2017 IL App (1st) 152245-U

SIXTH DIVISION
NOVEMBER 9, 2017

No. 1-15-2245

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.
	)	
	)	No. 12 CR 9463
v.	)	
	)	
JIMMY TRAN,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The State's evidence was sufficient to convict the defendant, under an accountability theory, for attempt armed robbery and aggravated battery. Further, the convictions did not violate the one-act, one crime doctrine.

¶ 2 The defendant-appellant Jimmy Tran (defendant) appeals from his convictions for attempt armed robbery and aggravated battery. We affirm the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The defendant and his codefendants[1] Theodore Nguyen (Theodore) and Timothy Nguyen (Timothy) were charged with offenses committed against Lukasz Morysewicz (victim). After

[1]The codefendants were not tried with the defendant.

the defendant waived his right to jury trial, the court conducted a bench trial on the charges of aggravated battery and attempt armed robbery.

¶ 5 The State called the victim as its first witness. The victim testified that on the afternoon of April 27, 2012, he was on the campus of the University of Illinois at Chicago (UIC) with two friends, Michael Napierala and Matt Konopka. The defendant and "a couple other guys" approached the victim, Napierala, and Konopka. The defendant asked the victim for $80 which he claimed the victim owed him. The victim responded that he did not owe the defendant anything.

¶ 6 Approximately 30 minutes later, the victim, Napierala, and Konopka were at another building on campus when the defendant and ten other males approached them. The defendant again told the victim to pay him. According to the victim, at that point, "Somebody just put a knife to my neck from behind me as I was sitting there, and they started yelling in my ear and telling me to pay [the defendant]." The victim recalled that he "grabbed at the guy's hands" to pull them away from his neck and he attempted to stand up, when "my neck got cut, and at that moment he let go and I let go."

¶ 7 The victim testified that he had "a gash on [his] neck" that was bleeding, and the person who cut him said "[n]ext time it's going to be deeper." The same individual grabbed the victim's backpack and threw it to others in the group. The group, including the defendant, walked away together. On cross-examination, the victim acknowledged that the defendant did not tell anyone to pull out a knife and agreed that the defendant "just stood there" during the incident.

¶ 8 The State also called the victim's friend, Napierala, who also described the two instances where the defendant approached the victim and asked for money. In the first incident, Napierala recalled that the defendant was with one or two others. Later that afternoon, the defendant and

"at least six" others approached the victim. Napierala saw an individual from the group put a knife to the victim's throat and ask "are you going to pay him." He then saw the victim "pushing the knife away and the person going back in and cutting him." Napierala recalled that the person who cut the victim picked up the victim's backpack and "threw it to the crowd" before the group walked away.

¶ 9 The State also called Kingsley Sawyers, an attorney in the Cook County State's Attorney's Office, who interviewed the defendant in custody on April 28, 2012. Based on the interview, Sawyers typed the defendant's statement, which was admitted into evidence.

¶ 10 The defendant's statement recalled that he met the victim about two months earlier and they "offered to sell each other Adderall and Ecstasy." About a week later, the defendant showed the victim "a bag with a small amount of Ecstasy" and the victim "grabbed the bag and ran without paying him."

¶ 11 On the afternoon of April 27, 2012, the defendant saw the victim and followed him. According to his statement, the defendant sent a text message to Theodore "to come and meet him in case something happened when he went to ask [the victim] for the money because [the victim] was a bigger person than him." The defendant waited for the victim outside a recreation center. After the victim came out, the defendant "asked [the victim] why he had stolen the Ecstasy from him, but [the victim] did not respond." The defendant then "asked other people to go with him to ask [the victim] for the money."

¶ 12 According to the defendant's statement, Theodore and Timothy followed the victim to another building. The defendant again approached the victim and asked for payment, but the victim refused. The defendant then "saw Theodore put his hand with a knife around [the victim's] neck" and the victim "struggled with Theodore." The defendant then saw blood

dripping from the victim's chin. The defendant stated that "[the defendant] and Theodore left together, and Theodore gave [the defendant] the knife, which [the defendant] threw away."

¶ 13 After the State rested, the defense recalled the victim, who testified that the defendant "was telling me that I owed him the money for some Molly he had attempted to sell me." Defense counsel asked if the victim "took the Molly" from the defendant; the victim answered that he did not intend to steal it, but "just wanted to get rid of it." Defense counsel called no other witnesses.

¶ 14 After closing arguments, the trial court found the defendant guilty of both attempt armed robbery and aggravated battery charges, under an accountability theory. The court reasoned that the defendant "set[] this ball into motion" by gathering others and formed a "common plan, scheme, design for them to get the money." The court noted the evidence that Theodore told the victim at knifepoint to pay the defendant, and that the defendant left with the codefendants and disposed of the knife. The court reiterated that the defendant "set the wheels in motion in this case."

¶ 15 On June 10, 2015, the defendant was sentenced to four years in the Illinois Department of Corrections with a recommendation of boot camp, plus two years mandatory supervised release. The defendant subsequently moved to merge the aggravated battery conviction into the conviction for attempt armed robbery. That motion was denied. The defendant filed a timely notice of appeal on June 23, 2015. Accordingly, we have jurisdiction.

¶ 16 ANALYSIS

¶ 17 The defendant asserts two arguments. First, he contends that the State's evidence was insufficient to prove his guilt on the basis of accountability. Alternatively, he claims that both convictions cannot stand without violating the one-act, one crime rule.

¶ 18 We first address the defendant's claim that the evidence was insufficient to prove his accountability for the criminal acts of his codefendants. The defendant does not dispute that his codefendants committed an attempted armed robbery and aggravated battery, but contends that there was no evidence that he "shared his codefendants' criminal intent, or that there was a common criminal design" among them. He claims he did not "participate" and "just stood there while his codefendants committed the offenses." Although he admits that he asked Theodore to meet him before approaching the victim, he argues this does not prove his criminal intent. Rather, he claims that the trial court improperly speculated about the content of his communications with codefendants to find a common criminal design. The defendant acknowledges that he left with his codefendants and discarded the knife, but he claims that the trial court could not rely on such evidence because "accountability cannot lie based only on actions occurring after the offense."

¶ 19 "When reviewing a challenge to the sufficiency of the evidence, this court considers whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]" *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). This court "may not substitute our judgment for the trier of fact's regarding the weight of the evidence or the credibility of the witnesses. [Citation.]" *People v. Ivy*, 2015 IL App (1st) 130045, ¶ 56. "A conviction should not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that a reasonable doubt exits about the defendant's guilt." *People v. Perez*, 189 Ill. 2d 254, 266 (2000).

¶ 20 "To convict a defendant under the theory of accountability, the State must prove beyond a reasonable doubt that he (1) solicited, aided, abetted, agreed or attempted to aid another person

in the planning or commission of the offense; (2) did so before or during the commission of the offense; and (3) did so with the concurrent, specific intent to promote or facilitate the commission of the offense. [Citations.] The law on accountability incorporates the 'common design rule,' which provides that where two or more persons engage in a common criminal design, any acts in furtherance thereof committed by one party are considered to be the acts of all the parties to the common design and all are equally responsible for the consequences of such further acts. [Citations.]" *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 58; 720 ILCS 5/5-2 (West 2014)).

¶ 21 "Intent may be inferred from the character of defendant's acts as well as the circumstances surrounding the commission of the offense." *Perez,* 189 Ill. 2d at 266. "Words of agreement are not necessary to establish a common purpose to commit a crime. [Citation.] Accountability may be established through a person's knowledge of and participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself. [Citation.] Proof that the defendant was present during the perpetration of the offense, that he fled from the scene, 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." *Id.* at 267. However, mere "presence at the commission of the crime, even when joined with flight from the crime or knowledge of its commission, is not sufficient to establish accountability." *Id.* at 268; see also 720 ILCS 5/5-2 (West 2014) ("Mere presence at the scene of a crime does not render a person accountable" but "may be considered with other circumstances by the trier of fact when determining accountability.").

¶ 22 Viewing the evidence in the light most favorable to the prosecution in this case, the trial court could reasonably find that the State had proven the defendant's accountability, based on evidence that the defendant and his codefendants shared a common criminal design. The defendant's claim that he merely "stood there" while the victim was harmed ignores evidence of his conduct before and after the incident, from which the court could reasonably infer the requisite intent to hold the defendant accountable. First, the court could and apparently did find (based on the defendant's undisputed written statement) that he gathered the codefendants and others and had them accompany him as he approached the victim for the purpose of collecting money from the victim by a show of force. The defendant's written statement acknowledged that he asked codefendant Theodore to accompany him "in case something happened," because the victim was "bigger" than the defendant. The defendant claims that the court improperly speculated about the content of his communications with his codefendants. We disagree. Viewing the defendant's written statement in the light most favorable to the State, the trial court could reasonably infer that the defendant contemplated a potentially violent confrontation with the victim. This is what prompted him to round up a large group, in a show of force, prior to confronting the victim a second time. The court could reasonably infer that the defendant's clear intent in gathering such a large group was to intimidate the victim. Separately, the court could and did rely on the testimony that codefendant Theodore told the victim to pay the defendant, while holding a knife to the victim's neck. This evidence indicated that the defendant told Theodore about the money allegedly owed to the defendant by the victim. The trial court could find that Theodore's use of a knife was in furtherance of the plan to collect the money by force.

¶ 23 Moreover, the defendant admitted that he left the scene with Theodore after the victim had been cut and later disposed of Theodore's knife. The defendant argues that the trial court

could not rely on his actions after the offenses, because one is legally accountable "if either before or during the commission of the offense" he acted with intent to aid the planning or commission of the offense. 720 ILCS 5/5-2 (c) (West 2014). Nevertheless, the case law is clear that the trial court may consider such actions as circumstantial evidence of a common criminal purpose. *Perez*, 189 Ill. 2d at 267 (proof that a defendant "maintained a close affiliation with his companions after the commission of the crime" may be considered in determining the defendant's accountability).

¶ 24 We also reject the defendant's reliance on *People v. Ivy*, 2015 IL App (1st) 130045, which he cites to argue that the trial court could not find him accountable simply because he "set a chain of events into motion." The *Ivy* decision reversed an attempted murder conviction, explaining: "It is not enough that defendant initiated the shooting spree and set into motion a chain of events that resulted in Webb being shot" but that the State was required to prove that "Webb was shot in furtherance of the common criminal design which defendant shared with his accomplices." *Id.* ¶ 33. *Ivy* is distinguishable, as in that case no witness identified Webb's shooter and so the State could not prove "that anyone with whom defendant shared a criminal design shot Webb." *Id.* In contrast, in this case, there was ample evidence that the codefendants' actions were part of a common plan to force the victim to pay the defendant. Significantly, the identity of the person who cut the victim was known and he was the defendant's cohort, whom the defendant invited to the scene of the crime, and with whom the defendant left the scene having accepted the knife from the cohort for disposal. This is sufficient evidence to hold the defendant accountable. Thus, we reject the defendant's argument for reversal.

¶ 25 We turn to the defendant's alternative argument: that his conviction for aggravated battery should be vacated under the one-act, one-crime doctrine because it is based on the same act as his conviction for attempt armed robbery. He argues that "both offenses are based on the same act of holding a knife to [the victim's] neck" and thus both convictions cannot stand, and so the "less serious offense of aggravated battery must be vacated."

¶ 26 Under the one-act, one-crime doctrine, multiple convictions cannot be " 'carved from the same physical act.' " *People v. Miller*, 238 Ill. 2d 161, 165 (2010) (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). Reviewing courts follow a two-step analysis to determine if the doctrine is violated: "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper. [Citation.]" *Id.*

¶ 27 Applying the first step of the analysis to this case, we conclude that the two offenses at issue were based on separate acts. Specifically, the attempt armed robbery occurred when the victim was asked for money while threatened with a knife. See 720 ILCS 5/18-1 (West 2016) (robbery occurs when property is taken "by the use of force or by threatening the imminent use of force"); 720 ILCS 5/18-2 (a)(1) (West 2016) (armed robbery occurs when section 18-1 is violated and the defendant is "armed with a dangerous weapon other than a firearm"). That offense did not require any injury to the victim. On the other hand, aggravated battery was committed through the separate act of cutting the victim. See 720 ILCS 5/12-3/05(a)(1) (West 2016) (aggravated battery occurs when defendant causes "great bodily harm"). Although the

offenses were close in time, they were not based on "precisely the same physical act." *Miller*, 238 Ill. 2d at 165.

¶ 28 We note that, after the parties submitted their briefs, we granted the defendant leave to cite the recent decision in *People v. Smith*, 2017 IL App (1st) 141312, as additional authority. In that case, the defendant was convicted of both robbery and aggravated battery, where a "single punch was used as the basis for the aggravated battery conviction and as the element of force for the robbery conviction." *Id.* ¶ 21. As the defendant "committed only one single physical act," we held that the two convictions violated the one-act, one-crime principle. *Id.* ¶¶ 24-25. We find that *Smith* is distinguishable, as in that case there was "no evidence of any other use of force or threat of force" against the victim besides the single punch. *Id.* ¶ 21. That is not the situation here, as there was evidence that the victim was first threatened with a knife if he did not pay, (an independent act supporting the attempt robbery charge) before an ensuing struggle, during which the victim was cut. Thus, different acts supported each conviction.

¶ 29 Turning to the second step of the analysis, we consider whether either of the two offenses is a lesser-included offense. The "abstract elements approach applies to determine whether one charged offense is a lesser-included offense of another." *Miller*, 238 Ill. 2d at 176. Under this approach, "[i]f all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. *** In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Id.* at 166.

¶ 30 In this case, neither of the two offenses at issue is a lesser-included offense, as each offense includes distinct elements. In particular, the offense of attempt armed robbery does not require any bodily harm to the victim, which is an element of the aggravated battery offense.

720 ILCS 5/12-3.05(a)(1) (West 2016). On the other hand, aggravated battery can be committed without any attempt to take the victim's property, as would be necessary to prove an attempted robbery. As each of the offenses has independent elements, neither can be considered a lesser-included offense of the other. In turn, the defendant's convictions do not violate the one-act, one-crime doctrine.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.