2019 IL App (1st) 160902-U

No. 1-16-0902

Order filed on May 7, 2019.

Second Division

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. 15 CR 9434
	)	
DAVONTA TERRELL,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction of robbery is affirmed where the evidence showed he acted as a lookout, and where a detective's testimony regarding his investigative process did not constitute hearsay. Defendant's conviction of unlawful restraint is vacated where the conviction concerned the same act as his robbery conviction in violation of the one-act, one-crime rule.

¶ 2 Following a bench trial, defendant Davonta Terrell was convicted of robbery and unlawful restraint. He was sentenced to concurrent terms of seven years' imprisonment for robbery and three years' imprisonment for unlawful restraint. On appeal, he argues that (1) the State failed to prove him guilty beyond a reasonable doubt of robbery based on a theory of accountability, (2) the trial court erred by allowing one of the State's witnesses to give inadmissible hearsay testimony, and (3) his conviction for unlawful restraint violated the one-act, one-crime rule when he also was convicted of robbery for the same physical act. We vacate defendant's unlawful restraint conviction and affirm the judgment of the circuit court in all other respects.

¶ 3 Defendant and Kenneth Thomas were each charged by the same information with two counts of armed robbery (720 ILCS 5/18-2(a)(1), (2) (West 2014)) and two counts of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2014)), arising from an incident in Chicago on May 20, 2015. They were tried in a joint bench trial.[1]

¶ 4 At trial, Martese Harris testified that on May 20, 2015, he was working for a restaurant and received an order to deliver food to an address on the 5000 block of South Forrestville Avenue at 11:30 p.m. When he drove to the block, Harris could not find the address and called the phone number associated with the order; however, he did not recall the number at trial. A man answered the call and said that Harris had the wrong address, and that "they were at the corner" of 50th Street and Forrestville.

¶ 5 Harris reached that corner and saw defendant and Thomas, both of whom he identified in court. No other people were around. Harris observed Thomas talking to him on the phone and

[1]Following the joint bench trial, Thomas was found guilty of all four counts. He is not a party to this appeal, and he does not have a separate pending appeal.

waving him down, so he parked a quarter of a block south of 50th and Forrestville and exited his car with the food. Thomas met Harris 10 feet from the car, and defendant remained on the corner. Harris did not see Thomas holding a cell phone at this point. Thomas asked Harris how much the food cost. Harris recognized his voice from the phone call. When Harris answered, Thomas reached into his pocket, withdrew a black, metal gun, and told Harris to put the food down and "give me everything that you have." As Harris gave Thomas his belongings, Thomas pointed the gun at Harris and said, "Hurry up before I shoot you. You want to be shot." Harris gave Thomas his license, debit card, charger, cell phone, money, and the food.

¶ 6 At that point, a car slowly heading west appeared at 50th and Forrestville. Defendant, who seemed "startled," turned around and walked "the opposite direction" toward 51st Street and Forrestville, toward Thomas and Harris. Thomas saw defendant moving, and said he would shoot Harris if Harris did not get back in his car. After Harris reentered his car, Thomas caught up with defendant. Thomas and defendant walked south down Forrestville and turned east on 51st.

¶ 7 Harris testified that during the incident, Thomas looked back at defendant two or three times, but Harris was not sure if defendant looked at Thomas. Harris added that defendant did not face him. Afterwards, Harris returned to work and called the police. The next morning, he went to a police station where detectives showed him a photo array, but he did not identify any of the people as the offenders. However, he later identified both defendant and Thomas in a lineup, and gave the detectives the phone number used to place the order that he was delivering when he was robbed.

¶ 8 On cross-examination by Thomas's counsel, which defendant adopted, Harris testified that there were no houses near the corner of 50th and Forrestville. On cross-examination by

defendant's counsel, he confirmed that defendant never got within 65 feet of him. On redirect examination, Harris clarified that when he was on the phone trying to locate Thomas, Thomas said, "We are at the corner."

¶ 9 Chicago police officer Lewis testified that on May 21, 2015, at approximately 1:10 a.m., he and his partner Officer Clay[2] saw defendant and Thomas walking eastbound together about a mile and a half from the scene of the robbery and noticed they matched the description of the offenders. Lewis performed a protective pat-down on Thomas and found a driver's license and Chase Bank card bearing the name "Martese Harris." He arrested Thomas and defendant and took them to a police station. Lewis confirmed that a cell phone was recovered from defendant, but Lewis did not recall how many phones were recovered from him.

¶ 10 Chicago police detective Wilborn[3] testified that on May 21, 2015, he interviewed defendant. After receiving *Miranda* rights, defendant told Wilborn that he had no knowledge of the armed robbery. The following colloquy then occurred between the prosecutor and Wilborn:

"Q. *** Did you confront [defendant] with anything?

A. I did. *** I knew that a cellular phone had been recovered from his person. I knew that the victim had given me the telephone number that phoned the food order in.

Q. Was that Martece [*sic*] Harris?

A. Yes.

Q. What was that phone number?

A. I believe it was 773 area code, 563-***.[4]

[2]The first names of Officer Lewis and Officer Clay do not appear in the trial transcript.

[3]Detective Wilborn's first name does not appear in the trial transcript.

Q. Having the cell phone that was inventoried under this number I just mentioned and having that phone number given to you by Martece [*sic*] Harris, what did you do?

A. I used my cell phone and called the number.

Q. What happened?

A. The phone that was inventoried—the phone that was recovered from Mr. Terrell in inventory rang."

Wilborn testified that he confronted defendant about the inventoried phone bearing the number Harris gave, and defendant stated that "someone else must have used his phone." On cross-examination, Wilborn clarified that he "ha[s] no evidence" that the phone belonged to defendant.

¶ 11 During closing arguments, the State argued that defendant "is accountable for the armed robbery because he helped organize the armed robbery through the utilization of the cell phone." The State further asserted that defendant was arrested in possession of the cell phone bearing the number associated with the delivery order, which "the victim is calling and communicating with in order to eventually be thrown into the armed robbery." Defendant's counsel responded that no evidence showed defendant used the inventoried phone that Harris called. Moreover, no evidence suggested defendant knew before or during the incident that Thomas, if properly identified, was committing an armed robbery. The State rebutted that defendant was "clearly the lookout in this case," that he was "down by the corner when Defendant Thomas is in the face of the victim robbing him," and that "both *** left together" after the robbery, which occurred "out in the open."

[4]Wilborn provided the entire 10-digit phone number, which we redact in this order.

¶ 12 The trial court found defendant guilty of two counts of the lesser-included offense of robbery and two counts of the lesser-included offense of unlawful restraint. The court found that the State's witnesses were "credible and compelling," that "[t]here was a setup of a delivery driver *** to deliver food to a location," and that the delivery "ended up as a robbery instead." Moreover, "[t]he person that called used a cell phone that was found in the possession of [defendant], who was nearby watching the event take place with Mr. Thomas." The court also explained that while "[s]omething that appeared to be a gun was displayed" during the robbery, the court was "not certain *** what that object was" because it was neither recovered nor fired.

¶ 13 Defendant filed a motion for new trial, arguing that the evidence neither showed that he used the phone recovered from his person, nor that he knew that Thomas robbed Harris. Defendant's counsel additionally asserted that defendant was "90 feet to 65 feet away, not facing [Harris] while he was being robbed," and that defendant "walked past" Harris and Thomas, and "never said anything."

¶ 14 The trial court denied defendant's motion, finding the "robbery was set up by some people using a cell phone," which was later found on defendant's person. According to the court, defendant was "some distance away nearby in sight and in view of the encounter" between Harris and Thomas. The court observed that when another car appeared on the street, defendant, "who was nearby watching what had taken place," moved away. Thomas then left with defendant. The trial court concluded that the evidence showed defendant acted as a lookout and was guilty beyond a reasonable doubt. Following a hearing, the court sentenced defendant to concurrent terms of seven years' imprisonment on one count of robbery and three years'

imprisonment on one count of unlawful restraint. The court denied defendant's motion to reconsider sentence.

¶ 15 On appeal, defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of robbery based on a theory of accountability, since there was no evidence that he knew of, or participated in, the robbery. Defendant asserts that the evidence only showed he let Thomas use his phone to place a delivery order and then waited for Thomas to retrieve the food from Harris, unaware that a robbery was taking place. The State responds that the evidence established beyond a reasonable doubt that defendant acted as a lookout during the robbery, since defendant fled the scene with Thomas and the cell phone used during the robbery was found on his person.

¶ 16 "The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). When reviewing a question as to a defendant's accountability for an offense, our inquiry is "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." *People v. Fernandez*, 2014 IL 115527, ¶ 13.

¶ 17 It is not the reviewing court's function to retry the defendant. *People v. Schmalz*, 194 Ill. 2d 75, 80 (2000). Rather, it is the trier of fact's responsibility to determine the weight afforded to witness testimony, the credibility of witnesses, the resolution of inconsistencies and conflicts in evidence, and any reasonable inferences drawn from testimony. *People v. Sutherland*, 223 Ill. 2d

187, 242 (2006). "[W]here the evidence presented is capable of producing conflicting inferences, the matter is best left to the trier of fact for proper resolution." *People v. Campbell*, 146 Ill. 2d 363, 380 (1992); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 35. We will not set aside a conviction "on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that a reasonable doubt exists about the defendant's guilt." *People v. Perez*, 189 Ill. 2d 254, 266 (2000). Testimony is insufficient to sustain a conviction "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280.

¶ 18 Under section 18-1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/18-1(a) (West 2014)), "[a] person commits robbery when he or she knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force."

¶ 19 In this case, defendant was found guilty of robbery under a theory of accountability. To establish a person's accountability for the conduct of another under section 5-2 of the Code (720 ILCS 5/5-2(c) (West 2014)), the State must prove that: "(1) defendant solicited, ordered, abetted, agreed or attempted to aid another in the planning or commission of the crime; (2) defendant's participation took place before or during the commission of the crime; and (3) the defendant had the concurrent intent to promote or facilitate the commission of the crime." *People v. Garrett*, 401 Ill. App. 3d 238, 243 (2010). An accomplice's intent to promote or facilitate a crime is established where "the defendant shared the criminal intent of the principal," or where "there was a common criminal design." *People v. Hugo G.*, 322 Ill. App. 3d 727, 737 (2001).

¶ 20 The State can establish accountability "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." *Perez*, 189 Ill. 2d at 267. Accountability can also be established through "the circumstances surrounding the commission of the offense," and the defendant's assistance in the offense "may be inferred from activities occurring after the offense." *People v. Cooks*, 253 Ill. App. 3d 184, 188 (1993). When determining a defendant's legal accountability, factors to consider include "presence at the scene of the crime without dissociating oneself from the crime, acting as a lookout, flight from the crime scene, continued association with the perpetrator after the criminal act, failure to report the incident, and acceptance of illegal proceeds of the crime." *People v. McComb*, 312 Ill. App. 3d 589, 592-93 (2000). "Acting as a lookout constitutes aiding and abetting the commission of the offense." *People v. Harris*, 294 Ill. App. 3d 561, 565 (1998). Further, "a person's presence at the scene of a crime *** may be considered with other circumstances by the trier of fact when determining accountability." 720 ILCS 5/5-2(c) (West 2014). That said, "[p]resence plus knowledge that a crime was being committed, without more," does not sufficiently establish accountability. (Internal quotation marks omitted.) *People v. Reid*, 136 Ill. 2d 27, 61 (1990).

¶ 21 The evidence at trial showed that, on the evening of the robbery, Harris received a food delivery order but could not find the address when he arrived on the block. He called the number associated with the order, and Thomas, who answered the phone, told him that "[w]e are at the corner" of 50th and Forrestville. There, Harris saw defendant and Thomas, but no houses or other people. Thomas met Harris 10 feet from his car, drew an object that Harris thought was a gun, and demanded Harris's possessions. Defendant remained on the corner 65 feet from Harris, facing away the entire time, but Thomas looked at defendant two or three times. When a car began to slowly drive by on 50th and Forrestville, defendant seemed startled and walked away.

Thomas saw defendant moving, completed the robbery, and left with defendant. Later, Officer Lewis found defendant and Thomas walking together 1½ miles from the scene of the robbery. Harris's driver's license and Chase Bank card were recovered from Thomas, and a cell phone was recovered from defendant. Detective Wilborn's testimony established that the phone recovered from defendant was the same phone used to place the delivery order. In finding defendant guilty, the trial court stated it found the State's witnesses "credible and compelling."

¶ 22 Defendant does not dispute that this evidence showed Thomas committed the underlying offense of robbery beyond a reasonable doubt. Rather, he claims that the evidence only established his mere presence during the robbery and his association with Thomas, and not his knowledge of the robbery that Thomas committed. However, viewing the evidence in the light most favorable to the State, the circumstantial evidence supported an inference that defendant was aware of the robbery before and during its commission. *Hugo G.*, 322 Ill. App. 3d at 737 (when determining whether the evidence sufficiently established a defendant's accountability, "[i]ntent may be inferred from the nature of the defendant's actions as well as the circumstances surrounding the commission of the offense").

¶ 23 A rational trier of fact could have inferred that defendant and Thomas intentionally directed Harris to deliver food to a secluded area with no houses or other people, where they would not be caught while robbing him. During the robbery, defendant stood on the corner, looking in another direction, and when a car drove by slowly, he appeared "startled" and walked away. Throughout the robbery, Thomas looked at defendant multiple times and caught up with defendant when defendant walked away. These circumstances support the inference that defendant was acting as a lookout for Thomas during the robbery, and that he fled the scene with

Thomas when a vehicle appeared. *People v. Batchelor*, 171 Ill. 2d 367, 377-78 (1996) (finding a rational trier of fact could have found defendant acted as a lookout, and was therefore accountable, for a robbery and murder, where defendant stood outside the garage where the robbery took place, told another offender the police were coming, and fled the scene without reporting the incident). Defendant's knowledge and assistance in the robbery also could be inferred from his possession of the phone used to place the delivery. Thus, circumstantial evidence showed that defendant was present and acted as a lookout during the robbery, and he did not report or clearly dissociate himself from the crime. *McComb*, 312 Ill. App. 3d at 592-93.

¶ 24 The trial court was not required "to disregard inferences which flow normally from evidence before it," or to "search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Campbell*, 146 Ill. 2d at 380. Based on the evidence at trial, which we must construe in the State's favor, a rational trier of fact could have inferred that defendant let Thomas use his phone to place a food delivery order with the intent to facilitate a robbery, and then acted as a lookout while Thomas conducted the robbery. *Id.* at 374, 380. Accordingly, because the evidence does not compel us to conclude that "no reasonable person could accept it beyond a reasonable doubt," we affirm defendant's conviction for robbery. *Cunningham*, 212 Ill. 2d at 280.

¶ 25 Next, defendant argues that the trial court erred in allowing Detective Wilborn to give inadmissible hearsay testimony regarding the specific phone number associated with the delivery order, which Wilborn stated he received from Harris. In response, the State asserts that the phone number was not hearsay because it was offered to explain the course of Wilborn's investigation, and not for the truth of the matter asserted.

¶ 26 Defendant acknowledges that he failed to preserve this issue, since he did not object to the testimony at trial and in a posttrial motion. *People v. Kitch*, 239 Ill. 2d 452, 460 (2011). Nonetheless, he asserts that we can consider the issue under the plain-error doctrine, or alternatively, ineffective assistance of counsel. Under the plain-error doctrine, a reviewing court may consider an unpreserved error where a "clear or obvious error occurred," and (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Hanson*, 238 Ill. 2d 74, 113 (2010). However, we must first determine whether a clear or obvious error occurred at all. *Id.*

¶ 27 "Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted and depends for its value on the credibility of the out-of-court declarant." *People v. Edgecombe*, 317 Ill. App. 3d 615, 627 (2000). "Hearsay evidence is generally inadmissible because of the lack of an opportunity to cross-examine the declarant." *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005). However, an out-of-court statement "offered for some purpose other than to establish the truth of the matter asserted" is not hearsay and is admissible. *People v. Moss*, 205 Ill. 2d 139, 159 (2001).

¶ 28 "When a police officer recounts the steps of his or her investigation for the limited purpose of showing only the course of the investigation, that testimony is not hearsay, because it is not being offered for its truth." *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 177. While the officer may testify "to the fact that he spoke to a witness without disclosing the contents of that conversation," the officer "should not testify to the contents of the conversation." *People v.*

Trotter, 254 Ill. App. 3d 514, 527 (1993). The "officer may not testify to information beyond what was necessary to explain the officer's actions." (Internal quotation marks omitted.) *People v. Peoples*, 377 Ill. App. 3d 978, 984 (2007).

¶ 29 At trial, Wilborn testified that Harris gave him the telephone number used to place the food delivery order, and he stated the specific number. Wilborn called this number with his own cell phone, and the phone recovered from defendant rang. Wilborn confronted defendant with this fact, and defendant stated that "someone else must have used his phone."

¶ 30 It is clear from the record that the telephone number was elicited only to explain the officer's investigative process in linking the phone found on defendant's person with the phone used to place the delivery order. Specifically, the State elicited that information from Wilborn in the context of his other testimony that (1) he received a phone number from Harris that was connected with the food delivery order, (2) he called that number, and (3) the phone recovered from defendant rang as a result. This testimony was properly limited to the purpose of explaining Wilborn's investigative process. *Henderson*, 2016 IL App (1st) 142259, ¶ 177. Moreover, the State had no reason to enter the phone number's actual digits for a hearsay purpose, as such digits were not material or in dispute and thus did not need to be established. The phone number also would not have served to corroborate Harris's testimony, since Harris could not recall the number at trial, and only stated that he provided the number to police. Accordingly, we find Wilborn's statement regarding the number of the phone recovered from defendant did not constitute hearsay. Because we have found no error occurred, we need not consider defendant's plain-error or ineffective-assistance claims. *People v. Land*, 2011 IL App (1st) 101048, ¶ 146

(declining to consider the defendant's plain-error and ineffective-assistance claims where no error occurred).

¶ 31 Last, defendant argues, and the State concedes, that his conviction for unlawful restraint violated the one-act, one-crime rule because it was predicated on the same conduct as his conviction for robbery. Defendant failed to raise his one-act, one-crime claim before the trial court, and so the issue is forfeited. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). Nonetheless, an alleged one-act, one-crime violation "affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule." *Id.* at 389. Therefore, if we find a one-act, one-crime error occurred, the plain-error exception to the forfeiture rule applies. *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009). We review one-act, one-crime violations *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 32 Under the one-act, one-crime rule, "a criminal defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act." *Harvey*, 211 Ill. 2d at 389 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). We must first ascertain whether "defendant's conduct consisted of separate acts or a single physical act." *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). Multiple convictions based on the same physical act are improper. *Id.* If the defendant committed multiple acts, we must then determine whether any of the offenses are lesser included offenses and, if so, multiple convictions are improper. *Id.*

¶ 33 We agree that defendant's conviction for unlawful restraint should be vacated because it violates the one-act, one-crime rule. Defendant's unlawful restraint conviction concerned the same act as his robbery conviction, since Thomas's restraint of Harris was an inherent part of the robbery for which defendant was accountable. *People v. Daniel*, 2014 IL App (1st) 121171,

¶¶ 50, 55 (finding the one-act, one-crime rule applies where "defendant restrained [the victim] from the beginning until the end of the armed robbery").

¶ 34 Because defendant improperly received multiple convictions for the same act, he must "be sentenced on the most serious offense and the less serious offense should be vacated." *In re Samantha V.*, 234 Ill. 2d at 379. Robbery is a Class 2 felony, while unlawful restraint is a Class 4 felony. 720 ILCS 5/10-3(b) (West 2014) (unlawful restraint); 720 ILCS 5/18-1(c) (West 2014) (robbery). Accordingly, we vacate defendant's conviction and sentence for unlawful restraint, and amend the mittimus to reflect this modification. *People v. Sandifer*, 2017 IL App (1st) 142740, ¶ 78; Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1967).

¶ 35 For the foregoing reasons, we vacate defendant's unlawful restraint conviction and affirm the judgment of the circuit court in all other respects.

¶ 36 Affirmed as modified.