SECOND DIVISION
August 9, 2016

No. 1-14-3329

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. 11 CR 16971
	)	
MICHAEL DAVIS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in considering defendant's inculpatory custodial statement to an investigating police officer; the evidence was sufficient to establish beyond a reasonable doubt defendant's guilt of burglary by accountability. Conviction affirmed.

¶ 2 Following a bench trial, defendant Michael Davis was convicted of burglary on an accountability theory and sentenced to eight years in prison. On appeal, defendant contends that the trial court erred in considering a statement that was not shown to be attributable to defendant

and, as a consequence, the evidence was insufficient to establish his guilt beyond a reasonable doubt. We affirm.

¶ 3 Prior to trial, a hearing was held on a written pretrial defense motion which the trial court described as a "motion to suppress evidence[,] that being the statement made by Davis." The motion to quash arrest and suppress evidence alleged that defendant was driving a vehicle when stopped and detained by police without probable cause or lawful authority. The sole witness at the hearing was Officer Reyes Moran of the Norfolk Southern Railway Police Department who testified to the circumstances of defendant's arrest in connection with a burglary at a Norfolk Southern rail yard on the evening of September 16, 2011. Moran concluded his account by testifying that after defendant was placed under arrest, he was transported to the police station where Moran and fellow officers had a conversation with defendant. During argument on the motion, the court asked defense counsel what he was trying to suppress, and he responded, "I'm trying to suppress the statement." "I don't care about the search of the car, because there is no evidence that came out." The court denied the motion after concluding that the evidence established probable cause to arrest defendant.

¶ 4 Defendant and his codefendant, Ramirez Highsmith, were tried jointly in a bench trial. At the beginning of the trial, counsel for codefendant Highsmith advised the court: "As the State may be introducing the statement made by Mr. Davis, I would ask the Court I guess I am asking for a severance." The court responded: "I will only consider the statement by the person giving it, not against the other person."

¶ 5 At trial, Officer Moran again testified about the events leading up to and including his arrest of defendant. On September 16, 2011, at 8:25 p.m., Moran was conducting surveillance of a large rail yard, a known burglary location, at 2840 West 79th Street in Chicago. Inside the yard

were hundreds of containers, trailers, and trucks waiting to be placed on trains. There was a chain-link fence at least eight feet high with razor wire over the top. There was nothing but the rail yard extending about a mile along the north side of 79th Street. On the opposite side of the street were a couple of businesses and some apartment complexes.

¶ 6 There were several other officers on the surveillance team. Moran was in an unmarked vehicle by himself, just east of California in a parking lot on the south side of 79th Street, in radio contact with the other officers. Moran observed numerous cars traveling eastbound on 79th Street, but one car, a minivan, stopped in a bus stop, a no-parking zone, and sat there for a couple of minutes. The van was facing eastbound, on the opposite side of the street from the rail yard. Then Moran saw two men exit the minivan and cross to the north side of the street. At trial Moran identified codefendant Ramirez Highsmith as one of the two men. They crossed the median on 79th Street which Moran described as a kind of flower planter about two and one-half to three feet high. Once on the north side of the street, the men climbed over the fence into the rail yard.

¶ 7 Moran exited his vehicle and walked about 30 yards east of where the men climbed the fence, to an employee entrance where he entered the rail yard. Moran saw Highsmith and the second individual just two feet from the fence where numerous trucks were backed up to the fence. The second man, who was carrying a large set of bolt cutters, was working on breaking one of the protective seals on the door of a trailer. The man with the bolt cutters opened the back of the trailer door, disappeared inside the trailer, and came back outside. Then he moved on to the adjacent trailer and opened that door also by breaking the seal with the bolt cutters. He and Highsmith went inside and came out carrying boxes which they placed on the ground alongside the fence. They repeated the same action at a third container; both went inside and came out with

rolls of carpeting, which they placed with the boxes next to the fence.

¶ 8 Moran, who was 25 to 30 yards away, radioed his team to move in. He saw the vehicle headlights of one of his responding units approach through the yard. Highsmith and the second man peered around the container and started making their way toward the fence. Moran shined his flashlight on both men and announced his office. He saw them climb the fence and go over the top onto 79th Street. Moran went back out the employee entrance and "popped back out onto 79th Street" where he saw the two men about 25 or 30 yards in front of him, running westbound on 79th Street toward the same van they had exited earlier. Highsmith entered the passenger side of the van and the other individual entered its sliding door. As Moran was approaching the van on foot, running westbound on 79th Street, other units were also approaching in vehicles. Moran approached the front of the van and observed the driver. At trial, Moran made an in-court identification of defendant as the van driver. Moran "couldn't really tell if [the van] was running, but as soon as I got in front of it I could see the break [*sic*] light illuminate. And I could see the driver making a motion to the steering column like he was getting ready to place it in gear." Moran also saw the driver make a quick motion over his shoulder towards the back seat like he was throwing something. "The van did appear to creep up very closely, at which point I drew my weapon and ordered them to place it in park." Defendant complied. He was ordered out of the van and was placed in custody. Highsmith, who had entered the van's front passenger seat and closed the door, opened it and attempted to run out, but he was immediately placed in custody. The third individual, who had accompanied Highsmith into the rail yard, was also placed in custody; he was determined to be a juvenile. Neither defendant nor Highsmith had permission to enter the railway property or to enter any of the railway cars or take any items from the cars.

¶ 9 Dante Schumann testified that he was a police officer with Norfolk Southern. On the

evening in question, he and other members of the surveillance team were at the Landers rail yard at 79th Street between Western and Kedzie. Schumann was in a police vehicle inside the rail yard. Officer Moran was relaying to Schumann by radio what he was observing. Schumann broke surveillance when Moran advised him there was a burglary in progress. Schumann turned on his headlights, drove to the location Moran identified at the fence line by 79th Street, and drove to the trailer Moran said was broken into. Schumann heard people climbing the fence behind the trailer. He exited his squad car and walked to the rear of the trailers by the fence. He observed open doors on three separate trailers, some carpeting pulled out of one trailer, and some boxes stacked up by the back of a third trailer. Schumann climbed up onto a guardrail and looked over the fence onto 79th Street. He saw several Chicago police cars along with two Norfolk Southern Railroad police cars along 79th Street with their lights on. From his vantage where he heard the people climb the fence, Schumann saw a set of yellow-handled bolt cutters lying on the grass on the outside of the fence on his side of the street.

¶ 10 After Schumann testified, and before the next witness, Detective Walsh, took the stand, codefendant Highsmith's counsel stated to the court: "I believe there will be evidence that will be brought out from this witness that would be adverse to my client." She explained she was referring to a statement defendant had made. The court assured her, "I won't consider anything that one says against the other person."

¶ 11 Detective Michael Walsh of the Chicago Police Department was the next witness. In the evening hours of September 16, 2011, he was assigned to a burglary that had occurred at the Norfolk Southern railroad in Chicago. He went to the eighth police district and had a conversation with a suspect by the name of Michael Davis. The prosecutor questioned Walsh:

"Q. Do you see Michael Davis in court today?

A. I believe he's the gentleman on the table over there with the -- to the right with the braids with the Cook County DOC shirt, but I'm not sure. It was two years ago.

THE COURT: His answer was not sure. He thinks it was Highsmith. At this point he's not sure. Go ahead.

BY MS. LOTTERSTEIN [Assistant State's Attorney]: Q. You had a conversation with Mr. Davis at that time?

MR. DELGADO [defendant's attorney]: Objection.

THE COURT: Who did you talk to at that point, sir.

THE WITNESS: Mr. Davis.

THE COURT: Overruled."

¶ 12 Officer Kerry was present when Walsh had his conversation with defendant at approximately 10:41 p.m. After Walsh advised defendant of his *Miranda* rights, defendant told Walsh that "he was in the area of 79th and Kedzie" and "that Mr. Highsmith told him they were going to get some stuff there. And that they would share the stuff, but he did not know what the stuff would be." Davis did not state to Walsh how they got there.

¶ 13 Defendant's counsel elicited on cross-examination that "Mr. Davis," the burglary suspect Walsh talked to, told Walsh that Highsmith told him they were going to get some stuff. Walsh wrote a general progress report (GPR), which stated that defendant said Highsmith told "Michael" that he needed a ride. The GPR said that Highsmith directed "Michael" to the location of 79th and Kedzie and said that "Michael" would get some stuff. The GPR did not state defendant told Walsh that he knew they were going to a railroad yard.

¶ 14 After the State rested, defendant moved for acquittal. In support of the motion, defense counsel argued that Walsh had testified "that someone made a statement and he identified Mr.

Highsmith as the person making the statement"; Walsh referred to the maker of the statement as Michael Davis, but that no foundation was laid; and there was no evidence to corroborate how Walsh knew who Michael Davis was.

¶ 15 In denying the motion for acquittal, the court referred to Walsh's testimony about the contents of his GPR and concluded: "There is no question that [Walsh] was talking to Michael Davis. He merely said he wasn't sure about now, two years later."

¶ 16 Defendant presented no evidence in his own behalf. The court found defendant guilty of burglary by accountability and sentenced him to eight years in prison.

¶ 17 On appeal, defendant raises two issues: that the State failed to prove him guilty beyond a reasonable doubt and that the trial court improperly considered a statement against him that the State failed to establish defendant actually made. We address the latter issue first.

¶ 18 Initially, we note that the parties disagree about whether defendant adequately preserved the issue of whether the trial court properly admitted his alleged statement to Detective Walsh. The State argues that defendant failed to preserve the issue because it was not raised in a *written* posttrial motion. Defendant argues that he preserved the issue by raising it in an oral motion, and alternatively that it should be considered as plain-error. However, we find it unnecessary to determine whether this issue was properly preserved. The first step in a plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Because we ultimately conclude that no error occurred, we need not determine whether the error was preserved.

¶ 19 The parties also disagree about the standard of review. Defendant acknowledges that evidentiary rulings are usually reviewed under an abuse-of-discretion standard but asserts that *de*

novo is the appropriate standard of review on this issue because the trial court applied an "erroneous rule of law." See *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Defendant argues that *de novo* review is appropriate here because no facts are in dispute and the credibility of the witnesses is not at issue. Defendant's argument is misplaced. Here, a factual dispute, *i.e.*, whether defendant made the statement attributed to him, is at the heart of the evidentiary ruling. Moreover, a credibility determination, *i.e.*, whether Detective Walsh's testimony was impeached by his inability to accurately identify defendant in court, is essential to the underlying factual dispute. Defendant never clearly identifies the "erroneous rule of law" that he alleges the trial court employed. Defendant's suggestion that *de novo* review is appropriate is undermined by the basic premises of his own argument. Therefore we will consider the trial court's ruling under an abuse-of-discretion standard.

¶ 20 Here no abuse of discretion occurred. Defendant's argument confuses an error in foundation which would render evidence inadmissible (see *People v. Hallbeck*, 227 Ill. App. 3d 59, 62 (1992)) with impeachment which affects the weight to be accorded evidence but does not affect its admissibility (see *People v. Herrett*, 137 Ill. 2d 195, 204 (1990)). In order to lay the foundation for Walsh's testimony that defendant made a statement, the State merely had to establish the time and place of the statement along with the fact that defendant made the statement. Compare *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 137 ("the foundation is satisfied by presenting the place, circumstances and substance of the earlier statement to the witness and giving her an opportunity to explain the inconsistency.") with *People v. Bell*, 27 Ill. App. 3d 171, 177 (1975) (holding that a statement by a party opponent may be admitted without laying a foundation for its introduction by asking whether the party made the statement).

¶ 21 In our case, defendant disputes only the last element, that he made the statement.

However, Walsh testified that he spoke to “Mr. Davis.” Defendant argues that this is insufficient to establish that Walsh spoke with defendant. This is simply incorrect. The identity of names raises a presumption of identity of persons; if this presumption is unrebutted, identity of persons is established beyond a reasonable doubt. *People v. Nivens*, 239 Ill. App 3d 1, 6 (1992), citing *People v. Smith*, 148 Ill. 2d 454, 465 (1992). Here, no evidence rebutted the presumption that defendant was the Mr. Davis who made a statement to Walsh. Admittedly, Walsh was unable to accurately identify defendant when asked to do so. However, in-court identification is not required to lay the foundation for an admission by a party opponent. See *People v. King*, 151 Ill. App. 3d 644, 647-48 (1987) (holding that the defendant was proven guilty despite the failure to identify him directly in court where the witness referred to "Raymond King" and there was no indication that he was referring to anyone other than "the defendant in this case, Raymond King.") Walsh’s failure to make an in-court identification of defendant impeached his testimony and cast doubt on his ability to accurately recall the events of the evening. See *Herrett*, 137 Ill. 2d at 204. However, this does not lead to the conclusion that the State failed to lay a foundation for the statement. Rather this was merely a factor for the trier of fact, the trial court, to consider when assessing the credibility of the witnesses and the strength of the State’s case. See, *e.g.*, *People v. Evans*, 209 Ill. 2d 194, 211 (2004).

¶ 22 We next turn to defendant's claim that the evidence was insufficient to establish defendant's guilt of burglary, on an accountability theory, as the driver of the "getaway car."

¶ 23 When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, our inquiry is limited to "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); accord, *People v. Jordan*, 218 Ill. 2d 255, 270 (2006); *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 24 The accountability statute, section 5-2(c) of the Criminal Code of 1961 (720 ILCS 5/5-2(c) (West 2012)), provides in pertinent part that a person is legally accountable for the crime of another when: "(c) 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." In *People v. Fernandez*, 2014 IL 115527, ¶ 13, the supreme court reaffirmed "that the underlying intent of [section 5-2(c)] is to incorporate the principle of the common-design rule." The accused may be deemed accountable for acts performed by another pursuant to a common plan or purpose. *People v. Cooper*, 194 Ill. 2d 419, 434 (2000). The "common design" rule provides that where two or more persons engage in a common criminal design or agreement, any acts in furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts. *Id.* at 434-35, citing *In re W.C.*, 167 Ill. 2d 307, 337 (1995). Accountability may be established through a person's knowledge of and participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself. *W.C.*, 167 Ill. 2d at 338. Thus, acting as a lookout or driving the getaway car is sufficient to render one accountable. *People v. Jones*, 86 Ill. App. 3d 278, 282 (1980). Proof of the common purpose or design need not be supported by words of agreement, but may be drawn from the circumstances surrounding the commission of the

unlawful conduct. *Cooper*, 194 Ill. 2d at 435, citing *People v. Taylor*, 164 Ill. 2d 131, 141 (1995); *People v. Reid*, 136 Ill. 2d 27, 62 (1990).

¶ 25 Defendant's accountability for the actions of Highsmith and their juvenile companion is supported by the evidence. Officer Moran testified that defendant drove his two cohorts to the rail yard in a van, parked illegally in a bus stop, and the three men sat in the van for a time until the other two left the van and climbed over the eight-foot-high rail yard wall. Then defendant waited for them as they ran back to the van from the rail yard with police officers in close pursuit. After the two entered the van, defendant attempted to drive away until ordered to stop by Officer Moran.

¶ 26 Defendant claims there is no evidence that he actually saw where his two passengers went after they left the van or that he saw that one of them possessed a large pair of bolt cutters. However, the van was parked facing east on 79th Street and the rail yard was on the north side of the street, meaning that when Highsmith and the juvenile exited from the front passenger door and the sliding door on the south side of the street, it was reasonable for the court to infer that defendant saw them pass to the far side of the van and cross the street to reach the rail yard and climb its fence. Likewise, Moran saw that the juvenile offender was armed with large bolt cutters to force open the doors of the burglarized trailers, and Schumann saw the bolt cutters lying in the grass on the opposite side of the fence that the two later scaled to avoid apprehension. It was reasonable to infer that defendant knew the juvenile possessed the cutters when he left the van.

¶ 27 Defendant's statement to Detective Walsh also gave support to the court's conclusion that defendant knowingly participated in the crime by driving the getaway car. Defendant told Walsh he was in the area of 79th and Kedzie and that codefendant Highsmith told him they were going to "get some stuff there" and that they would "share the stuff."

¶ 28 The reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact. *People v.Stanciel*, 153 Ill. 2d 218, 235 (1992). Here, the trial court, as the trier of fact, was not required to accept any possible explanation compatible with defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 230 (2009). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 29 The parties are in disagreement over whether the State would have been able to prove defendant's guilt beyond a reasonable doubt without evidence of defendant's statement to Walsh. We need not engage in that speculation, as the trial court did not abuse its discretion in overruling defense counsel's general objection to Walsh's testimony about the statement which, when combined with other evidence and the inferences flowing therefrom, was sufficient to establish defendant's guilt beyond a reasonable doubt.

¶ 30 For all the above reasons, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.