

No. 1-12-0217

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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. 10 CR 2834
	)	
ROEGASTON LEE,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Hyman and Justice Mason concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) Where the State's evidence showed defendant was in a verbal altercation with a victim, pulled that victim's hair, and then defendant and co-defendant fired weapons into that victim's group of friends, ran away from the scene together, hid together, and attempted to get rid of their respective weapons, the evidence was sufficient to support defendant's conviction for attempt murder and aggravated discharge of a firearm based either on defendant's actions as a principal or on a theory of accountability; (2) the same evidence was also sufficient to support that defendant had intent to kill the victims; and (3) defendant's aggravated unlawful use of a weapon conviction is vacated in light of our supreme court's ruling in *People v. Aguilar*.
- ¶ 2 Following a jury trial, defendant Roegaston Lee was convicted of attempt murder, aggravated discharge of a firearm, and unlawful use of a weapon. On appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt of attempt murder and

aggravated discharge of a firearm because the jury found that the State did not prove beyond a reasonable doubt that defendant personally discharged a firearm during the commission of the attempt murder and the State's evidence failed to prove defendant was accountable for the actions of his co-defendant; (2) the State failed to prove him guilty beyond a reasonable doubt of attempt murder because the State's evidence failed to show defendant had the specific intent to kill; and (3) his conviction for aggravated unlawful use of a weapon under section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)) should be vacated as unconstitutional pursuant to our supreme court's ruling in *People v. Aguilar*, 2013 IL 112116. We affirm in part and vacate in part.

¶ 3 Defendant and co-defendant Dennis Moore, who is not a party to this appeal, were charged with the attempt first degree murder of Ebony Boyd and Carla Morrison, aggravated discharge of a firearm, and aggravated unlawful use of a weapon. Specifically, defendant was charged with the attempt murder of Boyd and Morrison, the attempt murder of Boyd and Morrison where he personally discharged a firearm, aggravated discharge of a firearm toward Boyd and Morrison, and aggravated unlawful use of a weapon. The charges were based on a shooting that occurred at approximately 10:30 p.m. on January 23, 2010, near the intersection of St. Louis Avenue and Adams Street. Defendant and Moore had simultaneous but severed jury trials.

¶ 4 At trial, Ebony Boyd testified that at approximately 10 or 10:30 p.m. on January 23, 2010, she was walking alone near the intersection of St. Louis and Adams, on her way to pick up her younger sister, Carla Morrison. While she was walking, a man whom Boyd identified as defendant tried to talk to her from across the street, saying, "hey, little momma." At the time, defendant was standing with another man Boyd identified as Moore and some women. Boyd

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ignored defendant and kept walking to meet her sister at Jackson Boulevard and St. Louis. Morrison was with a group of friends including Shanice Hicks. The group was 10 or 11 people in total and, after Boyd met up with them, the group turned back to head home, walking north on St. Louis. As the group passed defendant, who was still across the street, defendant again said, "hey, little momma." Boyd ignored him. Defendant then said, "I don't want to talk to your skinny a\*\*\* anyway," and Boyd responded, "I don't care. I don't want to talk to your Fred Sanford looking a\*\*\* either." Then defendant walked toward Boyd who was at the front of her group of friends. Defendant stood in front of Boyd and grabbed Boyd's hair, not letting go until one of the girls in Boyd's group, Tonisha Jones, sprayed defendant with Mace. Defendant let go of Boyd's hair and was wiping his face for "[m]aybe a minute or two" during which time Boyd walked to the back of her group. Boyd knew that liquid came out when Tonisha Jones maced defendant because she could smell it and feel her nose burning. Boyd then saw Moore walk up to the group and heard Moore say, "I know that b\*\*\* didn't just mace you," then "shoot that b\*\*\*." Boyd saw Moore hand something to defendant that she believed was a gun, then she heard two gunshots and "everybody started running." Boyd and Hicks ran to the corner, but then Boyd stopped to look for Morrison. Boyd saw Morrison running south on St. Louis, so Boyd grabbed Morrison and kept running toward Jackson while dragging Morrison along. Moore then started shooting toward Boyd and Morrison as they ran. Boyd knew she was being shot at because she saw "the fire come out of the gun. And every time I [ran] past a window, it [would] bust or a vase, it [would] bust over our heads." Moore shot at Boyd and Morrison five or six times. At some point while she was running, Boyd saw defendant and Moore running into an apartment building on the corner of the intersection. Boyd and Morrison then ran through an alley and hid underneath a porch, where they stayed hidden until "a lot of police came so that I

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knew I was safe." She then told the police what had happened. While speaking with the police, Boyd saw another officer come out of the apartment building on the corner with defendant and Moore. Boyd identified defendant and Moore to the police as the men who had shot at her.

¶ 5 On cross-examination, Boyd admitted she was not 100% sure that Moore handed defendant a gun and she never saw defendant fire a gun. On the night of the incident, Boyd said she told an officer or detective that defendant said he did not want to talk to her "skinny a\*\*\* anyway," and that Jones had maced defendant, although she could not remember which officer or detective she had spoken to.

¶ 6 Shanice Hicks corroborated Boyd's testimony that at about 10:30 p.m. on January 23, 2010, she was spending time with friends, including Morrison. Boyd met them and the group started walking toward home, north on St. Louis. As they walked, a man whom Hicks identified as defendant tried to talk to Boyd, but Boyd ignored him. Defendant then became angry and grabbed Boyd's hair. The group was standing in the middle of the street, and from the back of the group Hicks saw Tonisha mace defendant. Then a man whom Hicks identified as Moore approached and said, "I know that b\*\*\* didn't just mace you." Moore handed something to defendant, which Hicks thought was a gun, then said, "shoot that b\*\*\*." Hicks started running and heard "a few shots" right after she took off, but did not see anyone firing a weapon. Hicks hid on a porch by herself until the police arrived. Hicks then returned to the intersection of Adams and St. Louis with Boyd and Morrison. The police brought defendant and Moore out of the "coed building" and Hicks told the police that defendant and Moore were "them."

¶ 7 On cross-examination, Hicks testified that she did tell an officer or detective that she saw defendant grab Boyd's hair on the day of the shooting and that Tonisha maced defendant, although she could not remember which officer or detective. Hicks testified that, in response to

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being maced, defendant "was holding his eyes. But after so long, he shook it off." However, she also testified that she did not remember what defendant did after he was maced. Hicks and Boyd were together at the police station the night of the shooting and, during interviews at the station, they were together sometimes and separated sometimes. Hicks admitted she never saw defendant firing a gun.

¶ 8 Officer Chris Tottas testified that, while on duty at around 10:30 p.m. on January 23, 2010, he and his partner were driving when Tottas heard gunshots. Tottas and his partner, who was driving, drove north on St. Louis toward the sound of the shots. As they were driving, Tottas saw a man he identified as defendant "firing two shots at a crowd of people in the street sidewalk." Tottas was not sure how many people defendant was firing at or whether they were male or female. When Tottas exited the patrol car and announced himself as a police officer, defendant and another man, identified as Moore, ran toward an apartment complex. Tottas could not see what kind of weapon defendant had, but he actually saw the fire coming out of "something." As defendant and Moore were running away, Tottas saw Moore throw a two-tone gun on the ground. The gun hit the street, then slid underneath a parked car and Tottas immediately recovered the gun. Tottas saw defendant and Moore run into the apartment complex on St. Louis and Adams. Officers from other units were able to gain access to the building and brought out defendant and Moore. Tottas identified defendant as the man he had seen fire into a crowd of people and Moore as the man who threw the gun into the street. The gun Tottas recovered was a stainless steel Ruger P-95 semi-automatic handgun. It had one round in the chamber, eight in the magazine, and could hold a total of 15 rounds. Tottas secured the Ruger and took it back to the station where it was inventoried.

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¶ 9 On cross-examination, Tottas said the crowd could have been more than 20, 30, or 40 people and "some were running at us already" when he and his partner drove up to the scene. No bullets were found near the recovered weapons.

¶ 10 Officer Kris Stipanov testified that at approximately 10:30 p.m. on January 23, 2010, he and his partner were in an unmarked police vehicle when they received a radio call that shots had been fired at Adams and St. Louis. Stipanov and his partner immediately drove to the location and, when they arrived, Stipanov approached Officer Tottas. After speaking with Tottas, Stipanov and his partner went to an apartment building on the corner of Adams and St. Louis, and entered through the rear entrance. They then went through an open door into a vacant apartment on the first floor where they saw two individuals, who Stipanov identified as defendant and Moore, standing in the apartment entrance. When the officers walked in, defendant and Moore "immediately looked in [the officers'] direction and [defendant] took a gun from his left hand and tossed it into the utility closet." Stipanov immediately retrieved the gun from the closet, while his partner detained defendant and Moore. The gun was a .38 Taurus blue steel revolver that contained three live rounds and three expended shell casings. Stipanov secured the gun on his person and then he and his partner took defendant and Moore out of the apartment building in handcuffs and escorted them to the corner of Adams and St. Louis. Tottas told Stipanov that defendant and Moore were the two men Tottas had seen flee into the apartment building. Stipanov took the .38 revolver back to the station where it was inventoried by another officer.

¶ 11 Officer Kenneth Weller testified that at approximately 10:30 p.m. on January 23, 2010, he and his partner were on patrol when they heard a dispatch call of shots fired near St. Louis and Adams. Weller and his partner immediately responded to the call. When they arrived,

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Weller and his partner helped secure the scene, blocked off the street with their squad car, and assisted in a search for evidence. Within a few minutes of his arrival, while Weller was standing and speaking with Hicks, Boyd, and Morrison, officers brought out two men he identified as defendant and Moore from an apartment building immediately across the street. As defendant and Moore were brought out, Boyd and Hicks "yelled out that that was, those two were the ones that shot at them."

¶ 12 On cross-examination, Weller testified that he assisted in looking for physical evidence, but that he personally did not find any shell casings or fired bullets. Weller did see a flower pot that had been shot but did not see any broken windows or anything else that had been hit by gunfire. When he spoke to Boyd, Hicks, and Morrison, he was not able to question them because they were "in a very animated state. They were talking over each other." Boyd did not tell Weller that Moore said "I know that b\*\*\* didn't mace you." Hicks never told Weller that she saw Moore hand defendant a gun. Further, neither Boyd nor Hicks told Weller that defendant had pulled Boyd's hair, or that Jones had maced defendant. However, Weller did not have an in-depth interview with Boyd or Hicks.

¶ 13 Kellen Lee Hunter, a forensic scientist and expert in firearms identification, testified that on July 16, 2010, he received a revolver, three fired cartridge cases, and three unfired cartridge cases. Hunter explained that when a pistol is fired, the cartridge cases are expelled automatically from the weapon. In contrast, when a revolver is fired, the cartridge cases remain inside the gun. An unfired cartridge still contains the bullet while a fired cartridge is just the cartridge case itself because the bullet has already been fired. The revolver Hunter received was a .38 caliber gun, and the cartridge cases were also .38 caliber. After test-firing the revolver, Hunter concluded

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that, in his expert opinion, the test-fired cartridge cases and the cartridge cases received as evidence came from the revolver Hunter received as evidence.

¶ 14 On cross-examination, Hunter admitted that he had no way of knowing when the bullets from the spent cartridges had been fired. Hunter received no bullets for testing.

¶ 15 The parties then proceeded by way of stipulation, that evidence technician Angel Mosqueda, if called, would testify that at approximately 1:23 a.m. on January 24, 2010, he met defendant and Moore at the police station. Mosqueda used gunshot residue collection kits to test for the presence of gunshot residue on the hands of defendant and Moore. After obtaining a lift from defendant and Moore, each lift was sealed separately and placed in its respective kit.

¶ 16 Robert Berk, an expert in the field of trace evidence, specifically relating to gunshot residue testing, testified that he received two inventories involving defendant and Moore and conducted gunshot residue tests. Berk received the gunshot residue lifts of both defendant and Moore on April 13, 2010, and began his analysis of the lifts on June 24, 2010. Berk received the lifts in a sealed condition. Berk was unable to identify any of the necessary gunshot residue particles on defendant's test and, therefore, the gunshot residue test for defendant was negative. However, Berk explained, "a negative gunshot residue indicates to me that the individual may not have been exposed to gunshot residue. However, if he was exposed to gunshot residue, then the particles must have been either removed by activity, not deposited, or not detected by the instrumentation." Berk went on to explain that a negative gunshot residue test does not mean defendant did not fire a weapon:

"Well, gunshot residue is like any other trace material and can be picked up and lost due to hand activity. So over a period of time, normal hand activity will remove gunshot residue from an

individual's hand so that even if they have been exposed, they will not test positive.

Likewise, depending on the environmental factors, the residue may not have been deposited at the time the weapon was discharged."

Berk also testified that some weapons deposit more gunshot residue than others. Berk was able to identify some of the necessary particles on Moore's gunshot residue test. Based on the data, in Berk's opinion, Moore's kit was positive for the presence of primer gunshot residue and therefore Moore "either discharged a firearm, has contacted an item that has primer gunshot residue, or that he had his right hand in the environment of a firearm when it was discharged."

¶ 17 Detective John Climack testified for the defense that he was assigned to investigate the shooting sometime after midnight on January 24, 2010. Climack and a partner went to the scene where Climack looked for physical evidence including shell casings or fired bullets. Climack found neither. The other officers on the team also found neither shell casings or fired bullets. Climack did not request photographs to be taken of the scene because "[t]here was really no reason." Climack received the names of witnesses from officers on the scene and spoke with Boyd hours after the shooting occurred. Boyd did not give Climack the name of Tonisha Jones but named her sister, Morrison, as another witness. Boyd did not tell Climack that defendant had pulled her hair or that Moore said "I know that b\*\*\* didn't mace you." Hicks did not tell Climack anything about Jones, about the "macing incident," or about defendant pulling Boyd's hair. Climack testified that he had written in his supplementary report that Tottas reported that he saw defendant throw a stainless steel nine-millimeter handgun in the street. Climack's report also reflected that Stipanov saw Moore toss a black handgun into a utility closet. Climack

admitted that he had switched the names of defendant and Moore in his report. He never corrected the mistake because he did not realize the mistake until much later.

¶ 18 The jury was instructed and given verdict forms on the following charges: attempt first degree murder of Boyd, attempt first degree murder of Morrison, aggravated discharge of a firearm, and unlawful use of a weapon. The jury was also instructed on and given a form to determine whether the allegation was proven "that during the commission of the offense of attempt first degree murder the defendant personally discharged a firearm."

¶ 19 During deliberations, the jury sent a note with three requests. The jury stated that they needed "clarification between aggravated discharge of a firearm and attempted murder." The trial court responded, "you have the instructions, the evidence, and the exhibits. Review the instructions that define the offenses and the issues therein. Please continue to deliberate." The jury then asked, "if we rule guilty on one, do we have to rule the same on the other?" to which the trial court responded "You have separate verdict forms for each charge." Finally, the jury stated that they needed "additional information on [the] attempt murder charge." To that, the trial court responded, "You have all the evidence, instructions, and exhibits. Please continue to deliberate." Neither party objected to the court's responses.

¶ 20 The jury found defendant guilty of aggravated unlawful use of a weapon, aggravated discharge of a firearm, and the attempt first degree murders of Boyd and Morrison. The jury also found, "the allegation was not proven that during the commission of the offense of attempt first degree murder the defendant personally discharged a firearm."

¶ 21 The circuit court sentenced defendant to two concurrent 15-year prison terms for the attempt murder of Boyd and the attempt murder of Morrison, and merged the aggravated

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discharge of a firearm conviction with the attempt murder convictions. The court also sentenced defendant to an additional two years for aggravated unlawful use of a weapon.

¶ 22 On appeal, defendant first contends that the State failed to prove him guilty beyond a reasonable doubt of both attempt murder and aggravated discharge of a firearm under a theory of accountability. This claim is based upon the jury's finding that the State failed to prove defendant personally discharged a firearm during the commission of the attempt murder offense. Therefore, defendant concludes that the jury could only have found him guilty of attempt murder and aggravated discharge of a firearm based upon his accountability for Moore's conduct. He continues by arguing that because there is no evidence of defendant's participation either before or during the commission of the offense, the State failed to prove him guilty beyond a reasonable doubt.

¶ 23 The State responds by characterizing defendant's argument as challenging the verdicts as inconsistent. The State points out that, even though the jury concluded the State failed to establish that defendant personally discharged a firearm during the commission of the attempt murder, this finding was not legally inconsistent with the verdicts of guilty on attempt murder and aggravated discharge of a firearm. The State then discusses the difference between legally inconsistent and logically inconsistent verdicts, and correctly points out that defendant cannot challenge the verdicts when they are merely logically inconsistent.

¶ 24 Defendant replies that the State has misconstrued his argument and that the verdicts are not inconsistent.

¶ 25 Inconsistent verdicts may be logically inconsistent or legally inconsistent. *People v. Gorka*, 374 Ill. App. 3d 85, 90 (2007). Consistency in verdicts is not required as a matter of constitutional law and inconsistent verdicts may often be explained as a result of juror lenity.

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*People v. Jones*, 207 Ill. 2d 122, 130 (2003). Logically inconsistent verdicts may stand as long as they are legally consistent. *People v. D.D.R.*, 258 Ill. App. 3d 282, 288 (1994). Legally inconsistent verdicts occur when the verdicts “ ‘necessarily involve the conclusion that the same essential element or elements of each crime were found both to exist and not to exist. [Citations omitted.]’ ” *Id.* A defendant may not challenge a conviction on the sole basis that it is inconsistent with his acquittal on another charge. *People v. Jones*, 207 Ill. 2d 122, 133-34 (2003). However, a defendant “may always challenge his conviction on sufficiency-of-the-evidence grounds.” *Id.* at 148.

¶ 26 Although we agree that the verdicts are neither logically nor legally inconsistent, we conclude that the outcome of this issue is resolved for reasons not provided or discussed by either party in their briefs.

¶ 27 To sustain a conviction for attempt murder, the State must prove that a defendant, "with intent to commit a specific offense [first degree murder], \*\*\* does *any act* that constitutes a substantial step toward the commission of that offense." (Emphasis added.) *Id.* Although the State must prove all the elements of the offense of attempt murder, the State is not required to prove, as an element of this offense, that defendant *personally* discharged a firearm. See 720 ILCS 5/8-4(a) (West 2010). To sustain a conviction for aggravated discharge of a firearm, the State must prove that the defendant knowingly or intentionally discharged a firearm in the direction of another person. 720 ILCS 5/24-1.2(a)(2) (West 2010).

¶ 28 Defendant was charged with the attempt murder of Boyd and Morrison and with additional charges for the attempt murder of Boyd and Morrison where defendant personally discharged a firearm. These latter charges, however, were enhancements for sentencing purposes only. See 720 ILCS 5/8-4(c)(1) (West 2010).

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¶ 29 While the offense of attempt murder is a Class X felony which generally has a sentencing range of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25 (West 2010)), section 8-4(c)(1) of the Criminal Code additionally provides that:

"(B) an attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court;

(C) an attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court;

(D) an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1) (West 2010).

¶ 30 In addition, section 111-3(c-5) of the Code of Criminal Procedure (725 ILCS 5/111-3(c-5) (West 2010)) requires that the State must notify defendant, either by the charging document or through a written notification before trial, that an enhancement will be sought. Here, the State complied by including the enhancement in the charging instrument. The section further provides that failure to find defendant guilty of the enhancing fact beyond a reasonable doubt "is not a bar

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to a conviction for commission of the offense, but is a bar to increasing, based on that fact, the range of penalties for the offense beyond the statutory maximum." *Id.*

¶ 31 As a result of the above, we conclude that the failure of the jury to find that defendant personally discharged a firearm in the commission of the attempt murder does not negate the verdicts of guilty, nor does it mean that the State failed in its burden of proof; the finding only prohibits the State from seeking an enhancement. See 720 ILCS 5/8-4(c)(1)(C); 725 ILCS 5/111-3(c-5) (West 2010); see also *People v. Reed*, 396 Ill. App. 3d 636, 648 (2009) (finding that "a guilty verdict cannot be challenged based on an inconsistent answer to a special interrogatory absent a statute providing such").

¶ 32 In *Reed*, the jury found the defendant guilty of first degree murder but also made a finding that the State had not proven beyond a reasonable doubt that the defendant had personally discharged a firearm that proximately caused the victim's death. *Reed*, 396 Ill. App. 3d at 637. On appeal, the defendant challenged the two verdicts as inconsistent and argued that the jury's finding that the State had not proven beyond a reasonable doubt that defendant personally discharged a firearm was "fatal to the guilty verdict." *Id.* at 645. Unlike the defendant in *Reed*, here defendant is not challenging the verdicts as inconsistent. Rather, defendant is arguing that, as a result of the jury finding that defendant did not personally discharge a firearm during the commission of the attempt murder, the State failed in its burden of proof. However, in arguing that the testimony does not support a finding of guilty for attempt murder and aggravated discharge of a firearm, defendant has ignored all of the testimony presented at trial related to his having or using a handgun, or his participation before or during the commission of the offense. Defendant, apparently, has concluded that this evidence should be excluded from any discussion because of the jury's finding that the State did not prove that

defendant personally discharged a firearm during the commission of the attempt murder. Since there is no requirement that the State establish that defendant personally discharged a firearm in order to prove defendant guilty of the offense of attempt murder or aggravated discharge of a firearm, there is no reason to exclude that testimony in determining whether the State established the elements of the offenses of attempt murder and aggravated discharge of a firearm beyond a reasonable doubt. Although defendant's sentence could not be increased based upon the jury's finding, the evidence presented at trial is not excluded for the purposes of considering whether the convictions may stand. Even though defendant contends the jury could have reached their conclusions based only on an accountability theory, it is simply incorrect to discard that evidence from our consideration of the sufficiency of the evidence and defendant has provided no citation to authority to support the contrary. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant \*\*\* with citation of the authorities \*\*\* relied on").

¶ 33 Our review of the evidence presented at trial demonstrates that the jury could have reasonably concluded that defendant was guilty of both attempt murder and aggravated discharge of a firearm either as a principal, based on his own conduct, or under an accountability theory.

¶ 34 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in a 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. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *Id.* Rather, it is the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the facts. *Id.* The reviewing court will not

substitute its judgment for that of the trier of fact on issues of witness credibility or the weight of the evidence. *Id.* at 224-25. A reviewing court will only reverse a conviction if the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 35 Here, there was more than sufficient evidence to prove defendant guilty beyond a reasonable doubt of attempt murder and aggravated discharge of a firearm either as a principal or under an accountability theory. The evidence at trial showed that after exchanging words with Boyd, defendant grabbed Boyd's hair. One of Boyd's friends maced defendant at which point Moore approached. Moore said "I know that b\*\*\* didn't just mace you." Moore then said, "shoot the b\*\*\*," and handed something to defendant that both Boyd and Hicks believed to be a gun. After, the young women both heard shots being fired and ran. Although Boyd only saw Moore actually shooting, Tottas testified that he saw defendant firing a gun into the crowd. The testimony of a single eyewitness is sufficient to sustain a conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). In addition, Stipanov saw defendant throw a gun into a utility closet when he apprehended defendant. The gun, which was recovered, contained three expended shell casings. Based on the evidence, a jury could reasonably infer that Boyd and Hicks did see Moore handing defendant the gun that Tottas subsequently saw defendant shooting into the crowd, and that defendant ultimately discarded in front of Stipanov. Accordingly, after viewing the evidence in a light most favorable to the State, we conclude that any rational trier of fact could have found defendant guilty beyond a reasonable doubt of the elements of attempt murder and aggravated discharge of a firearm based upon his own conduct.

¶ 36 In addition, we also find that the State provided sufficient evidence to prove defendant guilty beyond a reasonable doubt of attempt murder and aggravated discharge of a firearm based

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on a finding that defendant was accountable for the actions of Moore. In Illinois, a defendant is legally accountable for the criminal 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). The State establishes accountability when it proves beyond a reasonable doubt that the defendant shared the criminal intent of the principal or that there was a common criminal design. *People v. Perez*, 189 Ill. 2d 254, 266 (2000).

¶ 37 Intent may be inferred from the circumstances surrounding the commission of the offense and the defendant's acts themselves. *People v. Cooper*, 194 Ill. 2d 419, 435 (2000). "Among the factors the jury may consider in determining whether a defendant is legally accountable for another person's acts are: (1) proof that the defendant was present when the crime was perpetrated; (2) proof that he maintained a close affiliation with his companion after the crime was committed; (3) whether the defendant reported the crime to the police; and (4) whether the defendant fled the scene." *People v. Reeves*, 385 Ill. App. 3d 716, 727 (2008). Furthermore, if the evidence shows that a defendant was present for the commission of the crime and did not oppose or disapprove of the crime "it is competent for the trier of fact to consider this conduct in connection with other circumstances and thereby reach a conclusion that such a person assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime." *People v. Kessler*, 57 Ill. 2d 493, 498-99 (1974).

¶ 38 In the present case, the evidence shows that defendant and Moore were together at the side of the street when Boyd first walked by. When Boyd walked by the second time, she and defendant had words, defendant pulled Boyd's hair, then Boyd's friend maced defendant. At that time, Moore approached the group, spoke to defendant saying, "I know that b\*\*\* didn't just

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mace you” and “shoot that b\*\*\*\*” then handed an object to defendant that both Boyd and Hicks believed was a gun. Defendant accepted the object. Defendant remained with Moore during the shooting and was seen by Tottas firing a gun into the crowd on the street. Defendant and Moore fled together once Tottas identified himself as a police officer and defendant attempted to hide with Moore in the apartment building. When Stipanov entered the vacant apartment, he saw defendant and Moore standing inside and then saw defendant throw a gun into the utility closet. It is clear that defendant was present when the crime occurred and he remained with Moore while fleeing the scene. Defendant makes much of the fact that the entire sequence of events leading to the shooting was spontaneous and concludes that defendant neither took part in planning the crime nor knew it would occur. However, “[a] conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts” of others. *Cooper*, 194 Ill. 2d at 435 (citing *In re W.C.*, 167 Ill. 2d 307, 338 (1995)). Not only did defendant stay for the crime without showing any indication of disapproval or opposition, but he also actively participated by firing into the crowd using the gun he received from Moore. We find that, the evidence presented at trial was not so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Jackson*, 232 Ill. 2d at 281.

¶ 39 Defendant also claims that flight from the scene may not be considered in determining whether a defendant is accountable, citing *People v. Taylor*, 186 Ill. 2d 439, 449 (1999), and *People v. Dennis*, 181 Ill. 2d 87, 106-07 (1998). However, the cases defendant relies on do not support his conclusion. In *Dennis*, the supreme court determined that “for the purposes of accountability, the duration of the commission of an offense is defined by the elements of the offense.” *Dennis*, 181 Ill. 2d at 101. Therefore, if flight or escape is not included as an element

of the charged offense, a defendant cannot be held accountable for that crime if he only forms the intent to facilitate the escape after the fact. *Id.* at 104. However, nowhere in *Dennis* did the supreme court hold that flight could not be considered as a factor to show the required intent. Similarly, the supreme court in *Taylor* held that "[e]scape is not an element of aggravated discharge of a firearm," and found that the defendant there did not intend to facilitate any element of the offense, only the escape. *Taylor*, 186 Ill. App. 2d at 449.

¶ 40 The mere presence of a defendant, even coupled with the defendant's flight from the scene, is insufficient to show that the defendant was accountable for the crime committed. *Perez*, 189 Ill. 2d at 268. However, in *Perez* the supreme court also observed, "[p]roof that the defendant was present during the perpetration of the offense [and] that he fled the scene \*\*\* are [ ] factors that the trier of fact *may consider* in determining the defendant's legal accountability." (Emphasis added.) *Id.* at 267. In the present case defendant was more than just present for the crime and the escape: he received a gun from Moore, fired the gun into the crowd on the street, fled with Moore, and then attempted to dispose of the weapon.

¶ 41 The cases on which defendant relies are distinguishable. See *People v. Taylor*, 186 Ill. 2d 439, 448-49 (1999); *People v. Phillips*, 2012 IL App (1st) 101923; *People v. Estrada*, 243 Ill. App. 3d 177, 184-85 (1993). In all three cases, the State presented no evidence to show that the defendant had any knowledge ahead of time that the crime was going to occur. See *Taylor*, 186 Ill. 2d at 448-49; *Phillips*, 2012 IL App (1st) 101923, ¶¶ 20-21; *Estrada*, 243 Ill. App. 3d at 185. In addition, in *Taylor* and *Phillips*, the only significant way the defendants participated in the crime was by providing the perpetrator with a means of escape, which was not an element of either of the charged crimes at issue and therefore insufficient to support the theory that the

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defendants were accountable for the actions of the perpetrators. *Taylor*, 186 Ill. 2d at 448-49; *Phillips*, 2012 IL App (1st) 101923, ¶¶ 20-21.

¶ 42 In *Estrada*, the defendant and the co-defendants were in a car and showing gang signs to members of a rival gang on the street. *Estrada*, 243 Ill. App. 3d at 180. The defendant left the vehicle with a tire iron and, as he did so, one of the co-defendants fired two shots from the car, striking the victim, who eventually died. *Id.* at 180-81. The defendant broke a window with the tire iron. *Id.* at 179. The defendant was convicted of first degree murder on a theory of accountability. *Id.* at 177. However, on appeal the reviewing court concluded that there was no evidence tying the defendant to a common plan or design to shoot the victim, because the defendant had already left the car when Moore fired the gun, and "[a]lthough [the defendant's] act indicate that he intended to intimidate [the victim], there is no evidence that he was aware" that the co-defendant intended to shoot. *Id.* at 185.

¶ 43 In contrast to the above cases, defendant in the present case took a gun from Moore, fired the gun into the crowd, ran away with Moore to a nearby apartment, and attempted to dispose of the weapon. Defendant actively participated in Moore's crime and we are therefore unpersuaded by the authority cited by defendant.

¶ 44 Next, defendant claims that the State failed to prove him guilty beyond a reasonable doubt of attempt murder based on the State's alleged failure to show he had the specific intent to kill Boyd and Morrison. We have recited above the standard of review on a challenge to the sufficiency of the evidence.

¶ 45 As we also pointed out above, to sustain a conviction for attempt murder, the State must prove that a defendant, "with intent to commit a specific offense [first degree murder], \*\*\* does *any act* that constitutes a substantial step toward the commission of that offense." (Emphasis

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added.) 720 ILCS 5/8-4(a) (West 2010). Whether a defendant has a specific intent to kill is a question of fact to be determined by the trier of fact. *People v. Valentin*, 347 Ill. App. 3d 946, 951 (2004).

¶ 46 Intent is a state of mind, which is difficult to prove by direct evidence. *People v. Parker*, 311 Ill. App. 3d 80, 89 (1999). Therefore, intent to kill may be inferred from surrounding circumstances such as "the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries." *Id.* However, the extent of injury is only one factor to be considered and is not dispositive. See *People v. Teague*, 2013 IL App (1st) 110349, ¶¶ 25, 29 (finding the evidence sufficient to find an intent to kill where defendant fired an AK-47 at police officers in their vehicle despite there being no evidence of defendant's shots hitting either the officers or the vehicle). To support an attempt murder conviction, the fact finder must find that the defendant contemplated the use of force sufficient to cause serious injury that could lead to death. *People v. Thomas*, 407 Ill. App. 3d 136, 140 (2011). In addition, intent to kill may be "inferred from evidence that defendant voluntarily and willfully committed an act and that the natural tendency of such act was to destroy another's life." *People v. Bailey*, 265 Ill. App. 3d 262, 273 (1994) (citing *People v. Latimer*, 35 Ill. 2d 178, 182-83 (1966)); *Valentin*, 347 Ill. App. 3d at 951. "The very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill." *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001) (quoting *People v. Thornes*, 62 Ill. App. 3d 1028, 1031 (1978)); see also *People v. Garcia*, 407 Ill. App. 3d 195, 201-02 (2011) (finding an intent to kill can be inferred from firing two bullets in the direction of an occupied car and a crowded street).

¶ 47 In the present case, we find the evidence as we have summarized it above was sufficient to conclude defendant had intent to kill Boyd and Morrison. Moore came up to defendant,

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handed him something, and then Moore and defendant shot into a crowd including Boyd and Morrison. See *Ephraim*, 323 Ill. App 3d at 1110; see also *People v. Green*, 339 Ill. App. 3d 443, 451-52 (2003) (a jury could reasonably infer that the defendant had an intent to kill based on evidence that he fired a pistol four to five times in the direction of police officers seated in their car despite missing the officers at close range). Under these circumstances, we conclude that any reasonable trier of fact could have found defendant possessed intent to kill Boyd and Morrison beyond a reasonable doubt.

¶ 48 Defendant argues that he could not have had intent to kill Boyd and Morrison because the “evidence establishes only that shots were fired in Boyd’s direction,” but not at Boyd herself. He claims the evidence only shows that shots were fired at windows, flowerpots, and “other inanimate objects.” However, “[p]oor marksmanship is not a defense to attempted murder, and it is a question of fact for the jury to determine whether defendant lacked the intent to kill or whether defendant was simply unskilled with his weapon and missed his targets.” *Teague*, 2013 IL App (1st) 110349, ¶ 27 (citing *Green*, 339 Ill. App. 3d at 451-52; *People v. Johnson*, 331 Ill. App. 3d 239, 251 (2002) (although the defendant did not strike the victim while shooting at him, “poor marksmanship is not a defense to” attempt murder)). In addition, Boyd testified that “every time [she ran] past a window, it [would] bust or a vase, it [would] bust over our heads.” From this testimony, a jury could reasonably infer that defendant and co-defendant continued to aim at Boyd and Morrison while they ran away, but also continued to miss and hit inanimate objects near Boyd and Morrison.

¶ 49 Defendant offers more arguments as to why he could not have had the intent to kill, such as “it does not make sense that someone would shoot at buildings in front of a large crowd of people if he had an intent to kill someone” and the minor injury suffered by defendant after he

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pulled Boyd's hair "is not the type of incident that would typically cause someone to form an intent to kill." However, these arguments are completely speculative and are not supported by either evidence or case law. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and pages of the record relied on"). Moreover, it is the responsibility of the jury to draw reasonable inferences from the facts, and we will not substitute our judgment for that of the jury on issues of witness credibility or the weight of the evidence. *Siguenza-Brito*, 235 Ill. 2d at 224-25.

¶ 50 We find the cases on which defendant relies in support of his claim to be factually distinguishable. See *People v. Wagner*, 189 Ill. App. 3d 1041 (1989), *overruled on other grounds by People v. Mitchell*, 241 Ill. App. 3d 1094 (1993); *People v. Trinkle*, 40 Ill. App. 3d 730 (1976).

¶ 51 In *Wagner*, the attempt murder conviction was overturned because, in its findings, the trial court specifically stated that he did not find intent to kill on the part of the defendant. *Wagner*, 189 Ill. App. 3d at 1045-46. Here, there is no evidence that the jury failed to find defendant had the specific intent to kill Boyd or Morrison. The jury was properly instructed on the offense of attempt murder, found defendant guilty of the attempt murder of both Boyd and Morrison and, absent evidence to the contrary, we will presume the jury followed the court's instructions. See *People v. Taylor*, 166 Ill. 2d 414, 438 (1995) (a jury is presumed to follow the instructions given by the court).

¶ 52 In *Trinkle*, the defendant fired one shot at a tavern, which pierced the front door and wounded a patron inside. *Trinkle*, 40 Ill. App. 3d at 731-32. The reviewing court concluded that the evidence was not sufficient to sustain a finding of intent to kill because the defendant did not

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know the victim was standing behind the door. *Id.* at 734. The court observed, “[m]any cases dealing with the problem of implied malice, and reckless disregard for the value of human life, speak in terms of a defendant who fires, or attempts to fire, a gun directly at an individual. In this case, the defendant fired a gun, not at any person, but at a building.” *Id.* In the present case, however, defendant fired a gun into a crowd of people, including Boyd and Morrison. That he did not hit Boyd and Morrison does not negate that fact. See *Teague*, 2013 IL App (1st) 110349, ¶ 27 (poor marksmanship is not a defense to attempt murder).

¶ 53 Finally, in a supplemental brief, defendant contends, and the State concedes, that his conviction for aggravated unlawful use of a weapon should be vacated as unconstitutional.

¶ 54 Defendant was charged with three counts of aggravated unlawful use of a weapon (AUUW) under section 24-1.6(a)(1) of the Criminal Code (720 ILCS 5/24-1.6(a)(1) (West 2010)). However, only one charge of AUUW was presented to the jury, the offense pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code, namely that defendant knowingly possessed an uncased, loaded, and immediately accessible firearm. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010). This is evident from the jury instruction provided for the AUUW charge, which read:

“A person commits the offense of aggravated unlawful use of a weapon when he knowingly carries or possesses on or about his person a firearm, at a time when he is not on his land, in his abode, or in his fixed place of business, and the firearm was uncased, loaded, and immediately accessible at the time of the offense.”

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¶ 55 The Illinois Supreme Court recently held that the Class 4 felony form of section 24-1.6(a)(1), (a)(3)(A), (d) to be facially unconstitutional for violating the right to keep and bear arms as provided by the Second Amendment of the United States Constitution. *People v. Aguilar*, 2013 IL 112116, ¶ 22. The ruling in *Aguilar* rendered the Class 4 form of the offense of AUUW under section 24-1.6(a)(1), (a)(3)(A), void *ab initio*, or “as if the law never existed.” See *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (1999). The mittimus shows defendant was convicted of the Class 4 form of the offense of AUUW. Therefore, we agree with the parties and, in light of *Aguilar*, we vacate defendant’s conviction for AUUW.

¶ 56 For the foregoing reasons, we affirm defendant’s convictions for attempt murder and aggravated discharge of a firearm, and vacate defendant’s conviction and two-year sentence for aggravated unlawful use of a weapon.

¶ 57 Affirmed in part; vacated in part.