2018 IL App (1st) 152643-U

SIXTH DIVISION
Order filed: June 29, 2018

No. 1-15-2643

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 of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 8594
	)	
BRIAN LEWIS,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the defendant's convictions for attempted first-degree murder, aggravated discharge of a firearm, and unlawful possession of a weapon by a felon where the evidence was sufficient to prove both his identity as a shooter and his intent to kill. Because the record establishes that the defendant did not receive ineffective assistance of trial counsel or posttrial counsel, any error arising from the trial court's alleged failure to conduct an adequate inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), was harmless.

¶ 2 Following a jury trial, the defendant, Brian Lewis, was found guilty of the attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)) of Marlo Davis and Ebony Cain,

aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), and unlawful possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2012)). He was sentenced to concurrent prison terms of 36 years for each count of attempted first-degree murder, 15 years for aggravated discharge of a firearm, and 7 years for UUWF. On appeal, he argues that the evidence was insufficient to prove he was one of the shooters and, with respect to the attempted first-degree murder convictions, had the intent to kill. He further argues that he received an inadequate hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and ineffective assistance of trial counsel and posttrial counsel. We affirm.

¶ 3 The defendant was charged in a 24-count indictment and went to trial on 6 counts of attempted-first degree murder of Cain, Davis, and Rondale Standors, as well as aggravated battery, aggravated discharge of a firearm, and UUWF, all stemming from an April 3, 2012, shooting in Riverdale, Illinois. The defendant and codefendant, Shaquille Wright, proceeded to a joint jury trial, where each was represented by his own counsel. The following evidence was presented.

¶ 4 Davis testified that, on April 3, 2012, he was playing basketball at Riverdale Park with Cain, Standors, Andre Kidd, Deandre Echols, and a person named "Michael." Around 2 p.m., three people arrived in a black sedan and walked onto the basketball court. Davis identified the defendant and Wright at trial as two of the three men. The men were wearing t-shirts and pants, and spoke with Cain before leaving.

¶ 5 Around 2:30 p.m., Davis was resting at the side of the basketball court when he saw three men wearing hoodies and masks coming towards the basketball court with guns in their hands. The hoodies were predominantly black with "another color" on them. Davis alerted everyone playing basketball that the men were approaching with guns. The men, from about 20 to 25 feet

away, began shooting, and everyone started to run. Davis climbed the fence surrounding the basketball court as bullets were hitting the fence. He and Michael ran down the street and went up a staircase to the elevated train station platform. From the platform, Davis observed the basketball court and a person chasing Kidd and shooting in his direction.

¶ 6 Davis and Michael ran back down the stairs, entered a backyard, and exited to a side block. Davis saw the defendant, who was "still" wearing "the same" black hoodie with the hood up but did not have a mask or gun. Davis observed the defendant's face from 20 to 25 feet away and knew he was one of the three men who were shooting at the people on the basketball court. When Davis saw the defendant, the defendant was coming towards him.

¶ 7 Davis spoke with a Metra police officer, who then followed the defendant. Shortly afterwards, Riverdale police officers arrived and detained Davis and the defendant. Davis later saw the defendant and observed that he was no longer wearing the hoodie, but now had on a black t-shirt with a light gold design. The defendant was wearing this same t-shirt when he arrived at the basketball court roughly 30 minutes before the shooting.

¶ 8 Davis viewed a lineup at the police station and identified the defendant and Wright. He identified the defendant as a shooter because, when he ran towards Davis, he was wearing the same hoodie that one of the shooters in the park had been wearing.

¶ 9 Standors testified consistently with Davis's account of the shooting at Riverdale Park. Standors was playing basketball when three people wearing all black, with black hoods and masks, approached the basketball court. He could not see their faces. The men began shooting in Standors's direction from about 15 to 20 feet away. Standors ran away but tripped over a man who had been shot. He and others from the park were arrested and taken to the police station.

¶ 10 Riverdale Police Detective Plumey testified that he responded to a call of shots fired at Riverdale Park. He observed Cain on the ground, bleeding profusely from shots in the buttocks, torso, and arm. Detective Plumey spoke with Standors, who described one of the suspects as being a medium-complexioned black man, approximately 5 feet 10 inches tall, weighing 160 pounds, and wearing a black face mask with his hair in braids.

¶ 11 Chanee Loston testified that, on April 3, 2012, she was on her third-floor balcony smoking a cigarette and talking to Lenee Johnson, who was on the second-floor balcony of an adjacent house. Loston heard gunshots and saw people running. She observed three black men standing and talking under the porch of a next-door building but could not hear what they were saying. Loston saw Wright, who she identified in court as one of the three men under the porch, run into the alley and fall. A black gun slid onto the ground from his body. Wright picked up the gun and threw it into a garbage can.

¶ 12 After the police arrived, Loston pointed out where Wright had run and informed the officers that he had thrown a gun into a dumpster. Wright was wearing a black and white or gray hoodie when Loston saw him in the alley. She further told the officers that there were people hiding under the porch. The next day, Loston identified Wright in a lineup at the police station. She also identified the defendant in the lineup, and in court, as one of the individuals standing under the porch. She stated that the defendant was initially wearing a black hoodie when she saw him but, at some point, took it off and was wearing a black shirt with a design on it. Loston did not see the defendant with a gun, but did hear him say "the police [are] coming."

¶ 13 Lenee Johnson testified that she was on her balcony when she heard gunshots. A few minutes later, she observed Wright wearing a black and white hoodie running through the alley towards her. Wright slipped and fell, and a black gun he was carrying slid onto the ground. He

picked up the gun and put it into a dumpster. At the police station the next day, Johnson identified Wright in a lineup as the person who dropped the gun into the dumpster.

¶ 14 Johnson testified that she also observed another person, who was wearing a black shirt with a design on it, running. This person went back and forth from the alley to the street and ended up near a garden apartment. Although Johnson testified that she identified the defendant in a lineup, she conceded at trial that she did not tell the officer at the lineup that she identified the defendant. The parties stipulated that Johnson had not previously identified the defendant.

¶ 15 Eddie Thompson testified that, on April 3, 2012, he was painting the outside of a house in Riverdale when he heard gunshots. The gunshots started getting closer, and Thompson believed two to three weapons were involved. He stopped painting until the gunfire ended. One to two minutes later, he heard more gunshots that were closer and saw a man running towards him between two buildings. The man was wearing a black hoodie and a mask, and carried two guns that looked like automatic "45s."

¶ 16 Thompson observed the man with the guns fall near a blue dumpster. Thompson went to the front of the next-door building and, while he was turned away, heard a metal "clank" sound coming from the dumpster. He looked towards the dumpster and saw the same person squatting next to the back porch of the building Thompson was painting. The man still had the guns with him. The man took off his mask and ran past Thompson while holding the hoodie he was previously wearing. The man was wearing a white t-shirt. Thompson did not get a good look at his face. The man dropped the hoodie before he crossed the street and went towards a tavern that was next to a vacant lot. Police arrived and detained the man.

¶ 17 Thompson went to the porch where he had observed the man squatting and saw two guns under the porch that resembled the firearms that the man had been carrying. At trial, Thompson identified a jacket and a mask as the items that he saw the man wearing.

¶ 18 Metra Police Officer Frank Manfredo testified that he was on patrol in Riverdale when he was flagged down by two people. After speaking with the people, Officer Manfredo continued driving and was stopped again by a different person, who gave him a description of another individual. Officer Manfredo then saw a person matching that description attempting to enter the passenger-side door of a white Pontiac. The man, identified in court as Wright, looked at Officer Manfredo before the Pontiac sped away. Wright was wearing a black and white jacket and blue jeans, and had short dreads as a hairstyle. He ran away between the buildings. Officer Manfredo followed him and eventually arrested him near a tavern. Wright was no longer wearing the jacket when he was arrested.

¶ 19 Riverdale Police Officer Lugo testified that, while on patrol, he received a dispatch to assist in the area of Riverdale Park. As he was driving, Officer Lugo observed police officers speaking with several individuals and learned that one offender had run between the buildings. Officer Lugo exited his police vehicle and began running in the direction where the offender had gone. He then saw the defendant, whom he identified in court, crouched near the basement windows of a building. Officer Lugo placed the defendant into custody. After speaking with two women on nearby balconies, Officer Lugo looked inside a blue dumpster and observed a firearm. He left the firearm inside the dumpster to prevent contamination and secured the scene. Officers recovered two other firearms under the deck of a nearby building, as well as a jacket and a mask.

¶ 20 Riverdale Police Sergeant Anthony Padron testified that he and an evidence technician responded to a call of a shooting at the basketball court in Riverdale. Sergeant Padron found and

inventoried four 9-millimeter shell casings along a walking path near the basketball court. He also found a zip-up jacket with a box of .22 caliber bullets in the pocket and, inside a blue dumpster, a .22 caliber revolver with six spent casings. Sergeant Padron further recovered an unloaded Springfield 9-millimeter semiautomatic handgun and a loaded black 9-millimeter Beretta with an extended magazine under the porch of a nearby building. Near the handguns, Sergeant Padron recovered a mask.

¶ 21 Sergeant Padron later went to the police station, where several individuals were being held in connection with the shooting, and interviewed Andre Kidd and Marlo Davis. Around 11 p.m., Sergeant Padron performed gunshot residue (GSR) tests on the defendant and Wright. After completing the tests, Sergeant Padron sealed the vials and sent them to the Illinois State Police crime lab for analysis.

¶ 22 The next day, Sergeant Padron conducted a lineup at the police station. Davis identified the defendant as the individual who wore a black and white hoodie, and Wright as the individual who wore a mask. Johnson identified Wright as the person who ran, fell, and threw the gun into the dumpster. Loston identified the defendant as the person she saw hiding under a porch, and identified Wright as the person who dropped a gun.

¶ 23 On April 7, 2012, Sergeant Padron returned to the park with a metal detector, recovered four more shell casings near the basketball court, and inventoried them. He brought the three recovered firearms, magazines, and shell casings to the Illinois State Police crime lab for fingerprint and ballistic testing.

¶ 24 Forensic scientist Jeffrey Parise, an expert in the field of firearms and firearms identification, testified that he test-fired the three firearms that were recovered. He also examined

the four casings that were recovered from the walking path and determined that they were fired from the 9-millimeter Beretta, one of the guns recovered from under the porch.

¶ 25 Forensic scientist Scott Rochowicz, an expert in the field of microscopy and trace chemistry, testified that GSR tests performed on the defendant and Wright were positive for GSR. This meant that the defendant might have discharged a firearm, or came into contact with GSR from another item, or was within "the environment of a discharged firearm." On cross-examination, Rochowicz testified that GSR can be transferred from one part of the body to another, or from the person administrating the test to the kit if that person has GSR on his hands. He further testified that GSR can travel 9 to 10 feet from a firearm.

¶ 26 Lauren Wicevic, an expert in the field of latent fingerprint examination, testified that she received three firearms, two magazines, and cartridges to examine. After analyzing the materials, Wicevic was unable to find any fingerprints suitable for comparison. She explained that this was not unusual because there are few surfaces on magazines, firearms, and cartridges that would receive a latent print.

¶ 27 The State entered a stipulation between the parties that the defendant had a prior felony conviction, and then rested. The defendant moved for a directed verdict, which was denied. Thereafter, he rested without presenting any evidence.

¶ 28 Following closing arguments, the jury found the defendant guilty of four counts of attempted murder of Cain and Davis, finding in two of the counts that he personally discharged a firearm during the commission of the offenses. The jury also found the defendant guilty of aggravated battery with a firearm with respect to Cain, two counts of aggravated discharge of a firearm with respect to Davis and Standors, and UUWF. The jury found the defendant not guilty of the attempted murder of Standors.

¶ 29 On the next court date, the defendant's trial counsel informed the court that he had prepared and filed a written motion for a new trial but the defendant did not want him to further represent him. Trial counsel explained that the defendant alleged that he had been ineffective and, therefore, he could no longer represent the defendant. The trial court granted trial counsel's motion to withdraw and appointed a public defender to represent the defendant.

¶ 30 On December 9, 2014, the trial court vacated its order allowing trial counsel to withdraw and stated that he would have to represent the defendant on the motion for new trial that he had previously filed. Following argument, that motion was denied.

¶ 31 The court then questioned the defendant as to his claim that trial counsel was ineffective. The defendant responded that counsel was ineffective for failing to call Cain as a witness, whose testimony, the defendant stated, would prove his innocence. The defendant further explained that counsel told him that Cain was not going to be called as a witness. The court asked trial counsel if he spoke with the defendant regarding whether to call Cain, and whether trial counsel had decided not to subpoena Cain, and trial counsel answered affirmatively. The court did not ask trial counsel the reason for that decision, but stated, in some detail, that trial counsel provided "excellent representation of [the defendant]" and that the decision not to call Cain was a matter of trial strategy. The court therefore denied the defendant's *pro se* claim of ineffective assistance of counsel pursuant to *Krankel*. The court then appointed the public defender to represent the defendant for sentencing.

¶ 32 On February 5, 2015, the assistant public defender told the court that she intended to file another motion for a new trial. The defendant then told the court that he wished to proceed *pro se* for purposes of sentencing. The court continued the case and told the assistant public defender to appear at the next court date.

¶ 33 On March 19, 2015, a new private attorney (posttrial counsel) appeared on behalf of the defendant and asked for time to review the transcripts and possibly file a motion for a new trial. On August 10, 2015, the matter proceeded to sentencing without another motion for a new trial having been filed. In mitigation, posttrial counsel argued that Cain had appeared at Wright's sentencing hearing on May 26, 2015, and, before the same judge, testified that he believed the defendant was not one of the shooters. The court sentenced the defendant to concurrent terms of 36 years' imprisonment on each of two counts of attempted murder, 15 years' imprisonment for aggravated discharge of a firearm, and 7 years' imprisonment for UUWF. The defendant filed a timely notice of appeal.

¶ 34 On appeal, the defendant argues that the evidence was insufficient to prove his identity as a shooter and, with respect to the attempted first-degree murder convictions, an intent to kill. He further argues that he received an inadequate hearing pursuant to *Krankel*, and ineffective assistance of counsel where trial counsel failed to call Cain as a witness at trial and posttrial counsel failed to file a motion for a new trial raising exculpatory evidence based on Cain's testimony at Wright's sentencing hearing.

¶ 35 When reviewing the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Hardman*, 2017 IL 121453, ¶ 37. A reviewing court will not substitute its own judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses. *People v. Moore*, 2016 IL App (1st) 133814, ¶ 54. As trier of fact, the jury has the responsibility to weigh the evidence and any inferences derived therefrom, determine the credibility of witnesses, and resolve any conflicts in the evidence. *People v. Green*, 2017 IL App (1st) 152513,

¶ 102. We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it justifies a reasonable doubt of a defendant's guilt. *People v. Gray*, 2017 IL 120958, ¶ 35.

¶ 36 The defendant first argues that the evidence was insufficient to prove his identity as one of the shooters beyond a reasonable doubt. The State must prove the identity of the person who committed the charged offense beyond a reasonable doubt. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). "The reliability of a witness's identification of a defendant is a question for the trier of fact." *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). In assessing identification testimony, courts in Illinois utilize a five-factor test established in the United States Supreme Court's decision in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989). These factors include:

> "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification." *Id.* at 308.

¶ 37 Viewing the evidence in the light most favorable to the State, we find that it was sufficient to prove the defendant's identity beyond a reasonable doubt. Regarding the first and second factors, Davis had an adequate opportunity to view the defendant and exercised a high degree of attention. He testified that he observed the defendant arrive at the park 30 minutes before the shooting and speak with Cain. Later, Davis was resting at the side of the basketball court in daylight when he saw three men wearing black hoodies and masks and holding guns. The men began shooting and Davis ran away, but not before he noticed how the men were

dressed. Later, Davis observed the defendant coming towards him from 20 to 25 feet away, wearing the same black hoodie as one of the shooters, but no longer wearing a mask. Although the shooting occurred quickly and Davis began running after he heard gunshots, we are not persuaded that he lacked an adequate opportunity or degree of attention to reliably identify the defendant. See *People v. Temple*, 2014 IL App (1st) 111653, ¶ 87 (where the eyewitness previously knew the shooter but did not look at him after the shots were fired, the identification was sufficiently reliable). Davis clearly saw what the shooters were wearing and, when he saw the defendant after the shooting, immediately observed him wearing the same hoodie as a shooter.

¶ 38 Turning to the third factor, the record does not reveal how Davis described the defendant to the Metra police officer he encountered. Therefore, we find this factor to be neutral. With respect to the fourth factor, however, Davis positively identified the defendant as a shooter and the record does not indicate that he waivered or was unsure. Further, as noted, Davis immediately identified the defendant as a shooter because he was wearing the same hoodie that one of the offenders was wearing. This factor also weighs in favor of the State.

¶ 39 Turning to the final factor, the length of time between the crime and the identification, Davis identified the defendant to the Metra police officer minutes after the shooting. He identified the defendant as a shooter again in a lineup at the police station one day after the shooting. The immediacy of his identification supports its reliability. See *Slim*, 127 Ill. 2d at 313 (finding that 11 days between the crime and identification was not a significant amount of time).

¶ 40 The defendant asserts that his identification based on a hoodie was insufficient to prove that he was one of the shooters. Specifically, he contends that a commonly-worn item that is not distinctive cannot serve to prove his identity. The defendant cites *People v. Hughes*, 59 Ill. App.

3d 860, 862-63 (1978), *People v. Kincy*, 72 Ill. App. 2d 419, 425-26 (1966), and *People v. Reed*, 103 Ill. App. 2d 342, 348-49 (1968), as instances where courts have reversed convictions based on identifications that relied only on an individual's clothing. However, "[t]he identification of distinctive clothing worn by a defendant may be sufficient to sustain his conviction, particularly when other evidence of guilt exists, and a positive facial identification is not required." *People v. Ward*, 66 Ill. App. 3d 690, 693 (1978). Here, Davis observed the defendant shortly after the shooting wearing the same hoodie as one of the shooters, *i.e.*, black with "another color." At this point, as the defendant was no longer wearing a mask, Davis was able to see his face and recognized him as one of the men who spoke to Cain on the basketball court.

¶ 41 We also note that the State's circumstantial evidence supports Davis' identification of the defendant. While testimony from a single, credible witness may be sufficient to convict (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)), a conviction may also be based on circumstantial evidence, provided that it satisfies proof beyond a reasonable doubt of the charged offense (*People v. Hall*, 194 Ill. 2d 305, 330 (2000)). It is well-settled that circumstantial evidence may be used to establish the identity of the accused. *People v. Darrah*, 18 Ill. App. 3d 1018, 1022 (1974); see also *Hall*, 194 Ill. 2d at 330 ("The trier of fact need not, however, be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. It is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt.").

¶ 42 In this case, the State presented circumstantial evidence of the defendant's guilt through the testimony of Loston, Johnson, and Thompson. Loston testified that she heard gunshots and observed men running. She saw Wright fall and throw a gun into a dumpster and witnessed two other men hiding with him under a porch, including the defendant, whom she identified in a lineup and in court. Loston testified that the defendant originally wore a black hoodie but later

wore a black shirt with a design on it. Johnson also testified that she observed Wright fall and throw a gun into a dumpster, and saw another man under the porch wearing a black t-shirt. Finally, Thompson testified that he observed a man running with two guns before falling near a dumpster. Thompson heard the clang of metal hitting metal by the dumpster, and then saw the man remove his hoodie and mask, squat near a porch, and run past Thompson before dropping the hoodie. Thompson found two guns under the porch were the man had squatted. Viewing the evidence in the light most favorable to the State, a rational jury could infer that the defendant was involved in the shooting where he was observed running with Wright before hiding with him under the porch near where the guns were recovered. Moreover, the defendant tested positive for GSR on his hands, all while wearing a black hoodie—which, Davis and Standors testified, the shooters were wearing.

¶ 43 The defendant further argues that the positive GSR test results should be disregarded because they does not establish that he fired a gun and could have resulted from contamination.[1] We do not dispute that it is possible for GSR to be present on a person even when that person did not fire a weapon. However, the jury heard Rochowicz's explanations of any deficiencies in the test results, which would go to the weight of this evidence. See *Hall*, 194 Ill. 2d at 332. The jury was "not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Id.* Accordingly, a finding that the positive GSR test results demonstrated that the

[1] The defendant cites scholarly reports including one, attached to his brief, describing how GSR is present on Chicago police vehicles and tables. We note that "[a]ttachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record." *Zimmer v. Melendez*, 222 Ill. App. 3d 390, 394-95 (1991) (citing *People v. Lutz*, 103 Ill. App. 3d 976, 979 (1982)). Further, to the extent the reports seek to insert expert opinion testimony into the record on appeal which was not presented to the trial court, we will not consider them. See *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993).

defendant fired a gun was not so improbable or inconclusive as to justify a finding of reasonable doubt, and provided circumstantial evidence of the defendant's guilt.

¶ 44 The defendant also contends that his identity was not proven beyond a reasonable doubt because the other physical evidence did not implicate him. Specifically, he submits that the black and white jacket containing the .22 caliber bullets, the mask, the three handguns, and the four spent shell casings did not have any fingerprints and were otherwise linked to Wright. However, "the absence of physical evidence corroborating eyewitness identifications is not in itself a reason for reversal, since a single eyewitness identification can sustain a conviction." *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23. Accordingly, where Davis positively identified the defendant as a shooter based on his clothing, the defendant had GSR on his hands, and Loston identified him as hiding under the porch with Wright, who had disposed of the Berretta from which the shells recovered next to the park were fired, we reject the defendant's contention that he was not proven guilty beyond a reasonable doubt.

¶ 45 The defendant next argues that the State failed to prove that he was accountable for any of the shooters at Riverdale Park. We have already concluded that the evidence was sufficicent to show that the defendant was one of the shooters. In fact, in his reply brief, he acknowledges that, if we credit the hoodie identification, then he would be accountable for Wright's actions.

¶ 46 Nevertheless, we address his accountability for the offense. A defendant may be held accountable if, either before or during the commission of the offense, with the intent to promote or facilitate that commission, he solicited, aided, or abetted in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2012); *People v. Dennis*, 181 Ill. 2d 87, 96 (1998). To establish that a defendant possessed the intent to facilitate or promote the crime, "the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2)

there was a common criminal design." *People v. Fernandez*, 2014 IL 115527, ¶ 13. Intent may be inferred from the defendant's action and the circumstances surrounding the commission of the crime. *People v. Perez*, 189 Ill. 2d 254, 266 (2000). "Under the common-design rule, if 'two or more persons engage in a common criminal design or agreement, any acts in the 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.' " *Fernandez*, 2014 IL 115527, ¶ 13 (quoting *In re W.C.*, 167 Ill. 2d 307, 337 (1995)). However, a defendant's mere presence at the scene, even with knowledge of an offense being committed, is not sufficient to render him accountable. *W.C.*, 167 Ill. 2d at 338.

¶ 47 Here, the evidence was sufficient to show that the defendant actively assisted in the shooting at Riverdale Park. Davis testified that, 30 minutes before the shooting, the defendant, Wright, and a third man walked onto the basketball court and spoke with Cain. Three hooded, masked men then went to the basketball court with guns and shot at the individuals on the basketball court. Based on the testimony showing Wright's flight, wearing a black hoodie and mask and carrying guns, and his subsequent hiding of the Beretta that fired four of the shots, the evidence supports a finding that Wright was one of the shooters. A reasonable trier of fact could conclude that, by approaching the basketball court with Wright shortly before the shooting, the defendant was casing the scene and planning the later shooting. See *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 52 ("a common design may be inferred from the circumstances surrounding the crime"). Further, witnesses testified to the defendant running from the area and hiding with Wright, who was armed. A defendant's flight from the scene of a crime may be considered in determining whether he is accountable. See *People v. Taylor*, 164 Ill. 2d 131, 141 (1995). The evidence, therefore, showed that the defendant was a part of a common scheme to attack and

shoot a group of men, including Davis and Cain. Accordingly, the defendant was, at a minimum, accountable for Wright's actions in shooting at the people on the basketball court.

¶ 48 The defendant further contends that the evidence was insufficient to establish his specific intent to kill as required to sustain his convictions for attempted first-degree murder. In order to sustain a conviction for attempted first-degree murder, the State had to prove that the defendant (1) performed an act constituting a "substantial step" toward the commission of murder, and (2) intended to kill the victim. See 720 ILCS 5/8-4(a), 9-1 (West 2012); *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39. Proof of a specific intent to kill is a necessary element of the offense. *People v. Hill*, 276 Ill. App. 3d 683, 687 (1995). "However, because the specific intent to take a life is a state of mind, it is rarely proven through direct evidence." *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 52. This court has noted that " '[t]he very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill.' " (Internal quotation marks omitted.) *Petermon*, 2014 IL App (1st) 113536, ¶ 39 (quoting *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001)). The jury must determine whether a specific intent to kill exists, and its conclusion will not be reversed absent reasonable doubt as to the defendant's guilt. *Viramontes*, 2017 IL App (1st) 142085, ¶ 52.

¶ 49 Viewing the evidence in the light most favorable to the State, we find that it was sufficient to establish the defendant's intent to kill Davis and Cain beyond a reasonable doubt. The defendant, Wright, and a third man wearing hoodies and masks began shooting at Davis and the others on the enclosed basketball court from about 20 to 25 feet away. As Davis was climbing a fence to escape, bullets struck the fence. The repeated firing in the direction of Davis, Cain, and the other individuals supports the jury's finding that the defendant acted with a specific intent to kill. *Petermon*, 2014 IL App (1st) 113536, ¶ 39 (noting the very fact that a defendant

fired a gun at a person supports the conclusion that he acted with an intent to kill); see also *Ephraim*, 323 Ill. App. 3d at 1110. Moreover, Cain was struck in the buttocks, torso, and arm, also evincing a specific intent to kill him on the part of the defendant and his cohorts. See *People v. Harris*, 2016 IL App (1st) 141744, ¶ 27 ("A reasonable trier of fact could infer that shooting a defenseless person multiple times evinces a specific intent to kill that person"), *pet. for leave to appeal allowed*, No. 121932 (May 24, 2017). Accordingly, a rational jury could find that the offense of attempted first-degree murder was proven beyond a reasonable doubt.

¶ 50 We reject the defendant's argument that, if he did have the intent to kill Cain and Davis, he would have done so because he was only 20 feet away. "Poor 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." *People v. Teague*, 2013 IL App (1st) 110349, ¶ 27. The jury determined that the defendant had the requisite intent to kill, and, based on the record before us, we will not substitute our judgment for that of the jury on this issue. *Id.* ¶ 29.

¶ 51 The defendant next argues that he received ineffective assistance of posttrial counsel where posttrial counsel failed to file a motion for a new trial setting forth exculpatory evidence. Specifically, he argues that posttrial counsel should have presented testimony from Wright's sentencing hearing in which Cain, the victim, stated that he did not believe that the defendant was one of the shooters. The defendant also argues that posttrial counsel should have raised a claim of ineffective assistance of trial counsel based on trial counsel's failure to use Cain's testimony from Wright's sentencing hearing as the basis for a motion for new trial.

¶ 52 In order to establish ineffective assistance of counsel, the defendant must establish both that (1) trial counsel's representation was deficient, and (2) that deficiency prejudiced the

defendant. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "Defense counsel's decision to file or not to file a motion is a matter of trial strategy." *People v. Muhammad*, 257 Ill. App. 3d 359, 365 (1993). Generally, a trial strategy is immune from ineffective assistance of counsel claims. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). With respect to the second prong, "the prejudice prong of *Strickland* is not simply an 'outcome-determinative' test but, rather, may be satisfied if [the] defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Jackson*, 205 Ill. 2d 247, 259 (2001).

¶ 53 The defendant's claims of ineffective assistance of trial counsel and posttrial counsel both stem from the same underlying "evidence": Cain's testimony at Wright's sentencing hearing. However, because the defendant cannot establish prejudice as a result of posttrial counsel's failure to file a motion for a new trial, we need not determine whether this constituted deficient performance. See *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 54 In support of his argument, the defendant attached to his brief the transcript from Wright's sentencing hearing where Cain testified. This transcript is not in the record on appeal. We generally do not consider matters *dehors* the record. See *People v. Williams*, 2012 IL App (1st) 100126, ¶ 27. Nevertheless, as Wright's appeal is pending before this court and we have access to the record therein, we will review the transcript of Wright's sentencing hearing cited here by the defendant. See *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010).

¶ 55 The transcript of Cain's testimony at Wright's sentencing hearing shows that, on direct examination, Cain testified that Wright "and his cousin was on the [basketball c]ourt when the shooting happened, and they didn't shoot me. They say it was other people that shot me." On cross-examination, Cain stated that he did not know who shot him, but "it wasn't them because

they was on the court when the shooting happened." Cain also acknowledged that he never came forward and told the police that the defendant did not commit the crime. Rather, he stated that he reported this information to "the attorneys that was up in here." When asked what he told "the attorneys," Cain stated: "The attorneys up in here wanted me to say that it was them. They wanted me to say it was them that shot me, but I know it wasn't them that shot me because they was on the court when it happened." Cain clarified that the attorneys were Wright's attorneys and that "they wanted me to blame—say it was them [sic]." Cain also admitted that he was not present at trial. Following arguments, the judge commented that Cain's testimony "makes no sense" because he appeared to claim that Wright's attorneys wanted him to implicate their client.

¶ 56 At the outset, we note that the judge who rejected Cain's testimony at Wright's sentencing hearing also presided over the defendant's jury trial, and it is unlikely that he would have granted the defendant's motion for new trial based on that testimony. See *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006) ("An attorney's performance will not be deemed ineffective for failing to file a futile motion"). As for the content of Cain's testimony, it is unclear whether Wright's "cousin" was, in fact, the defendant. And, even if the defendant was the "cousin" to whom Cain referred, Davis and Standors testified to the people on the basketball court when the shooting occurred, and the defendant was not among them.

¶ 57 Moreover, the State provided circumstantial evidence of the defendant's guilt at trial where Davis identified the defendant as a shooter based on his clothing, GSR was found on the defendant's hands, and eyewitness testimony showed that he hid with Wright and the firearms, dressed in the black hoodie. Based on the totality of the evidence presented, Cain's purported testimony would not have changed the outcome at trial. See *People v. Metcalfe*, 202 Ill. 2d 544, 562 (2002) (where the evidence was "more than sufficient to prove defendant guilty beyond a

reasonable doubt," counsel's alleged error would not have changed the outcome of trial). Therefore, a posttrial motion setting forth Cain's testimony would neither have changed the outcome of the trial nor provided a basis for an allegation of ineffective assistance of trial counsel for failing to call Cain. Accordingly, the defendant cannot establish prejudice from either trial counsel's or posttrial counsel's failure to file a posttrial motion raising the issue of Cain's testimony, and both of his ineffective assistance of counsel claims fail.

¶ 58 Finally, the defendant contends that the trial court failed to conduct a sufficient *Krankel* inquiry into his posttrial claim that trial counsel was deficient for failing to call Cain as an exculpatory witness. Specifically, the defendant argues that the trial court erred by not inquiring "whether trial counsel interviewed Cain to determine his viability as a defense witness." However, even if we were to find that the trial court's *Krankel* inquiry was deficient, any such error would be harmless because, for reasons explained *supra*, the defendant's underlying substantive claim that trial counsel was ineffective for failing to call Cain is without merit. See *People v. Henney*, 334 Ill. App. 3d 175, 190 (2002) ("Since a clear basis for an allegation of ineffectiveness of counsel does not exist, we cannot find that the trial court erred in failing to *sua sponte* examine whether defendant was provided with effective assistance of counsel."). Consequently, we reject the defendant's *Krankel* challenge.

¶ 59 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 60 Affirmed.