2016 IL App (1st) 141006-U

FIRST DIVISION
November 7, 2016

No. 1-14-1006

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 05797
	)	
RICKY FOUNTAIN,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's conviction for attempted first degree murder based on a theory of accountability. However, we vacate his aggravated battery conviction based on the one-act, one-crime doctrine and order his *mittimus* corrected.

¶ 2 The victim, Demetrius Harris, was driving down Kolmar Avenue in Chicago when he came to a stop sign at the intersection of Kolmar and Van Buren Boulevard. Upon stopping his

van, Harris noticed a black Grand Marquis pull up along his driver side window. He recognized defendant, Ricky Fountain, as the driver and the codefendant, Dwayne Hill, as the passenger. Harris then saw Hill pull out a gun and fire multiple rounds at him. Harris sped away from the intersection but realized he had been shot in the back. Harris came upon a friend a few blocks away who drove him to the hospital. While in the hospital Harris spoke with a Detective Garcia and named defendant as the driver and codefendant as the shooter. At a later date, while still in the hospital, Harris provided a statement to a different Chicago detective and an assistant state's attorney. The statement identified defendant as the driver and codefendant as the shooter. Steven McKinnie, a witness, also provided a statement to authorities, which mirrored Harris's account and also identified the defendant as the driver and his codefendant as the shooter.

¶ 3 On the first day of trial, Harris denied seeing who shot him and denied making any statements to the authorities. The court then heard testimony from the assistant state's attorney and the detective who interviewed Harris and took his statement. The State moved to admit the statement Harris had previously provided as a prior inconsistent statement. This was granted by the trial court without objection. On the second day of trial, McKinnie also denied identifying either defendant and testified that the statement he gave was the result of police coercion. After hearing from the assistant state's attorney and detective who were present when McKinnie gave his statement, the trial court also admitted the witness's statement as a prior inconsistent statement.

¶ 4 Based on the details found in the inconsistent statements of both Harris and McKinnie, the trial court found the defendant guilty of attempted first degree murder and aggravated battery with a firearm based on a theory of accountability. Defendant timely filed his notice of appeal.

¶ 5 Defendant raises four issues before this court: (i) the trial court erred in admitting the out-of-court statement of Harris; (ii) the evidence was insufficient to convict him of attempted first degree murder; (iii) the State failed to prove him guilty based on a theory of accountability beyond a reasonable doubt; and (iv) defendant should have been able to cross-examine Harris concerning Harris's later attempt to shot defendant. Based on the record before this court, we affirm defendant's conviction, but order a correction to his *mittimus.*

¶ 6 JURISDICTION

¶ 7 The trial court found defendant guilty of attempted murder and aggravated battery with a firearm on January 31, 2013. On March 14, 2014, the trial court sentenced defendant to a total of twenty-six years in the Illinois Department of Corrections. A motion to reconsider sentence was filed on March 18, 2014, but was denied. A timely notice of appeal was filed the same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 8 BACKGROUND

¶ 9 The victim, Demetrius Harris (hereinafter Harris), testified that on the afternoon of July 15, 2009, he was driving his green van on Kolmar Avenue in Chicago, Illinois. He slowed his vehicle as he approached the stop sign at the intersection of Kolmar and Van Buren. At the same time, he noticed a black car pull up along side of him. Harris observed a gun sticking out of the passenger side window. Shots rang out as Harris attempted to pull away from the other car but he was struck in the back by one round. After being struck, Harris drove toward Jackson Boulevard where he encountered his friend, Howard Williams. Harris informed Williams he had

been shot. Williams got in the car and drove Harris to Mt. Sinai Hospital. While at the hospital, Harris underwent several surgeries to repair his wound.

¶ 10 On the first day of trial, Harris denied seeing what kind of gun was pointed out the window, who was in the car, or the type of car. He denied the car was a black Grand Marquis. Harris denied that the defendant was driving and the codefendant was sitting in the passenger seat. He denied it was the codefendant who shot him.

¶ 11 On the morning of July 25, Harris spoke with a Detective Garcia of the Chicago Police Department and provided him details about the shooting. Harris informed Detective Garcia that Defendant Ricky Fountain (hereinafter defendant) and codefendant Hill (hereinafter codefendant) pulled up alongside of him and Hill started shooting immediately. Harris told the Detective Garcia there was bad blood between himself and the defendants whom he knew from Maywood. He identified both Defendants from a photo array. On the first day of trial, Harris denied this conversation took place.

¶ 12 Also on the first day of trial, Harris similarly denied speaking with Detective Gomez and Assistant State's Attorney Nyshana Sumner (hereinafter ASA Sumner) at the hospital on September 2, 2009. He denied telling ASA Sumner the events surrounding the shooting, or signing a statement memorializing the events. He denied telling ASA Sumner that he and the codefendant looked at each other before the shooting started. He further denied reviewing the written statement prepared by ASA Sumner, making corrections or initialing it. While he did acknowledge his name appeared on each page of the statement, he stated it did not look like his signature. He did acknowledge his signature did appear on a photo of the codefendant.

¶ 13 On cross-examination Harris stated that he was hospitalized for a little more than three months, underwent several surgeries, and was given medication for pain while there. Harris

testified that a couple of weeks before trial he went to defendant's attorney's office and signed an affidavit which stated: he did not see who was driving; the windows of the vehicle were tinted; the window was cracked and not all the way down; he was heavily medicated in the hospital; he did not remember making either statements to the police or the state's attorney; and the statement from September 2, 2009 was erroneous. The affidavit also stated that he never saw the defendant on the day he was shot. He did admit on the cross-examination that he knew both defendants.

¶ 14 On redirect, Harris agreed that the photo attached to the September 2 statement showed him alert and awake. He agreed that the statement correctly identified his date of birth, address, family members, high school, and that he graduated from high school. He further acknowledged he did not have a copy of his written statement at the time he signed the recantation affidavit at defendant's attorney's office.

¶ 15 Detective Roberto Garcia of the Chicago Police testified that on the day of the shooting, he and his partner went to the hospital to investigate the shooting of Harris. He examined the van Harris had been driving in and found multiple holes in the driver side door. He talked with another officer at the hospital and Howard Williams. He also spoke with medical personnel and learned Harris's medical condition. Detective Garcia testified that he and his partner then relocated to the intersection of Kolmar and Van Buren. He observed shell casings scattered on the street from 419 S. Kolmar all the way through the intersection. He testified that he canvassed the area but found no eye witnesses. He also searched 911 calls and video from local pod cameras, but found no useful information regarding the shooting.

¶ 16 He continued the investigation and on the morning of July 25, 2009 he went to interview Harris at the hospital. The hospital personnel indicated that Harris was okay to talk. Detective

Garcia testified that Harris did not appear to be under the influence of medication and did not have any difficulties answer questions.

¶ 17 According to Detective Garcia, Harris informed him that on July 15, 2009, he was driving northbound on Kolmar toward Van Buren when the defendant and codefendant drove up next to him in a black Grand Marquis. Defendant was driving and codefendant was in the passenger seat. After pulling up alongside of him, the codefendant stuck a gun out the window and began to fire. Harris stated that he believed he was struck by the first shot, and began to speed away from the intersection while the codefendant continued to fire. He drove to Jackson and turned eastbound where he encountered his friend, Howard Williams. Harris informed the detective he had known the defendant for many years and the codefendant for at least three or four years. He acknowledged bad blood between them. Detective Garcia left the hospital and compiled a photo array with photos of the defendant and codefendant. He went back to the hospital and Harris identified defendant as the driver. He also identified the codefendant as the shooter. Harris signed both photographs.

¶ 18 On September 2, 2009, Detective Garcia learned that codefendant Hill was in custody. He updated Detective Jose Gomez on the investigation and Detective Gomez took over the investigation. Detective Gomez contacted the Felony Review division of the State's Attorney office and was met by ASA Sumner. Both of them went to the hospital around 9:30 p.m. to interview Harris.

¶ 19 At the hospital they checked on Harris's condition and were permitted to meet with him. The detective introduced himself, and in the presence of ASA Sumner, asked Harris to review the photo array they had brought. Harris again identified the codefendant as the shooter. Harris also talked with ASA Sumner about the shooting. She asked if she could memorialize his

statement in writing and he agreed. Harris was cooperative, appeared to understand what was being asked of him, and asked appropriate questions. He never indicated that he did not understand what was occurring. Harris reviewed the statement and was allowed to make corrections.

¶ 20 At trial, Detective Gomez identified the written statement Harris gave ASA Sumner at about 10:40 p.m. on September 2, 2009. He identified both ASA Sumner's and Harris's signature. Officer Gomez identified the photo taken of Harris after the statement had been taken and showed how he appeared on that day in the hospital.

¶ 21 ASA Sumner testified that on September 2, 2009, she was assigned to the Felony Review Unit and went with Detective Gomez to Mt. Sinai Hospital to interview Harris. She testified that she introduced herself and Harris agreed to discuss the July 15 incident. She found Harris to be alert and awake. After their conversation, ASA Sumner testified that she asked Harris if she could memorialize his statement in writing. She testified that she sat next to Harris, and used the tray table next to the bed to write out the statement. As she wrote out the statement, she would ask questions and he provided answers. He did not appear hesitant or confused, and relayed that he was not under the influence of drugs or alcohol. She testified that she inquired how the police had treated him and he answered "fine."

¶ 22 The pair then reviewed the statement together with ASA Sumner first reading a portion of the statement herself and then having Harris read the remainder. Harris made several corrections, and then Harris, ASA Sumner, and Detective Gomez initialed them. She testified that Harris had not been threatened or promised anything in exchange for the statement. During her testimony, the State moved to admit Harris's written statement and the trial court did so

without objection. The statement further acknowledged he had been treated well and not threatened by police. The statement concluded it had been given freely and voluntarily.

¶ 23 On the second day of trial the State recalled Harris without objection from either defendant. Upon direct examination by the State, Harris acknowledged he talked with the prosecutor after the first day of testimony. He acknowledged that he discussed his pending criminal cases with her and she informed him she could not help him with those cases. He further testified that he was not being promised or threatened for testifying a second time. He testified the events of July 15, 2009 occurred as he described them in his statement to ASA Sumner. He acknowledged that on July 15, 2009, he was driving his van down Kolmar Avenue around 1:00 p.m. As he approached the intersection of Kolmar and Van Buren, a black Grand Marquis pulled up alongside his driver's side window. Harris recognized "Pig," as he knew defendant, driving the Grand Marquis. He then identified defendant in court. He also recognized "Weasy," as he knew the codefendant, in the passenger seat and also identified him in court. Harris then testified the passenger side window on the Grand Marquis was down and the codefendant was pointing a gun at him. The codefendant fired multiple shots with one hitting Harris in the back.

¶ 24 Harris also testified concerning his relationship with the defendants. He stated that he knew the defendant for a long time because defendant was his brother-in-law and had a child with his sister. He acknowledged that on the date of the shooting he knew defendant for at least ten years. He also stated that at the time of the shooting he had known the codefendant for at 3 to 4 years but had not known his last name.

¶ 25 He also testified that despite his previous testimony denying it, he did speak with Detective Garcia on July 25, 2009 and did relay the events surrounding the shooting to him. He

also acknowledged speaking with Detective Gomez and ASA Sumner on September 2. He testified that despite his denial the previous day, he had provided a statement to ASA Sumner and that her testimony accurately reflected his interactions with the pair. He testified that he was on medication in the hospital but that it did not impair his ability to recall what happened when he was shot on July 15, 2009.

¶ 26 Harris testified that he lied on the first day of trial because he was scared that something might happen to him. He testified that "they" tried to bribe him and threatened that if he did not do as they wanted, there would be consequences for his family.

¶ 27 On cross-examination, Harris acknowledged that he lied under oath the previous day. He had received an anonymous phone call after he testified and then reported it to prosecutors the morning of the second day. He testified that defendant had promised to pay him and "all types of stuff" if he signed the recantation affidavit. Harris stated that on the first day of trial there were "guys in the audience" who threatened him. He recognized their faces but did not know their names. Harris acknowledged that he went to defendant's attorney's office, spoke to an associate attorney, and signed the affidavit, but the affidavit was a lie. He also testified that when he spoke with the prosecutor on the second day, she informed him that if he made contrary statements under oath he could be charged with perjury, but did not tell him he would be charged with perjury.

¶ 28 On redirect examination he acknowledged he had provided the recantation affidavit because he had felt intimidated and that his sister asked him not to testify.

¶ 29 The State also called Steven McKinnie (hereinafter McKinnie) to testify. He testified that he was currently in the custody of the Illinois Department of Corrections, had prior convictions for driving on a suspended license, possession of a controlled substance,

manufacture and delivery of a controlled substance, and had a pending case for possession of a controlled substance with intent to deliver. He testified that in 2009 he was living at 4531 West Jackson Boulevard in Chicago. He also stated that he did not know the codefendant in 2009, but did know defendant from the neighborhood.

¶ 30 McKinnie denied that on July 15, 2009, he was in a lot at the corner of Van Buren and Kolmar. He denied seeing Harris's green van turn right from Congress on to Kolmar or that a black Grand Marquis made the same turn behind the van, eventually pulling up alongside. He denied seeing the defendant driving the car or the codefendant sitting in the passenger seat. He denied he saw the codefendant with a gun or fire at Harris multiple times. He denied running towards Jackson to escape the gunfire. He similarly denied flagging down a police officer to inform the officer that his buddy had just been shot by "Weasy" and "Pig." He further denied accompanying those same officers to Area 4 police headquarters to talk with a detective.

¶ 31 McKinnie did admit at trial that on September 3, 2009, Detectives Raschke and Crane came to his home, he agreed to speak with them, and they all went to Area 4 together. McKinnie testified that he told the detectives he was not present for the shooting and denied giving any details of the shooting. He acknowledged that he signed a lineup advisory form and looked at some photos, but denied that he identified defendant. He testified that he only signed the form because the detectives forced him to. He stated that he did not remember signing a physical line up advisor form but admitted he did view a lineup. He denied identifying codefendant Hill.

¶ 32 McKinnie admitted that he met with an ASA after viewing the physical lineup but denied he told her anything or gave a written statement. At trial, he did review the written statement and the photograph of himself attached to it, but did not recall having his photo taken. He further testified that a detective typed up the written statement and told him to sign and initial it.

McKinnie acknowledged that his signature and writing appeared on the photograph identifying the defendant. He admitted the written statement contained details of the shooting and his identifications, but again denied seeing any of the shooting. He stated that the reason he signed the statement and photos because the detectives threatened him with a drug or gun case.

¶ 33 On cross-examination by defense counsel, McKinnie testified that his written statement was not made under oath. He testified that when he spoke to the ASA at Area 4, the detectives never left the room, and so he never had an opportunity to tell the ASA he had been intimidated by them and forced to sign the statement. He claimed he did not accompany the detectives voluntarily to the police station, and that they put him in a locked room at the station. He reiterated that he told the detectives he did not see anything but they would not let him leave. McKinnie said he kicked the door to the room because he wanted to leave, but the detectives told him they could keep him for 48 hours. He further claimed they handcuffed him to the bench in the room and after a few hours, the detectives told him he would be charged "with some guns" if he did not cooperate and sign a statement. He stated the detectives told him where to sign.

¶ 34 Officer Jonathan Apacible testified he was working with his partner at 1:00 p.m. on July 15, 2009, when he received a flash massage of Harris's shooting. Minutes later in the area of 400 South Kolmar, McKinnie flagged down the officers and told them he saw "Pig" and "Weasy" shoot "Meechie."[1] Officer Apacible had no idea who these people were, and McKinnie agreed to go with them to the police station to talk to detectives. Officer Apacible testified that McKinnie wanted to get into their squad car so quickly that it startled his partner. After patting down McKinnie, they all drove to the police station.

[1] Harris had previously testified that his nickname is Meechie.

¶ 35 The State then called Detective Adamik who met McKinnie at the police station. He testified that McKinnie was not handcuffed when they spoke. Detective Adamik testified that at the police station, McKinnie informed him that he was in a lot at Van Buren and Kolmar when he saw "Meechie" driving a green van. A black car driven by "Pig" pulled up alongside the van with "Weasy" or "Wayne" sitting in the passenger seat. Detective Adamik testified McKinnie claimed "Weasy" pulled out a gun and started firing at the van. The black vehicle drove down Van Buren and McKinnie ran away.

¶ 36 On cross-examination, the detective testified his interview with McKinnie was brief because McKinnie wanted to leave. He stated that he did not take a sworn, written, or videotaped statement from McKinnie. He included McKinnie's statement in a written report he made later in the evening, though he admitted this report was not filed until months later.

¶ 37 Detective Wayne Raschke was called to testify about the interview he and his partner conducted with McKinnie on September 3, 2009. The detective testified that they arrived at McKinnie's residence, introduced themselves, and told him they were investigating the shooting at Kolmar and Van Buren. He stated that McKinnie agreed to accompany them to Area 4. He stated that McKinnie never told them he wanted to be interviewed at his house nor was McKinnie ever handcuffed. They drove to Area 4 and McKinnie was placed in the roll call/conference room. McKinnie was not handcuffed to a bench or placed into a locked room he could not exit. He denied ever threatening McKinnie.

¶ 38 Detective Raschke testified that McKinnie told them that on July 15, 2009, he was at the corner of Van Buren and Kolmar when he saw Harris driving his van northbound on Kolmar. He saw a black Grand Marquis being driven by defendant with the codefendant sitting in the passenger seat. McKinnie relayed that he watched codefendant Hill point a black gun at Harris

and fire approximately ten times into the driver's side of the van. The detective asked McKinnie to view a photo array and McKinnie agreed. McKinnie viewed the photo array and identified "Pig" as the person driving the black Grand Marquis. He circled the picture and signed his name next to it. McKinnie also agreed to view a physical lineup. Upon viewing the physical lineup, McKinnie identified the codefendant as the shooter.

¶ 39 Detective Raschke testified that ASA Aileen Bhandari (hereinafter ASA Bhandari) arrived at Area 4 around 5:30 p.m., introduced herself and spoke to McKinnie in an interview room. He testified that McKinnie was in an office chair, was not handcuffed and the door was not locked. He stated that he was present for ASA Bhandari's interview and denied that he or any other officer stood over him during the interview. He left the interview briefly when ASA Bhandari asked him. He testified that he was present when ASA Bhandari took a type written statement in a larger room with computers. He saw McKinnie review the statement and make corrections to it. He testified McKinnie was given food and drink and was driven home following the interview.

¶ 40 The State also called ASA Bhandari to testify regarding the interview she conducted with McKinnie on September 3, 2009 at Area 4. She testified that she did speak with McKinnie in an interview room in the presence of Detective Raschke. She testified the door was never locked and McKinnie was never handcuffed. After talking with McKinnie for 15 to 20 minutes she asked if he would be willing to reduce his statement to writing and he agreed. The pair went to the computer room and ASA Bhandari asked Detective Raschke to wait outside. She testified that while she was alone with McKinnie she inquired as to how he was being treated. McKinnie informed her that he had been treated fine and had no complaints. He had been given some pop

and candy during the interview. She testified that she included this information in the written statement.

¶ 41 After confirming that McKinnie had been treated well, she asked Detective Raschke back into the room while she typed up McKinnie's statement. When she finished typing the statement, she reviewed it with McKinnie. After reviewing the statement with ASA Bhandari, McKinnie made some edits, which he initialed, and then signed each page of his statement. ASA Bhandari and Detective McKinnie also signed the signed each page.

¶ 42 At trial, ASA Bhandari identified McKinnie's statement and the photograph taken of him the day he gave his statement. She testified that she personally typed up the statement. She identified the two exhibits attached to the statement, which were photographs of defendant and codefendant identified by McKinnie. The type written statement was admitted into evidence as a prior inconsistent statement and published without objection.

¶ 43 The events described in McKinnie's statement are almost identical to the events described by the victim. McKinnie stated that he was 21 years old and lived in the area of Jackson and Kolmar. On July 15, 2009, he was in a lot at Van Buren and Kolmar, walking toward the corner. He saw a green Chevy van turning right from Congress onto Kolmar and saw a black Mercury Grand Marquis make the same turn behind the van. The black Grand Marquis then pulled up alongside the van at the stop sign. McKinnie was across the street on Van Buren facing the van and noticed the driver was Demetrius Harris, a man he had known his whole life. McKinnie also noticed the driver of the Grand Marquis was a man he knew as "Pig" and the passenger was a man he knew as Wayne or "Weazy." McKinnie witnessed the passenger pull a gun out and start shooting at the driver side of the van. The Grand Marquis swerved off onto Van Buren as McKinnie ran for cover.

¶ 44 The statement also relayed the events that took place while McKinnie was at the police station. He acknowledged he came to the station because he wanted to help. He stated that he viewed a lineup and no one told him who to identify. He stated that the subject identified in the lineup was the same person identified in a photo included with his written statement. He further stated that he had been treated well by both the police and the ASA, had been given food and drink, and allowed to use the restroom. He had never been handcuffed and was not threatened into making the statement. He gave the statement freely and voluntarily because he wanted to help.

¶ 45 After ASA Bhandari's testimony, the parties stipulated to the testimony of Harris's doctor and two forensic scientists. The State then rested. Defendant then moved for the admission of Harris's recantation affidavit, which was granted without objection. Defendant moved for a directed finding, which was denied.

¶ 46 After considering the evidence, the trial court, sitting as the finder of fact, found the defendants guilty of attempted murder and aggravated battery with a firearm. In making his ruling, the trial court found the recantation affidavits and trial testimony of Harris and McKinnie to not be credible. The court found the eyewitness statements encapsulated into the written documentation and submitted into evidence identified defendant as the driver of the Grand Marquis and codefendant as the passenger who shot Harris. The court found these statements corroborated by credible witnesses. The court specifically noted that despite being given at different times, the two statements had almost identical facts about what occurred and who was involved.

¶ 47 The defendant challenged both his conviction and his sentence in post-trial motions, which the trial court denied. Defendant timely filed his notice of appeal.

¶ 48 ANALYSIS

¶ 49 Defendant raises several issues on appeal: (i) the trial court erred in admitting the out-of-court statements of Harris; (ii) there was insufficient evidence to prove his guilt beyond a reasonable doubt; (iii) the State failed to prove his guilt beyond a reasonable doubt based on a theory of accountability; and (iv) the trial court abused its discretion when it barred him from eliciting evidence Harris had shot him a year after the events in this case.

¶ 50 Defendant argues that the trial court erred in admitting the prior inconsistent statement of Harris. The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion. *People v. Hall*, 195 Ill. 2d 1, 20–21 (2000). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *People v Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 51 Defendant argues Harris's out-of-court statement should not have been admitted because the statement was consistent with the trial testimony he gave on the second day of trial. The State called Harris to testify on the first day of trial. Once on the stand, Harris denied speaking with either Detective Garcia on July 25, 2009 or Detective Gomez and ASA Sumner on September 2, 2009. Harris denied giving ASA Sumner the details of the shooting and denied identifying the defendant and codefendant as the driver and shooter. He denied reviewing any statement, making corrections, or initialing it. The State then called Detective Gomez and ASA Sumner to the stand. Both Detective Gomez and ASA Sumner provided details surrounding Harris's September 2 statement. During ASA Sumner's testimony the State sought admission of Harris's September 2 statement as a prior inconsistent statement. The trial court admitted the

statement without objection from defendant. At this point in the trial Harris's testimony had been completely inconsistent with his September 2 statement.

¶ 52 A prior inconsistent statement may be admitted if it meets the criteria in Section 115-10.1 of the Code:

> (a) the statement is inconsistent with [the witness'] testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement –
>
> (1) was made under oath at a trial, hearing or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness, or
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the of the prior statement is being sought, or at a trial, hearing or other proceeding, or
>
> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording. 725 ILCS 5/115-10.1 (West 2012).

An earlier statement that is inconsistent with a witness' testimony also may be admissible as impeachment, as long as it is truly inconsistent with the trial testimony and deals with a matter that it more than collateral. *People v. Crowe*, 327 Ill. App. 3d 930, 938 (2002).

¶ 53 At the time the trial court admitted the September 2 statement, the criteria found in Section 115-10.1 of the Code had been satisfied. First, as shown above, the statement was inconsistent with Harris's testimony on the first day of trial. Second, Harris was subject to cross-

examination. Finally, subsection (c)(2) was satisfied because the statement narrated, described, or explained an event within Harris's personal knowledge and the statement was proven to have been signed by him through the testimony of ASA Sumner and Detective Gomez. Accordingly, all the elements of section 115-10.1 were satisfied and the trial court did not abuse its discretion in admitting it.

¶ 54 Defendant's argument that the statement should not have been admitted because of Harris's testimony on the second day is illogical. When the statement was admitted, he had testified inconsistently with his prior written statement. Harris's day two testimony was not before the trial court when it admitted the statement on day one. Whether Harris should have been allowed to testify on day two is a different issue that defendant does not raise before this court. Notably, defendant did not object to Harris testifying on day two. Moreover, after his day two testimony, defendant did not seek to have the trial court reexamine the admission of the September 2 statement. Accordingly, we reject defendant's argument that the September 2 statement should not have been admitted.

¶ 55 Next, defendant argues that there was insufficient evidence to convict him of attempted first-degree murder and aggravated battery with a firearm.

¶ 56 When a defendant argues that the evidence was insufficient to sustain his conviction, the inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). In reviewing the sufficiency of the evidence, the appellate court will not retry the Defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). It is the trier of fact's function to assess witness credibility, weigh and resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2006). While

the trier of facts' findings regarding witness credibility are entitled to great weight, the determination is not conclusive. *Smith*, 185 Ill. 2d at 542. The fact that a judge accepted testimony as true does not guarantee that it was reasonable to do so. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). However, an appellate court will only reverse a conviction where "no rational tier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith*, 185 Ill. 2d at 541.

¶ 57 Section 5 of the Criminal Code defines attempted murder as when one "either intends to kill or do great bodily harm * * * or knows that such acts will cause death * * *; or (2) knows that such acts create a strong probability of death or great bodily harm" and, "does any act that constitutes a substantial step toward the commission" of that act. 720 ILCS 5/9–1; 5/8–4 (West 2012). The burden is on the State to prove beyond reasonable doubt the identity of person who committed the offense. *People v. Goodloe*, 263 Ill. App. 3d 1060, 1069 (1994).

¶ 58 In seeking reversal of his conviction, defendant urges us to disregard the prior inconsistent statements of both Harris and McKinnie. He argues the testimony given by McKinnie at trial that he did not see the incident and was threatened into given a statement to police is far more believable then the prior statement. He similarly argues Harris's first day testimony is more credible then his prior inconsistent statement that was admitted.

¶ 59 In *People v. Morrow*, this court held that the witness's previous inconsistent statement alone was sufficient to prove defendant's guilt beyond a reasonable doubt. 303 Ill. App. 3d 671, 677 (1999). In affirming the conviction, this court recognized that if a prior inconsistent statement is properly admitted, "a finding of reliability and voluntariness is automatically made. * * * Accordingly, no additional analysis is needed. * * * [I]t is the jury's decision to assign weight to the statement and to decide if the statement was indeed voluntary, after hearing the

declarant's inconsistent testimony." (Internal quotation omitted.) *Id.* at 677 (citing *People v. Pursley*, 284 Ill. App. 3d 597, 609 (1996)). Continuing on, the *Morrow* court concluded that a reviewing court cannot engage in any analysis to determine if the declarant's testimony was "substantially corroborated" or "clear and convincing." *Id.* at 677.

¶ 60 In the present case, the State presented sufficient evidence to establish defendant's guilt beyond a reasonable doubt. The trier of fact chose to believe the State's evidence, including the prior inconsistent statements of Harris and McKinnie. This is a credibility decision it is entitled to make. Shortly after the shooting, Harris made a statement to ASA Sumner and Detective Gomez. Lending credibility to Harris's statement was the fact that McKinnie gave almost the exact same description of events. Both Harris and McKinnie stated they knew defendant a long time. McKinnie stated he was across the street when the event happened and could see all three individuals involved. In issuing its ruling, the trial court rejected the recantation affidavits as not credible because they merely stated Harris and McKinnie did not recall making statements as to what happened on July 15, 2009; not that the event did not happen. Again, it is for the trier of fact to weigh the statements, weigh the disavowal, and determine which is to be believed. *People v. McBounds*, 182 Ill. App. 3d 1002, 1016 (1989).

¶ 61 In making his argument for reversal of his conviction defendant relies on *People v. Wise*, 205 Ill. App. 3d 1097 (1990); *People v. Parker*, 234 Ill. App. 3d 273 (1992); *People v. Arcos*, 282 Ill. App. 3d 870 (1996); and *People v. Brown*, 303 Ill. App. 3d 949 (1999). However, since those cases have been decided, this court in *People v. Craig*, 334 Ill. App. 3d 426, 440 (2002), found that those cases turned on their facts and pursuant to *Morrow* and *People v. Curtis*, 296 Ill. App. 3d 991 (1998), a conviction may rest on a prior inconsistent statement and "additional corroboration is not required, nor are we to engage in looking for the corroboration." *Id.* at 440.

¶ 62 Viewing the evidence in the light most favorable to the State, a rational tier of fact could find the essential elements of the crime of attempted murder were proven beyond a reasonable doubt.

¶ 63 Defendant next argues there was no evidence introduced to support a conviction based upon a theory of accountability. As previously stated, we may reverse defendant's conviction only if, after viewing the evidence in the light most favorable to the State, we conclude that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Smith*, 185 Ill. 2d 532, 541 (1999).

¶ 64 Illinois law provides that a person is accountable for the conduct of another if "either 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 2012). Under Illinois case law, in order to convict a defendant under an accountability theory, the State must show the defendant, either before or during the commission of the offense, intentionally aided or abetted an offender in conduct that constitutes an element of the offense. *People v. Dennis*, 181 Ill. 2d 87, 101 (1998).

¶ 65 Defendant argues there is no evidence to hold him accountable for the actions of his codefendant. In seeking reversal defendant relies on *People v. Taylor*, 186 Ill. 2d 439 (1999), however defendant's actions in this case are distinguishable from those found in *Taylor*. In *Taylor*, our supreme court reversed the conviction of the defendant for aggravated discharge of a firearm based on a theory of accountability. In that case, Taylor's codefendant shot at the victim following an argument. Defendant testified that he stopped his vehicle to allow the victim's car to pass by on a narrow street. *Id.* at 443. An argument ensued between the victim and the

codefendant, whereby the codefendant exited the vehicle and fired two shots toward the victim. *Id.* The codefendant reentered the vehicle and Taylor drove away. *Id.* at 444. Taylor was convicted of aggravated discharge of a firearm, which the appellate court upheld. *Id.*

¶ 66 In finding the State failed to prove defendant accountable beyond a reasonable doubt, our supreme court found the evidence in the case demonstrated that the defendant "neither had knowledge that [codefendant] intended to fire his gun upon exiting the vehicle nor made any effort to aid [codefendant] in the discharge of the weapon. Furthermore, there is no evidence that defendant knew of, or facilitated, the shooting in the direction of the [victims]." *Id*. at 448. Based on this, the court vacated defendant's conviction. *Id.* at 449.

¶ 67 Unlike the lack of evidence in *Taylor*, there was evidence before the trial court to demonstrate that defendant facilitated the shooting in the direction of Harris. Specifically, the evidence showed that defendant followed Harris onto Kolmar and then pulled up alongside the driver side window of Harris's van. Defendant stopped the car next to Harris's driver side window then multiple shots came from the passenger side of the Grand Marquis. Based on these actions, a rational trier of fact could find beyond a reasonable doubt that defendant facilitated the shooting in the direction of Harris. Accordingly, we affirm defendant's conviction based on the theory of accountability.

¶ 68 In his fourth issue, defendant challenges the trial court's decision barring him from eliciting testimony from Harris that Harris shot or attempted to shoot defendant following the events at issue in this case. The scope of cross-examination in a criminal case rests largely within the discretion of the trial court and its decision will not be disturbed unless there has been an abuse of discretion which resulted in prejudice to the defendant. *People v. McElroy*, 81 Ill.

App. 3d 1067, 1072 (1980). Irrelevant evidence may properly be excluded without violating defendant's right to confront witnesses. *Id.* at 1072.

¶ 69 On the second day of trial, the defendant attempted to question Harris as to whether he shot at defendant a year later, in July 2010. The State objected, and a side bar was held. Defendant argued, as he does before this court, that the testimony was relevant to Harris's credibility or lack thereof. The trial court sustained the objection after finding that Harris had already admitted to lying under oath. The trial court concluded the previous instances of lying obviated the need to go into any more instances that may affect Harris's credibility.

¶ 70 Before this court, defendant argues he should have been allowed to question Harris about Harris's attempt to shoot the defendant in July 2010 in order to further test Harris's credibility. We agree with the trial court that there was no need to allow defendant to question Harris regarding the alleged shooting because at that point in the trial Harris had already admitted to lying under oath.

¶ 71 We conclude defendant's reliance on *People v. Averhart*, 311 Ill. App. 3d 492 (1999) is misplaced. In that case, the trial court barred the defendant from eliciting testimony that he and the arresting officer had been involved in a prior altercation from which the defendant lodged a complaint against the officer. *Id.* at 494. In concluding the trial court erred in barring such testimony, this court determined such a limitation denied the defendant his right to test the truth of the police officer's testimony. *Id.* at 504. By barring defendant from questioning the officer about the pairs' first encounter, the defendant was prohibited from demonstrating the "reason why the officer would have a motive to testify falsely and provide a factual basis for defendant's theory of defense that defendant's complaint [following the first encounter] motivated the officer to frame defendant." *Id.*

¶ 72 The facts of this case are readily distinguishable from *Averhart*. The incident at issue in *Averhart* occurred **prior** to the arrest and conviction which was the subject of the appeal. Here, defendant alleges that Harris tried to shoot him almost a year **after** he is alleged to have shot Harris. Additionally, in this case, as the trial court specifically noted on the record, Harris had already damaged his credibility by admitting to lying under oath on the first day of trial. Moreover, the defendant in *Averhart* contended the officer was framing him for the prior complaint he had lodged. *Id.* at 501. The *Averhart* court found the testimony which would have been elicited would have been relevant to defendant's theory of the case and the trial court's prohibition "prevented defendant from demonstrating that what [the officer] had to gain from framing defendant was to discredit defendant with the second arrest and foreclose any further investigation of the abuse alleged" in defendant's complaint against the officer following the first encounter. *Id.* at 504. Unlike *Averhart*, this line of questioning did not relate to defendant's theory of the case. Accordingly, the trial court did not abuse its discretion when it barred defendant from questioning Harris regarding the subsequent shooting.

¶ 73 Finally, in the State's brief, it pointed out that defendant's *mittimus* reflects two convictions: one for attempted first degree murder and one for aggravated battery with a firearm. The State acknowledges that under the one-act, one-crime doctrine, multiple convictions may not rest on the same physical act. *People v. King*, 66 Ill. 2d 551, 556 (1977). Since defendant's convictions for attempted murder and aggravated battery rest on the same physical act of shooting Harris once in the back, we vacate his aggravated battery with a firearm conviction.

¶ 74 CONCLUSION

¶ 75 For the foregoing reasons, we affirm the order of the trial court which found defendant guilty of attempted murder under a theory of accountability. However, we correct defendant's *mittimus* and vacate the conviction for aggravated battery with a firearm.

¶ 76 Affirmed, *mittimus* corrected.