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2018 IL App (3d) 150583-U

Order filed May 14, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0583
)	Circuit No. 14-CF-2166
BENJAMIN J. CAMUNIAS,)	
Defendant-Appellant.)	Honorable Amy M. Bertani-Tomczak, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* In light of the trial court's factual findings during the codefendant's sentencing hearing, the State's evidence did not establish, beyond a reasonable doubt, that defendant had the necessary intent to support his convictions for drug-induced homicide and unlawful delivery of a controlled substance.
- ¶ 2 The trial court found defendant Benjamin J. Camunias guilty of drug-induced homicide and unlawful delivery of a controlled substance following a bench trial. The trial court sentenced defendant to 12 years of incarceration in the Illinois Department of Corrections for drug-induced

homicide and 7 years of concurrent incarceration for unlawful delivery of a controlled substance. Defendant appeals his convictions and challenges the sufficiency of the State's evidence at trial.

¶ 3

FACTS

¶ 4

On November 13, 2014, Benjamin J. Camunias (defendant) was charged, along with co-defendant Amy A. Shemberger, by indictment with two offenses. Count I alleged that on or about August 10, 2014, defendant, along with Shemberger, committed the offense of drug-induced homicide pursuant to section 9-3.3(a) of the Criminal Code of 2012 (720 ILCS 5/9-3.3(a) (West 2014)) "by knowingly and unlawfully delivering heroin, a controlled substance, to Peter Kucinski and Peter Kucinski thereafter ingested an amount of that heroin into his body and said ingestion of heroin caused the death of Peter Kucinski." Count II alleged that on or about August 10, 2014, defendant, along with Shemberger, committed the offense of unlawful delivery of a controlled substance pursuant to section 401(d)(1) of the Illinois Controlled Substances Act (720 ILCS 570/401(d)(1) (West 2014)) "in that said defendants knowingly and unlawfully delivered a substance containing heroin, a controlled substance." On March 27, 2015, defendant's case was severed from Shemberger's.

¶ 5

On May 4, 2015, defendant waived his right to a jury trial and the case proceeded to a bench trial the next day. During opening statements to the court, the State commented that: "this is an accountability case[.] The defendant did not actually deliver the heroin to Peter Kucinski." Dorothy Kucinski, Peter Kucinski's (the victim) mother, testified that on August 10, 2014, the victim was living in the basement of her Lockport home with his long-term girlfriend, Amy Shemberger, their son Noah, and Shemberger's friend, Sandra Egner.

¶ 6

Shemberger agreed to testify truthfully in exchange for a six-year sentence to run concurrent with her other two felonies in exchange for her testimony. On the day in question,

Egner gave Shemberger \$110 to obtain heroin which Egner was going to share with Shemberger, defendant, and the victim. Shemberger called defendant, whom she had met 5 to 10 times, to give her a ride to obtain the heroin. Defendant agreed to give Shemberger a ride because he was promised three bags of heroin and \$10 in gas money. Shemberger was “sent out to make sure that [defendant] didn’t run off with [Egner’s] hundred dollars.” Defendant arrived at the Lockport residence to pick up Shemberger somewhere between 1:00 p.m. and 3:00 p.m. Defendant drove the vehicle with Shemberger in the passenger seat.

¶ 7 At some point, Shemberger gave defendant the money Egner gave her. While driving, defendant called a drug dealer named “Boozie” whom Shemberger and defendant had bought drugs from previously. Shemberger could hear defendant’s conversation with Boozie. Shemberger had never met Boozie, but she had met people that work for him and had talked to him on the phone previously. Eventually, defendant and Shemberger ended up in a Walgreens parking lot. Shemberger exited the car and ran across the street to White Castle to use the washroom. Shemberger was only in White Castle for three minutes. Shemberger claimed that by the time she returned to the vehicle, defendant had already obtained “a jab of heroin,” consisting of 14 \$10 baggies wrapped in a larger bag. Shemberger never saw the drug dealer because she was in the washroom. Defendant kept three bags as payment and handed Shemberger the rest of the heroin. Shemberger sniffed one bag of heroin, and defendant injected heroin into his arm inside the vehicle.

¶ 8 When defendant and Shemberger arrived back at the Lockport residence, Shemberger saw Egner and the victim outside on the front porch. Defendant drove away without getting out of his vehicle. At this time, Shemberger had 10 bags of heroin left. Shemberger handed the victim one bag and handed the remaining bags to Egner. Shemberger also handed over two

syringes to Egner that defendant had given her in the car. Shemberger testified that the victim was under the influence of alcohol at this time, but not “noticeably.”

¶ 9 Shemberger, Egner, and the victim went into the basement washroom to consume the heroin. The victim “sniffed” a bag of heroin with a straw and left the washroom. Shemberger stated that the bag the victim snorted came from defendant. Ten minutes later, Shemberger and Egner exited the bathroom to find the victim passed out and snoring on the basement floor. Shemberger explained that this was not an unusual occurrence because the victim had been an alcohol and drug addict his whole life. Shemberger had done heroin with the victim many times and said that the victim would consume 6 to 10 liters of vodka per day.¹ After 5 to 10 minutes, Egner remarked that she did not believe the victim was breathing. Shemberger called 911 and began administering CPR to the victim. Shemberger asked Egner to flush the drugs. Egner took the drugs and the needles and ran out of the back door. The victim was taken to the hospital and later pronounced dead. Law enforcement found several additional empty bags of heroin at the Lockport residence, and Shemberger admitted that the victim would “save them as a backup in case he didn’t have any heroin left, he would scrape the bags and get something out of them.”

¶ 10 Shemberger admitted that she initially lied to law enforcement on August 10, 2014, because she was afraid of having her probation revoked, but told the truth in her statement on August 18, 2014. Shemberger initially told officers on August 10, 2014, that the group was not doing heroin and that she did not give the victim any heroin. In a written statement given on August 10, 2014, Shemberger stated that when she got in the car with her friend they just “drove around.” The State also admitted Shemberger’s video-recorded statement taken on August 18, 2014, into evidence. On that date, Shemberger averred that the victim asked her to get some

¹Shemberger claimed that a police officer found over 100 empty bottles of vodka throughout the Lockport residence.

heroin for him because his shoulder was hurting. Shemberger agreed that defendant was the “driver” and Egner was the “money person” while Shemberger stated that she was “just the messenger, the deliverer *** the legwork type of person.” Shemberger also agreed that she “gave three [bags] to [Camunias].”

¶ 11 Egner testified that on the day in question her brother came to the Lockport residence to give Egner \$650 for rehab because she had been a heroin addict for 10 years. Egner and Shemberger decided to use some of her brother’s money to buy heroin and get high. Egner loaned Shemberger \$120 to go purchase heroin. Shemberger did not have a car that day to go pick up the heroin, so Shemberger called defendant. Egner had known defendant for seven or eight years. On the date in question, Egner observed the victim drink at least three pints of vodka. Once Egner noticed the victim wasn’t breathing, Shemberger gave Egner three to four bags of heroin and Egner went to a nearby Burger King and flushed the bags down the toilet.

¶ 12 Egner admitted during her trial testimony that she initially lied to the police in a written statement given on August 10, 2014, when she told detectives neither she, Shemberger, nor the victim had not consumed heroin on that day. However, Egner stated that she subsequently told the truth in a written statement on September 4, 2010.

¶ 13 Detective William Sheehan of the Lockport police department testified that he interviewed defendant on August 13, 2014. Initially, defendant told Sheehan that he had picked up Shemberger, and that the pair had driven to a White Castle in Oak Park to hang out. Defendant never mentioned the purchase of heroin in his initial statement. However, when Sheehan showed defendant pictures he had taken from Egner’s phone, defendant said “Okay I will tell you the truth now.” Defendant told Sheehan that he received a text message from Shemberger wanting to buy heroin. Shemberger wanted to buy heroin for her back and the victim

wanted it for shoulder pain. Defendant picked up Shemberger at the Lockport residence and they picked up a “jab of heroin.” Shemberger snorted one bag of heroin in the car. Defendant received a couple bags of heroin and some gas money for giving Shemberger a ride.

¶ 14 The State introduced several photos of defendant’s phone showing text messages that were sent to Shemberger’s phone into evidence. On August 10, 2014, Shemberger texted, “Omg yes i am itching,” defendant responded, “Bet u hungry lol. OMW then,” Shemberger responded, “Totally down omg!” On August 11, 2014, defendant sent Shemberger a text message that said, “Sux wut happen2 peter. Sry that happened. Had 2 talk 2 cops. Told u u shouldnt of bought shit. Look at the results.” On August 12, 2014, defendant sent Shemberger a text message that said, “Y did the cops come to my house askin if I knew peter. Gotta talk 2 a detective. If worse come to worse im gona have 2 tell them the truth that u gave him shit.”

¶ 15 The defense introduced defendant’s voluntary videotaped statement taken on November 3, 2014. Defendant waived his rights and recited a version of events substantially similar to that given by Shemberger with several exceptions. Defendant admitted he was a heroin addict, but contrary to Shemberger’s testimony, defendant stated that when the drug dealer came up to their car, Shemberger paid him \$100. Defendant stated that he did not have any money and that Shemberger had \$100. Defendant did not know where Shemberger got the money. Shemberger then gave defendant three bags of heroin for his troubles. Defendant stated that he did not do any heroin on the drive back to the Lockport residence because he did not like to drive when “fu**ed up.” Upon arriving at the residence, defendant remained in the car and did not talk to the victim. Defendant reported that he had met the victim before, but did not know him well. In a written statement given by defendant on August 13, 2014, defendant stated that Shemberger

told him that she needed heroin on the day in question for her back and her boyfriend Peter's shoulder.

¶ 16 Dr. Michael Humilier testified as a forensic pathologist. Dr. Humilier performed an autopsy on the victim and stated that the toxicology report showed monoacetylmorphine in the blood, showing that the victim had done heroin. The toxicology report also revealed that the victim had a .378 BAC, but opined that this BAC level alone would not have caused the victim's death. Dr. Humilier determined that the victim's cause of death was "Heroin and alcohol intoxication."

¶ 17 After hearing closing arguments, the trial court took the case under advisement. On June 5, 2015, the trial court found defendant guilty on both counts. Specifically, the trial court found that:

"[The Victim] died on August 10, 2014, due to heroin and alcohol intoxication. It's disputed that [the victim] ingested the heroin on the date of the offense and ingested it in the basement of his home in the presence of Amy Shemberger by a charged defendant who cooperated with the State in exchange for six years, Sandra Egner.

Earlier that day [the victim], [Shemberger], and [Egner] decided to get some heroin. Amy Shemberger asked you, the defendant, for a ride to purchase that heroin. You agreed. Next, you and Amy Shemberger drove to the city, I will say, in your car and purchased the heroin. Sandra gave the money. Amy Shemberger testified that it was you that actually made the purchase; that she was, I believe, in the White Castle. Your statement to the police was that Amy actually made the exchange. In either event you both picked up the heroin.

[Shemberger] testified that she snorted some and that you injected some. Your statement was that you didn't because it messes with your driving. In any event then you brought [Shemberger] back to [the victim's] house who was standing on the porch. In exchange for this you received money for the three or four bags of heroin along with \$10 for gas and in addition [Shemberger] testified that she wanted the heroin for her back pain and that Peter needed it for his shoulder pain. Amy Shemberger, Sandra Egner, and [the victim] ingested the drugs, and [the victim] died; you went to the hospital. The autopsy report and expert testimony: Heroin overdose along with alcohol. You were interviewed at some point. Amy Shemberger denied any knowledge. Eventually, she admitted her knowledge and her complicity, and you made a videotaped statement and a written statement.

I find based upon all of this that the State has sustained their burden of proof as to both charges. Based upon the evidence, you knowingly facilitated in the purchase of the heroin, you knew it was heroin, most likely ingested the heroin, you knew what the heroin was, for who wanted it, and for what purpose. You picked up Amy Shemberger from [the victim's] house, you dropped her off at [the victim's] house, and you knew that when Amy Shemberger left the car that she was going to then facilitate or deliver the heroin and use it with [the victim] and then he ingested it and died as a result of heroin. I think there was not much time frame, time period passed.

And, lastly, when you were interviewed with the police, you told them you were familiar with heroin and the effects of heroin and some personal experiences and yourself in it and experienced other people overdose on heroin. Now, I know the case law is that anybody in the chain, it's foreseeable that they know the consequences of their

actions. I am not sure it includes everything but in this particular case, if you recall, you knew what you were getting, if you recall, most likely did, you knew where it was going and it was your car, you drove, everything, you facilitated all of this and joined in on all of this and so for those reasons, I find you guilty as charged as to both charges.”

¶ 18 On July 2, 2015, defendant filed a motion for a new trial, or in the alternative, a motion to reconsider the verdict. On August 7, 2015, defense counsel filed a motion to vacate defendant’s count II conviction for unlawful delivery of a controlled substance based on the one act, one crime rule. The trial court conducted a hearing on defendant’s posttrial motions on August 10, 2015. The court denied defendant’s motion for a new trial and defendant’s motion to vacate his conviction. Then, the court conducted a sentencing hearing and sentenced defendant to 12 years of incarceration in the Illinois Department of Corrections for count I. Additionally, the court stated that count II merged with count I and sentenced defendant to 7 years of concurrent incarceration for count II.

¶ 19 On August 17, 2015, defendant filed a motion to reconsider sentence which the trial court denied the same day. Defendant filed a timely notice of appeal on August 18, 2015.

¶ 20 In close relation to the hearing on defendant’s motion to reconsider his sentence, on August 26, 2015, the trial court conducted codefendant Shemberger’s sentencing hearing following her guilty plea in Will County case No. 14-CF-2167. Before imposing Shemberger’s punishment, the trial court found that Shemberger violated her agreement to testify truthfully as the State’s witness in defendant’s case. The court stated:

“Okay, Ms. Shemberger, you have entered into a plea agreement with the State to testify truthfully in co-defendant’s case, People vs. Benjamin Camunias. He was found guilty. And I believe you were placed on probation August 4 of 2014, and this drug

induced homicide occurred on August 10th of the same year. So that means you were on probation-- or 410 probation for six days, possibly. The plea agreement was for six years in exchange for your truthful testimony.

Now I've had a chance to consider all the evidence presented in aggravation and mitigation. I'm finding because of two things that you violated your agreement. One, the arrest for the retail theft, that was subsequently dismissed. And secondly, during the trial the State presented statements by [defendant] to the police, and your testimony was in -- different from his, or his statement. I remember the testimony. You had made connection with whoever was providing the heroin. You asked [defendant] for a ride. You had the money. Though in the testimony in the trial and evidence presented at trial [defendant] said you actually accepted delivery. And in your testimony you said you were in a bathroom somewhere.

So anyway, I find that you violated your agreement for those two reasons.”

Following the trial court's remarks the court sentenced co-defendant Shemberger to serve seven years in the Department of Corrections for drug-induced homicide.

¶ 21

ANALYSIS

¶ 22

Judge Bertani-Tomczak presided over defendant's bench trial and found defendant guilty of drug-induced homicide and unlawful delivery of a controlled substance. On appeal, defendant emphasizes that the trial court found the testimony of the State's key witness, Shemberger, was less than truthful. Ignoring Shemberger's testimony as unreliable in the court's eyes, defendant argues the State's evidence did not establish he had the requisite intent to deliver the heroin to the victim. Anticipating that the State would assert that defendant's conviction could be affirmed

on any grounds supported by the record, defendant alternatively contends that the State's evidence did not prove defendant was accountable for Shemberger's actions.

¶ 23 Conversely, the State asserts the evidence established defendant delivered the heroin by linking the heroin and the victim, who was not present when the heroin was purchased. However, the State clarified during oral argument that the prosecution is not suggesting that defendant's conviction should be affirmed based on accountability.

¶ 24 When considering a challenge to the sufficiency of the evidence, reviewing courts view the evidence in the light most favorable to the prosecution and are charged with determining whether any rational trier of fact could have found the essential elements of the crime to have been proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). A conviction should be reversed if "the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Collins*, 106 Ill. 2d at 261.

¶ 25 Section 9-3.3(a) of the Criminal Code of 2012 states that a person commits drug-induced homicide when he or she "violates Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance." 720 ILCS 5/9-3.3(a) (West 2014). Section 401 of the Illinois Controlled Substances Act provides that "Except as authorized by this Act, it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance." 720 ILCS 570/401 (2014). "Delivery" is defined as "the actual, constructive or attempted transfer of possession of a

controlled substance, with or without consideration, whether or not there is an agency relationship.” 720 ILCS 570/102(h) (West 2014).

¶ 26 To begin, we address defendant’s argument that the trial court did not find Shemberger’s testimony during this bench trial to be truthful. The defense directs our attention to the trial court’s statements, on the record, before announcing Shemberger’s punishment in Will County case No. 14-CF-2167. Specifically, the defense focuses on the following statement by the court on August 26, 2015:

“Okay, Ms. Shemberger, you have entered into a plea agreement with the State to testify truthfully in co-defendant’s case, (text omitted). He was found guilty. And I believe you were placed on probation August 4 of 2014, and this drug induced homicide occurred on August 10th of the same year. So that means you were on probation-- or 410 probation for six days, possibly. The plea agreement was for six years in exchange for your truthful testimony.²

Now I’ve had a chance to consider all the evidence presented in aggravation and mitigation. I’m finding because of two things that you violated your agreement [with the State]. One, the arrest for the retail theft, that was subsequently dismissed. And secondly, during the trial the State presented statements by [defendant] to the police, and your testimony was in-- different from his, or his statement. I remember the testimony. You had made connection with whoever was providing the heroin. You asked [defendant] for a ride. You had the money. Though in the testimony in the trial and evidence presented at trial [defendant] said you actually accepted delivery. And in your testimony you said you were in a bathroom somewhere.”

²Shemberger was sentenced to seven years for drug-induced homicide.

So anyway, I find that you violated your agreement for those two reasons.”

We agree the trial court’s remarks reveal that the court found Shemberger had not been truthful and had “actually accepted delivery” of the heroin from the drug dealer, rather than defendant. The State’s brief on appeal does not challenge the relevance of the statements the court made when sentencing Shemberger. Thus, we find ourselves somewhat constrained by the State’s failure to object to or challenge defendant’s heavy reliance on the trial court’s commentary during Shemberger’s sentencing hearing. Typically, the parties’ silence on an issue would be construed as a concession.

¶ 27 Consequently, during oral arguments in this appeal, our court requested an explanation of the State’s failure to address this issue in the written brief submitted to this court. In response to our questions, the appellate prosecutor explained that she thought it “was pretty unnecessary to do that.” The appellate prosecutor expressed her view that the trial court’s comments about Shemberger’s untruthful testimony were “irrelevant” to the issues presented by the defense in this appeal.

¶ 28 We recognize that points not argued in the appellee’s brief are considered waived. *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1048 (2000). Rules of waiver are equally applicable to the State and the defendant in criminal proceedings. *People v. Williams*, 193 Ill. 2d 306, 347 (2000). As other courts have repeated time and again, “Judges are not like pigs, hunting for truffles buried in briefs.” *United States v. Dunkel*, 927 F.2d 955, 956 (1991); See *Gross v. Town of Cicero, Illinois*, 619 F.3d 697, 702 (2010).

¶ 29 The record reveals that the factual basis for Shemberger’s guilty plea was predicated on the very same testimony introduced during defendant’s bench trial before the same judge. Based on the very unique circumstances of this case, we agree with defendant that the trial court’s

statements during Shemberger's sentencing hearing are both relevant and reliable. Further, by failing to address the relevance of the trial court's statement in the State's brief, we conclude this argument has been waived and/or forfeited by the State.

¶ 30 Relying on the decision in *People v. Coots*, 2012 IL App (2d) 100592, ¶ 36, defendant claims the State's evidence merely established defendant and Shemberger, at best, simultaneously possessed the heroin for a short period of time. In *Coots*, the reviewing court recognized two common scenarios that arise in typical drug transactions. *Id.*, ¶¶ 36-37. Defendant argues he falls into the first scenario described by the reviewing court as arising when "the defendant and the co-user simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together." (Internal quotation marks omitted.) *Id.*, ¶ 36 (citing *United States v. Swiderski*, 548 F.2d 445, 450 (1977)). According to the court in *Coots*, under this first scenario, defendant could only be found guilty of possession, not delivery. Defendant relies on the language in *Coots* stating that: "joint and simultaneous acquisition of contraband, *in itself*, will not support a conviction of drug-induced homicide." *Id.* There must be something more than "a copurchase by truly equal partners." *Id.* (citing *People v. Edwards*, 39 Cal.3d 107 (1985)).

¶ 31 The second scenario discussed in *Coots*, arises when "the defendant separately procures the drug in the absence of the co-user (and perhaps co-purchaser), then physically transfers possession to the co-user, with no intent to convey any to a third party." *Id.*, ¶ 37. In this second scenario, the *Coots* court observed "the defendant is guilty of delivery and is not merely a joint possessor." *Id.* The *Coots* court reasoned that when one person acquires the drug himself and physically transfers possession to another, he has operated as a link between the person he intended to share the drug with and the drug itself. *Id.* In this situation, the consumers of the

contraband are not “truly equal partners” because one has taken a more active role in carrying out the transaction. *Id.*; *Edwards*, 39 Cal.3d 107 (1985).

¶ 32 Here, the parties disputed whether defendant was alone in the vehicle when the drug dealer received cash in exchange for the heroin. It was the trial court’s task to evaluate the conflicting testimony and determine whether defendant was alone in the vehicle. The trial court’s comments, before imposing punishment on Shemberger, provide rare insight into the trial court’s unspoken resolution of this factual dispute. Clearly, the trial court concluded that defendant was not alone and Shemberger was also present in the vehicle when the drug deal was consummated. Further, the court also found Shemberger made arrangements with the drug dealer, made the arrangements for a ride to and from the transaction, and was present in the vehicle during the exchange of drugs for cash. Importantly, the trial court found Shemberger “actually accepted delivery” of the heroin from the drug dealer.

¶ 33 Based on the court’s evaluation of the facts pertaining to Shemberger’s lack of credibility, it is fair to deduce that the trial court did not believe defendant provided the money, made the arrangements with the drug dealer, or was alone in the vehicle when the exchange of heroin and money took place, and did not accept exclusive possession of the heroin or personally deliver the heroin to Shemberger.

¶ 34 Based on the trial court’s own language, we agree this case is analogous to the first scenario discussed in *Coots*. As stated above, the case law provides that the simultaneous acquisition of contraband, in itself, will not support a conviction of drug-induced homicide; there must be something more than a copurchase by truly equal partners. *Coots*, 2012 IL App (2d) 100592, ¶ 36 (citing *People v. Edwards*, 39 Cal.3d 107 (1985)). On this basis, we conclude the

State's evidence did not establish, beyond a reasonable doubt, that defendant acted as a principal and was responsible for the drug-induced homicide.

¶ 35 As indicated above, the State does not suggest the trial court found defendant guilty based on a theory of accountability. Similarly, the State's brief did not attempt to address accountability as a basis to affirm defendant's convictions. Nonetheless, accountability theory is easily disposed of based on the defendant's arguments before this court.

¶ 36 Section 5-2(c) of the Criminal Code of 2012 states that a person is legally accountable for the criminal conduct of another when: "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2014). In order to prove that a defendant intended to promote or facilitate a delivery of a portion of the heroin to someone who was not present during the drug buy, 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, 21. Mere presence at the scene and knowledge of the crime is insufficient to establish guilt under an accountability theory. *People v. Deatherage*, 122 Ill. App. 3d 620, 624 (1984) (citing *People v. Evans*, 87 Ill. 2d 77, 83 (1981)).

¶ 37 To share the intent of Shemberger, this defendant must have acted with the same specific intent to use the money provided by Egner to procure and later deliver heroin to the victim. As stated in a previous decision by this court, "One who solicits narcotics for his own personal use should not be held accountable for the distributor's intent to deliver." *People v. Raya*, 250 Ill. App. 3d 795, 801 (1993).

¶ 38 Here, the only evidence that defendant knew that Shemberger intended to potentially share her portion of the heroin with someone else, stemmed from Shemberger's comment in the car about the victim's shoulder pain. Again, accountability cannot be established by merely showing that the defendant was present at the scene of the crime and had knowledge of the crime. Mere presence at the scene and knowledge of the crime is insufficient to establish guilt under an accountability theory. *Deatherage*, 122 Ill. App. 3d at 624.

¶ 39 Nor did the State's evidence establish that defendant was accountable for Shemberger's actions because defendant engaged in a common criminal design or agreement with Shemberger to deliver the heroin to the victim. *Fernandez*, 2014 IL 115527, ¶ 13. Instead, the only agreement between defendant and Shemberger, solidified over the phone, related to transporting Shemberger to and from the drug transaction. According to the agreement between Shemberger and defendant, Shemberger promised to give defendant a small portion of the heroin in exchange for the ride, and without any consideration of whether Shemberger intended to distribute the heroin to the victim at some future point in time.

¶ 40 For the reasons stated above, we conclude the State's evidence merely established that defendant was a heroin addict acting in his own self interest. In other words, defendant intended to receive heroin from Shemberger for his own personal use with no intent to distribute or share his portion of the heroin with anyone else. Since defendant lacked intent to deliver heroin to a third party, both convictions, based on delivery, must be set aside. Consequently, defendant's drug-induced homicide and unlawful delivery of a controlled substance convictions are reversed and the judgment is vacated.

¶ 41 The judgment of the circuit court of Will County is reversed.

¶ 42 Reversed; convictions vacated.