

2014 IL App (1st) 123366-U

No. 1-12-3366

June 25, 2014

Modified Upon Denial of Rehearing July 30, 2014

THIRD DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of Cook County.
v.)	No. 07 CR 17100
ARMANDO VELASQUEZ,)	The Honorable
Defendant-Appellant.)	Thomas V. Gainer, Jr.,
)	Judge presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Where the defendant knew his companion intended to murder the victim, and that the victim would not let the companion near him unless the defendant accompanied them, and the defendant continued to associate with the killers after the murder, the evidence warranted an instruction on accountability, and the evidence sufficed to support a conviction of the defendant for murder on a theory of accountability. Defense counsel's decision not to

pursue a necessity defense, where defense counsel strategically chose not to concede that the defendant did anything to contribute to the murder, did not show ineffective assistance of counsel. The prosecutor's remark that defendant did not raise a compulsion defense did not misstate the law applicable to the case.

¶ 2 A jury found Armando Velasquez accountable for the murder of Jorge Rivas. In this appeal, Velasquez argues that the evidence does not support the conviction, that the trial court should not have instructed the jurors on accountability, that he received ineffective assistance of counsel, and that the prosecutor's remarks deprived him of a fair trial. We affirm.

¶ 3 BACKGROUND

¶ 4 A few minutes before 11 p.m. on July 8, 2007, Monica Ruppert heard several gunshots outside her home on the northwest side of Chicago. She went to her window and, seconds later, she saw a man walking across her lawn holding his arm as though he held something in his hand. Police arrived at the scene minutes later and found Rivas dead in his car, with six bullet wounds in his head. Three of the bullets entered the back of Rivas's head, and three entered on the right side. Stippling showed that the shooter fired some of the shots at very close range. Police spoke to Ruppert at the scene, and she described the man she saw as Hispanic, about 5'7" and 170 pounds with a shaved head. She also saw his face and clothing clearly as he passed a streetlamp. Ken Ovrin, who also heard the shots, told police that about five minutes after the shots, he saw a very thin man get out of Rivas's car and head in a direction that took him away from Ruppert's home. Ovrin could not see the thin man clearly. He described the man's clothing, but that clothing did not match the clothing of the man who crossed Ruppert's lawn.

¶ 5 In July 2007, Velasquez lived with his girlfriend, Lucia Martinez, and his friend Jonathan Ortiz. Velasquez sometimes worked for Rivas. On July 31, 2007, police officers arrested Velasquez in his home. The officers also spoke with Ortiz and Martinez. Martinez said Velasquez told her he shot Rivas. Officers recorded their questioning of Velasquez at the police station.

¶ 6 At first, Velasquez told the officers that he stayed home with Martinez and Ortiz on July 8, 2007. But after further questioning, and the disclosure of what Martinez told police, Velasquez told police that Ortiz obtained a gun and gave it to Anthony Buccio on July 8. Ortiz told Buccio to kill Rivas, and he ordered Velasquez to go with Buccio. Velasquez told police that Ortiz ordered him to accompany Buccio because Rivas trusted Velasquez. Velasquez admitted that Rivas "wouldn't let [Buccio] in the car" if Velasquez had not come also. According to Velasquez, Ortiz threatened Velasquez, telling him, "if something comes out wrong you're gonna die too."

¶ 7 Velasquez told police that Ortiz called Rivas several times and arranged for Rivas to pick up Velasquez and Buccio. Velasquez sat in the passenger seat and Buccio sat in the back of Rivas's car. As Rivas drove on the northwest side, Buccio shot him. The car rolled slowly into a parked car in front of Orvyn's home. Velasquez admitted that he told Martinez he, not Buccio, shot Rivas, but he told police he said that only to make himself "look cool" to his girlfriend.

¶ 8 Prosecutors charged Velasquez with first degree murder. At the trial, the prosecutors sought to prove that Velasquez shot Rivas. Ruppert identified Velasquez as the man she saw cross her lawn seconds after the shooting. Martinez told the jury, just as she told police, that

Velasquez told her he shot Rivas. Ortiz testified that he, too, heard Velasquez tell Martinez he shot Rivas.

¶ 9 An officer who went to the scene of the shooting on July 8, 2007, testified that he found the passenger seat of Rivas's car pushed forward, as though someone got out of the back seat of the car. Officers found bullets and cartridges in the car. They also found Buccio's fingerprints on a CD in the car.

¶ 10 The jurors watched excerpts from the police interrogation of Velasquez.

¶ 11 Ovrzyn testified for the defense about the thin man he saw getting out of Rivas's car several minutes after the shooting. The defense also presented records showing that Ortiz called Rivas and Buccio several times on the day of the murder.

¶ 12 The prosecutor argued:

"[I]f you're a part of the team, you share in the win, you share in the loss.

Michael Jordan gets his ring and makes the last second shot back in the day.

The guy that never even set foot on the floor, all he did was suit up, he got the ring too."

The court overruled defense counsel's objection to the remark.

¶ 13 Defense counsel argued that Velasquez did not intend to participate in the murder, and he did not do anything to aid in the murder. Defense counsel said Velasquez

"[was] sitting against his will in the front seat of [Rivas's] car to be a witness to the murder of his friend because if he doesn't do it, you heard on that tape, that he heard [Ortiz] tell [Buccio] if anything goes wrong, kill them both. What is he supposed to do? Is he supposed to just get shot?

*** He didn't want to be *** another victim of [Ortiz]. He didn't have a choice and he didn't do anything.

*** [To be held accountable, Velasquez] has to intend to facilitate or promote [the murder]. He didn't intend to do anything but live through the night. He's not responsible for not stopping a crime he knew of."

¶ 14

In rebuttal, the prosecutor said:

"They talk about the defendant and he was concerned about all these threats.

*** That is no defense to first degree murder. *** That plays no role in this case whatsoever. There is no compulsion defense.

* * *

*** There is no defense that says if he was coerced or threatened he gets away with this murder. *** To just throw that out there and try to play upon, oh, he was threatened, he's worried for his girl, Lucia. No. It does not come into play.

* * *

*** [H]e thinks he's getting himself out of this by putting it on somebody else.

*** He told you he's the one that Jorge trusts. But for the defendant, Jorge doesn't get killed on July 8th. But for the defendant, [Buccio] never gets in the car. But for the defendant, the shooter never get[s] into position.

* * *

*** [The jury should] find the defendant guilty of everything, not because I'm saying so ***, but because the facts support it, the law requires it, and justice demands it."

¶ 15 The trial court overruled some of defense counsel's objections to the arguments, and in response to another objection, the court reminded jurors that the court would later instruct them on the law. Velasquez's attorney moved for a mistrial because of the argument concerning compulsion. Defense counsel said,

"[T]hroughout my argument, I made it clear that [Velasquez] did nothing, so he was not legally responsible.

I did say he was there, but it was not a compulsion defense, it was not part of my defense that it was compulsion because we argued that any actions he took other than sitting in the car w[ere] the result of him being threatened and therefore his bringing up compulsion lowers his burden about accountability for my client."

¶ 16 The court denied the motion for mistrial. The court instructed the jury, over defense counsel's objection, on the law of accountability. Defense counsel did not offer an instruction on compulsion as a defense.

¶ 17 The jury found Velasquez guilty of murder and of having a firearm during the offense, but the jury found Velasquez not guilty of personally discharging a firearm to cause Rivas's death. The trial court denied Velasquez's motion for a new trial and sentenced him to 25 years for the murder, plus 15 years for having a firearm, for a total sentence of 40 years in prison. Velasquez now appeals.

¶ 18

ANALYSIS

¶ 19

Velasquez argues (1) the State failed to prove him accountable for the murder; (2) the trial court should not have instructed the jury on accountability; (3) defense counsel provided ineffective assistance when he failed to offer an instruction on the defense of necessity; and (4) the prosecutor's improper closing argument deprived Velasquez of a fair trial. Different standards of review apply to the different arguments.

¶ 20

Sufficiency of the Evidence

¶ 21

When we review an argument based on the sufficiency of the evidence, we must decide “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.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), quoted in *People v. Davison*, 233 Ill. 2d 30, 43 (2009). Although the State relied primarily on evidence that Velasquez shot Rivas, the jury rejected that theory, as it found Velasquez not guilty of personally discharging a firearm to cause Rivas's death. Instead, the jury apparently found that the State proved Velasquez accountable for Buccio's murder of Rivas.

¶ 22

When the prosecution seeks a conviction on a theory of accountability, the prosecution must prove beyond a reasonable doubt that “(1) defendant solicited, ordered, abetted, agreed or attempted to aid another in the planning or commission of the crime; (2) defendant's participation took place before or during the commission of the crime; and (3) the defendant had the concurrent intent to promote or facilitate the commission of the crime.” *People v. Williams*, 383 Ill. App. 3d 596, 637 (2008). Velasquez told police, in the videorecorded confession, that he saw Ortiz give a gun to Buccio and he heard Ortiz tell Buccio to kill

Rivas. Ortiz told Velasquez to go with Buccio because Rivas would not have permitted Buccio to get in the car without Velasquez. Thus, the confession showed that Velasquez abetted the commission of the murder by getting Rivas to permit Buccio to ride in his car. The facilitation preceded the crime.

¶ 23 Velasquez argues that his statement does not support the inference that he intended to facilitate the commission of the crime. He claims that he only intended to stay alive.

¶ 24 "To prove that the defendant possessed the intent to promote or facilitate the crime, the State must present evidence that proves beyond a reasonable doubt that either: (1) the defendant shared the criminal intent of the principal; or (2) there was a common criminal design. [Citation.] Intent may be inferred from the character of the defendant's actions and from the circumstances surrounding the commission of the offense." *People v. Williams*, 324 Ill. App. 3d 419, 434 (2001). As the prosecution pointed out, Velasquez continued to share an apartment with Ortiz for weeks after the murder. When police officers arrested Velasquez on July 31, 2007, they found Ortiz with Velasquez in the apartment. Although Velasquez explained that Ortiz's threats deterred him from reporting the murder to police, Velasquez never explained why, after the murder, he did not try to move out of the apartment he shared with Ortiz. The jurors could infer from the circumstances that Velasquez had attached himself to the conspiracy to kill Rivas, and he remained attached to Ortiz thereafter. "Evidence that the defendant voluntarily attached himself to a group bent on illegal acts, with knowledge of its design, also supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another." *Williams*, 324 Ill. App. 3d at 434. The jurors could rely on the circumstantial evidence of willing participation and

reject Velasquez's statement that he participated in the murder only because Ortiz threatened to kill him. We find the evidence sufficient to sustain the conviction for murder on a theory of accountability.

¶ 25 Accountability Instruction

¶ 26 Next, Velasquez argues that the trial court should not have given the accountability instruction. We will reverse the trial court for giving erroneous instructions only if the trial court abused its discretion. *People v. Jones*, 219 Ill. 2d 1, 31-32 (2006). In *People v. Calderon*, 369 Ill. App. 3d 221 (2006), the prosecution relied primarily on evidence that Calderon killed the victim. The trial court, over the defendant's objection, also instructed the jury on accountability. The appellate court affirmed the conviction, finding the evidence concerning accountability sufficient to permit the instruction. As we have already found the evidence sufficient to support a verdict of guilty on an accountability theory, we necessarily find the evidence sufficient to justify the trial court's decision to instruct the jury on that theory. See *Calderon*, 369 Ill. App. 3d at 235.

¶ 27 Ineffective Assistance of Counsel

¶ 28 Velasquez also contends that his trial counsel provided ineffective assistance when he failed to offer an instruction on a necessity defense. To prevail on a claim of ineffective assistance of counsel, "[a] defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, and (2) [h]e was prejudiced by the deficient performance." *People v. Haynes*, 408 Ill. App. 3d 684, 689 (2011). This court presumes that counsel provided reasonable professional assistance, and the defendant must overcome the presumption that counsel had sound strategic reasons for adopting his course of action.

People v. Albanese, 104 Ill. 2d 504, 526 (1984). Defense counsel decides what instructions to proffer as a matter of trial strategy. *People v. Bobo*, 375 Ill. App. 3d 966, 977 (2007). But "[w]here defense counsel argues a theory of the case, such as an affirmative defense, but then fails [to] ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy." *People v. Gonzalez*, 385 Ill. App. 3d 15, 21 (2008).

¶ 29 Defense counsel argued to the jury that Velasquez rode in the car on Ortiz's orders only because Ortiz threatened to kill him, and that Velasquez did not share Ortiz's intention to kill Rivas. Defense counsel explained to the trial court that he did not offer an instruction on necessity or compulsion because he believed that raising either defense would lower the prosecution's burden of proof. When a defendant raises the defense of necessity, he "must admit he committed the offense since necessity merely justifies an otherwise criminal act." *People v. Gengler*, 251 Ill. App. 3d 213, 222 (1993). Defense counsel chose not to concede that defendant committed any criminal act.

¶ 30 Thus, defense counsel explicitly told the trial court of his strategic reason for not presenting his argument as a necessity defense, and preferring to present the issue as one of whether the prosecution met its burden of proving the intent needed to make Velasquez accountable for the acts of Ortiz and Buccio. Although the strategy did not produce the result defendant sought, we cannot say that defense counsel's representation fell below an objective standard of reasonableness. Velasquez has not shown that he received ineffective assistance of counsel.

¶ 31 Closing Argument

¶ 32 Velasquez argues that remarks the prosecutor made in closing require reversal of the conviction. We apply *de novo* review when examining statements made by a prosecutor during closing argument, in line with *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), because we find that the standard applied makes no difference to the result. See *People v. Land*, 2011 IL App (1st) 101048, ¶ 151. Courts afford prosecutors wide latitude in closing argument. *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). Prosecutors may properly comment on the evidence and draw reasonable inferences from that evidence. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992).

¶ 33 Velasquez objects first to the prosecutor's explanation of accountability by comparing Velasquez to a member of a basketball team, and observing that all team members share in a team's victory, even the players who never set foot on the floor. Velasquez argues that the prosecutor's analogy misrepresents the law of accountability, because defendants who do not perform any act to solicit or aid in the commission of a crime do not share guilt under the law of accountability. See *Williams*, 324 Ill. App. 3d at 434. However, players on a sports team share an objective, and all work toward that objective, at least in practices, and in remaining available in case of injuries. We find that the prosecutor's remarks on the accountability of team members do not severely distort the law of accountability, and the remarks do not warrant reversal. See *People v. Moreno*, 334 Ill. App. 3d 329, 342 (2002).

¶ 34 Next, Velasquez objects to the prosecutor's several comments to the jury that "compulsion is not a defense" in this case. But Velasquez did not advance a compulsion defense; instead he argued that he appeared at the crime scene because of threats, and that all

of the State's evidence did not prove that he shared in the criminal objectives of Ortiz and Buccio. We cannot say that the prosecutor's remarks emphasizing defense counsel's decision not to raise a compulsion defense misstated the applicable law or distracted the jury from the task of determining whether the State proved all the elements needed to show Velasquez accountable for the murder. Therefore, we find no reversible error. See *People v. Legore*, 2013 IL App (2d) 111038, ¶ 60.

¶ 35 Finally, Velasquez objects to the prosecutor's remarks as belittling the burden of proof. The prosecutor said that the State needed to prove guilt beyond a reasonable doubt, and he "embrace[d] that burden. *** It's a burden of proof for over a hundred years." At the conclusion of the argument, the prosecutor told the jurors they should find Velasquez guilty because "the facts support it, the law requires it, and justice demands it." We find the remarks similar to the remarks the appellate court found unobjectionable in *People v. Harris*, 111 Ill. App. 3d 956, 958 (1982). Velasquez relies on *People v. Martinez*, 76 Ill. App. 3d 280, 285 (1979), but the *Martinez* court did not find the use of the more strident remarks in that case reversible. See *People v. Ayala*, 96 Ill. App. 3d 880, 884 (1981). Viewing the remarks in the context of the argument as a whole, as we must (see *People v. Nicholas*, 218 Ill. 2d 104, 122 (2005)), the prosecutor appropriately argued to the jury that, because of the evidence, the law required a conviction. We find no reversible error in the prosecutor's closing argument.

¶ 36

CONCLUSION

¶ 37

Velasquez's confession and his decision to continue living with Ortiz support the verdict finding him accountable for the murder of Rivas. The trial court properly instructed the jury

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on the law of accountability. Defense counsel's strategic decision not to offer an instruction on the compulsion defense does not show ineffective assistance of counsel. The prosecutor's closing remarks do not require reversal. Accordingly, we affirm the judgment of the trial court.

¶ 38 Affirmed.