the substance of the conversation with the individual because that would be inadmissible hearsay. *Id.* "On questions of the admissibility of evidence, we will not substitute our judgment for that of the trial court unless the record clearly shows the trial court abused its discretion." *People v. Cookson*, 215 Ill. 2d 194, 213 (2005) (citing *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984)). "An abuse of discretion exists only where the trial court's decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010) (citing *People v. Donoho*, 204 Ill. 2d 159, 182 (2003)). Finally, the admission of hearsay evidence is harmless error where there is no reasonable probability that the jury would have acquitted defendant absent the hearsay testimony. *People v. Sims*, 192 Ill. 2d 592, 628-29 (2000).

¶ 30 In this case, there was no abuse of discretion. In response to the State's questioning, Moore-Grose said she and her partner returned to the police station and were told that there was an individual (later determined to be Lacy) who could provide information "regarding who was responsible" for the shooting. She spoke to Lacy for around 15 minutes. The State then merely asked what she did after that conversation, but it did not ask her regarding the substance of that conversation with Lacy. Moore-Grose's reply, that they had a different description of "who was responsible" for the shooting, merely parroted her earlier characterization of the information Lacy was supposed to be able to provide her. Although the better practice may have been to

have provided a limiting instruction to the jury immediately after Moore-Grose's testimony regarding what she did after her conversation with Lacy, we nonetheless note that the substance of Moore-Grose's conversation with Lacy was not presented to the jury, and the trial court's decision on this point was not "arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *Ramsey*, 239 Ill. 2d at 429. Therefore, the trial court did not abuse its discretion.

¶ 31 Moreover, even assuming, *arguendo*, that this evidence was improperly before the jury, any error was harmless beyond a reasonable doubt. As noted above, the evidence establishing defendant's guilt was overwhelming, and therefore there is no reasonable probability that the jury would have acquitted defendant absent the hearsay testimony. *Sims*, 192 Ill. 2d at 628-29. Defendant's claim is therefore without merit.

¶ 32 Nonetheless, defendant relies upon various cases in support of his contention, including *People v. Johnson*, 116 Ill. 2d 13 (1987), *People v. Sample*, 326 Ill. App. 3d 914 (2001), *People v. Armstead*, 322 Ill. App. 3d 1 (2001), and *People v. Jura*, 352 Ill. App. 3d 1080 (2004).[2] None of these cases advances defendant's claim. In *Johnson*, *Armstead*, and *Jura*, the evidence was not overwhelming, as it was here. See *Johnson*, 116 Ill. 2d at 28-29 (the testimony of two key witnesses was "controverted in several respects"); *Armstead*, 322 Ill. App. 3d at 12 (holding that the evidence was "closely balanced"); *Jura*, 352 Ill. App. 3d at 1091 (noting that there was no physical evidence and the State's witnesses were only police officers, but no civilians, whose credibility was bolstered from the improper hearsay). Finally, the court in *Sample* held that the

[2] We do not consider defendant's citation to *People v. Duncan*, 2011 IL App (1st) 071766-U, an unpublished decision under Supreme Court Rule 23, because none of the exceptions to Rule 23 apply. See Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). We further strike the portion of defendant's brief citing *Duncan*.

trial court erred, but that the error was harmless. *Sample*, 326 Ill. App. 3d at 925. Here, we similarly hold that any error was harmless beyond a reasonable doubt.

¶ 33 C. The State's Rebuttal Closing Argument

¶ 34 Defendant next contends that the State's rebuttal closing argument erroneously implied that gang-related intimidation at defendant's behest was the reason that more witnesses did not testify and the reason that witness Holmes allegedly did not tell the police on the scene that the shooter was light-skinned. Defendant asserts that these comments denied him a fair trial.

¶ 35 The State is given considerable latitude in making closing arguments, and it may respond to comments that clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000). Furthermore, we must review the arguments of both the State and the defense in their entirety, with the challenged portions placed in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987). A significant factor in determining the impact of an improper comment on a jury verdict is whether "the comments were brief and isolated in the context of lengthy closing arguments." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). In addition, we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Finally, even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Defendant, citing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), argues that we should review this issue *de novo*. The State, citing *People v. Hudson*, 157 Ill. 2d 401, 441 (1993), argues in favor of an abuse of discretion standard. While the issue of which standard of review should apply is unsettled (see *People v. Maldonado*, 402

Ill. App. 3d 411, 421 (2010)), we need not resolve this apparent conflict because under either standard, defendant's claim fails.

¶ 36 During defendant's closing argument, defense counsel challenged Holmes's credibility (claiming that Holmes's description of the shooter as light-skinned was not provided to the police) and also the State's failure to present additional witnesses (claiming that there were a lot of people in the area at the time of the shooting). Defendant's comments clearly invited a response, and the State's response was primarily to challenge the credibility of the defense theory through ridicule, which is proper. See *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009) (the State may refer to the defense theory as "ridiculous"). In addition, the remarks that defendant complains of were isolated within the 20-page transcript of the State's rebuttal argument (and without regard to the 27 pages comprising the State's initial closing argument), which weighs significantly in favor of the State. See *Runge*, 234 Ill. 2d at 142. Furthermore, the specific content of the challenged remarks did not assert that defendant specifically intimidated any witness; rather, the remarks only related to gang intimidation generally, which is within the bounds of argument based upon well-established precedent. See, *e.g.*, *People v. Johnson*, 385 Ill. App. 3d 585, 604-06 (2008) (no error in prosecutor's rebuttal comment that there are "gangbangers" in Cook County jail, that cooperators are not popular among them, and that the witness was afraid of what would happen to him in jail as a result of cooperating); *People v. Cox*, 377 Ill. App. 3d 690, 708 (2007) (The State's comment that two witnesses did not care about the case anymore because the crime "impacts the community because people have to continue living in that community where the shooting occurred" was not improper.); *People v. Walker*, 230 Ill. App. 3d 377, 399-400 (1992) (no error for the State to argue that people, not prosecutors "come in at the risk of their own lives when we can find them, and when they are willing to lay their

own lives on the line to come in and testify about it and that's what [the witness] did in this case"). Finally, the jury was instructed that closing arguments are not evidence and to disregard any comment not based upon the evidence, and defendant has provided nothing to counter the presumption that the jury followed the trial judge's instructions in reaching a verdict. *Simms*, 192 Ill. 2d at 373. Since we cannot hold that the comments resulted in such substantial prejudice to defendant that the verdict would have been different absent those remarks, the State did not commit reversible error. *Hudson*, 157 Ill. 2d at 441. Defendant's contention must therefore be rejected. Finally, *People v. Smith*, 141 Ill. 2d 40 (1991), which defendant cites in support of his contention, is wholly distinguishable from this case. In *Smith*, "the State's theory of gang-related motive, which it argued extensively to the jury in closing argument, was not supported by the evidence adduced at trial." *Id.* at 61. Here, the State's theory of a gang-related motive that resulted in the shooting death of a 10-year-old girl was amply supported by the evidence. *Wicks* is therefore unavailing.

¶ 37 D. Jury Instruction on Accountability

¶ 38 Defendant next contends that the trial court erred in granting the State's request for an accountability instruction to the jury. Defendant insists that the State did not offer *any* evidence that would support an instruction on accountability. Specifically, defendant argues that the State's evidence solely pointed to Pena's principal liability as the shooter and codefendants' liability under an accountability theory. We disagree.

¶ 39 It is well established that, since accountability is not a crime in and of itself, individuals may not charged with the offense of accountability. *People v. Stanciel*, 153 Ill. 2d 218, 233 (1992). Rather, accountability is a method through which a criminal conviction may be reached. *Id.* In other words, "individuals are charged with a criminal offense, but their guilt is established

through behavior which makes them accountable for the crimes of others." *People v. Testa*, 261 Ill. App. 3d 1025, 1030 (1994).

¶ 40 Evidence of a accountability may be circumstantial, and a jury instruction on the issue of accountability is justified if the State submits even the slightest evidence to support that theory. *People v. Beltran*, 327 Ill. App. 3d 685, 692-93 (2002). Moreover, "[e]vidence, however slight, on accountability along with evidence of action as a principal offender is sufficient to support *both* instructions *regardless of whether both theories were advanced in the State's case in chief*." (Emphases added.) *People v. Batchelor*, 202 Ill. App. 3d 316, 331 (1990); *People v. Quiroz*, 253 Ill. App. 3d 739, 749 (1993). A trial court's decision with respect to jury instructions is reviewed for an abuse of discretion. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). A trial court abuses its discretion when its decision is "fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004).

¶ 41 In this case, as noted above, there was at least "the slightest" evidence supporting the theory that defendant was accountable to another person. *Beltran*, 327 Ill. App. 3d at 692-93. This evidence included the following: (1) Chico's testimony that Lacy, the first-in-command, ordered defendant, the shooter (and who was wearing a blue shirt prior to the shooting) to shoot at rival gang members—under their gang's standing policy—with the gun kept in Jones's custody; (2) Slomka's testimony that Jones stated that "Lou" "popped" the victim and that defendant shoved a blue rag at Jones; and (3) a blue shirt found with the gun had a DNA profile consistent with defendant's. From this evidence a jury could reasonably infer that there was a common criminal design and that defendant aided, abetted, or solicited another person in planning or committing the victim's murder. We also note that the State clearly argued the theory of accountability in its closing argument. Moreover, since we have already held that there

was sufficient evidence to find defendant guilty as the principal, any error in giving the accountability instruction was harmless. See *Batchelor*, 202 Ill. App. 3d at 332.

¶ 42 Nonetheless, defendant cites *People v. Williams*, 161 Ill. 2d 1 (1994), *People v. Lusietto*, 41 Ill. App. 3d 205 (1976), and *People v. Umphers*, 133 Ill. App. 2d 853 (1971), in support of his claim that the trial court erred in instructing the jury as to accountability where the evidence established that the defendant was either guilty as the principal or not guilty. Defendant's reliance on these cases, however, is misplaced because here, unlike in *Williams*, *Lusietto*, and *Umphers*, there was overwhelming evidence to support the theory that defendant was acting as an accessory in a common criminal design. See *Williams*, 161 Ill. 2d at 51-52; *Lusietto*, 41 Ill. App. 3d at 207-08; *Umphers*, 133 Ill. App. 2d at 858 (holding that it was not erroneous to provide an accountability instruction although there was no direct evidence supporting it).

¶ 43 E. Cumulative Effect of the Alleged Errors

¶ 44 Finally, defendant contends that the cumulative effect of the aforementioned claims of error prejudiced the jury and denied him a fair trial. In instances where individual errors committed by a trial court do not merit reversal alone, the cumulative effect of the errors may deprive a defendant of a fair trial. *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003) (citing *People v. Batson*, 225 Ill. App. 3d 157, 169 (1992)). In such cases, due process and fundamental fairness require that the defendant's conviction be reversed and the cause remanded for a new trial. *Id.* (citing *Batson*, 225 Ill. App. 3d at 169). Here, since we have already held that defendant's individual contentions were not erroneous and did not result in prejudice to defendant, the cumulative effect of these contentions also did not deprive defendant of a fair trial. Therefore, we must reject defendant's final claim of error.

¶ 45 III. CONCLUSION

¶ 46 In sum, the evidence amply supported defendant's conviction beyond a reasonable doubt both as a principal and under an accountability theory. In addition, defendant was not denied his confrontation rights regarding the State's eliciting a police detective's testimony that a codefendant identified defendant: the testimony was not inadmissible hearsay, and in any event, any error was harmless beyond a reasonable doubt. The State's rebuttal closing argument did not deny defendant a fair trial. The trial court was correct to provide the jury an accountability instruction, where there was at least "slight" evidence in support of that theory. Finally, the cumulative effect of these alleged errors did not deny defendant a fair trial. Accordingly, we affirm the judgment of the trial court.

¶ 47 Affirmed.