2017 IL App (1st) 150799-U

No. 1-15-0799

Order filed December 22, 2017

Fifth 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. 09 CR 13039
	)	
KEVIN BELL,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for first degree murder and two counts of attempt first degree murder are affirmed because the evidence, including the eyewitness's identification of defendant as one of the gunmen, was sufficient to support defendant's convictions under accountability principles. The case is remanded for a new sentencing hearing because the trial court improperly ordered defendant's two sentences for attempt first degree murder to run consecutively to each other, where there was no evidence that the victims suffered severe bodily harm.

¶ 2 Following a jury trial, defendant Kevin Bell was convicted of one count of first degree murder (720 ILCS 9-1(a)(1) (West 2008)) and two counts of attempt first degree murder (720

ILCS 5/8-4 (West 2008); 720 ILCS 5/9-1 (West 2008)). He was sentenced to 55 years' imprisonment for first degree murder and 25 years' imprisonment for each count of attempt first degree murder, with all three sentences to be served consecutively. On appeal, defendant contends that the State failed to prove him guilty of the charged offenses beyond a reasonable doubt because, in part, the testimony of the State's eyewitness, who identified him as one of the gunmen, was unreliable. Defendant also contends that his consecutive sentences for the two counts of attempt first degree murder should be vacated, and the cause remanded for sentencing, because there was no evidence that the victims suffered severe bodily harm. We affirm defendant's convictions, vacate defendant's sentences for attempt first degree murder, and remand for resentencing.

¶ 3 Defendant was arrested about 1:00 a.m., on March 19, 2008, at 147th Street and Loomis Avenue. He was arrested after an officer identified him as the person who, earlier that night, fled from a curbed vehicle suspected to be involved in a shooting that on that date. Defendant, along with Darica Walker and Antoine Watson, were charged with multiple counts of first degree murder, attempted first degree murder, aggravated discharge of a firearm, and attempted armed robbery. Defendant was tried separately on six counts of first degree murder of Augustus Winston, one count of attempt first degree murder of Hank Webb Jr., and one count of attempt first degree murder of Richard Harding. Because defendant challenges the sufficiency of the evidence to sustain his convictions, we recount in detail the evidence adduced at his jury trial.

¶ 4 At trial, Harding testified that on March, 18, 2008, he lived at 146th Street and Vincennes Avenue in Harvey. That evening, Harding drove his friends, Winston and Webb, to his house. On the way, they stopped at a liquor store at 145th Street and Halsted Avenue, where Harding

bought a six pack of beer. They also stopped at a gas station, where Harding bought a pack of cigarettes. While at the gas station, Harding noticed a white Chevy.

¶ 5 When the men arrived at Harding's house, Harding parked his vehicle in front of a garage that was located in an alleyway. The garage was next to a street light. Another nearby garage and a fire station also illuminated the area. Because Harding did not smoke inside his house, the three men "hung out" in Harding's vehicle. Harding sat in the driver's seat, Winston sat in the front passenger seat, and Webb sat in the back behind the driver's seat. There were also two children's car seats occupying the back middle seat, and the seat behind the front passenger. The three sat in Harding's vehicle for "maybe not even ten minutes."

¶ 6 Shortly before midnight, Harding saw the white Chevy, that he had seen earlier in the evening at the gas station, drive northbound past his vehicle. The Chevy drove through the alley up to a "Y" intersection, where it dropped off two black men. The Chevy then drove southbound, and passed Harding's vehicle again. Harding did not see where the two men went, and "continued about [his] business." Roughly two to four minutes later, "some guys" approached his vehicle. Harding saw, in his side-view mirror, one of the dropped-off men approach his vehicle from behind. That man walked to Harding's driver-side door, and told Harding to exit the vehicle and not touch anything. Harding described the man, who was holding a black handgun, as being "right in [his] face." Harding identified this man in open court as defendant and stated that the handgun defendant was holding was roughly one-and-a-half feet from him.

¶ 7 Harding testified that, on the passenger side of his vehicle, there was "commotion" regarding Winston trying to exit the vehicle. The commotion was followed by ten to twelve gun shots. Harding stated that some of the shots sounded louder than others. Upon hearing the gun

shots, Harding laid "almost underneath" his vehicle to protect himself. After the gun shots ended, Harding saw Winston standing near the passenger side of the vehicle, holding his side and complaining of pain. Harding's ex-wife called the police, and an ambulance transported Winston to the hospital. Harding later learned that Winston died from his injury. On the morning of March 19, Harding viewed a lineup at the Harvey Police Station and identified defendant as the man who approached the driver's side of his vehicle and pointed a gun at him.

¶ 8 On cross-examination, Harding acknowledged that, before the shooting, he had been drinking "during the day" at Webb's house. He denied that he drank the beer he had purchased before the shooting. At the gas station, Harding noticed the white Chevy because "a nice looking lady" was driving it. He did not give a description of the Chevy's driver to the police. Harding was 35 to 40 feet away from the "Y" intersection when two men were dropped off there. He acknowledged that he was not able to see their faces when they were dropped off. Although Harding saw two men get dropped off, he later saw three men approach his vehicle. The man who approached the driver's side "popped open" the vehicle door. Prior to the shooting, Harding heard Winston say, "why are you doing this, man?" Harding also heard Webb say "we don't have anything." The shooting occurred within seconds of the men approaching Harding's vehicle.

¶ 9 Harding further testified on cross-examination that, after the shooting, he did not see the three men leave, but could hear them running away. The men did not take any property from Harding, Winston or Webb. Harding denied that he told the officers that the man, who pointed a gun at him, was wearing a distinctive black jacket with embroidery or stitching. He acknowledged that nobody in the lineup was instructed to put on a black jacket. Harding viewed

the lineup at about 11:30 a.m., on the date of the shooting, for five to ten minutes. He did not recall the names of the detectives who presented the lineup. When asked if two detectives were present for the lineup, Harding testified "I guess so." Harding also testified that he was familiar with Detective David Ramsey because Ramsey drove him from his home in Michigan to Chicago for "the Grand Jury hearing." According to Harding, Ramsey was not present at the lineup identification. Harding could not recall if the lineup participants stood, spoke, or put on a black jacket.

¶ 10 Webb testified to, substantially, the same sequence of events as Harding. On the date in question, Harding drove Webb and Winston to a liquor store and a gas station. When the men arrived at Harding's house, Harding parked behind his garage in an alleyway, near a streetlight. The three men remained in the vehicle because they could not smoke inside Harding's house. Harding was in the driver's seat, Winston sat in the passenger seat, and Webb was sitting behind the driver's seat. While sitting and talking, Webb saw a white Chevy Monte Carlo drive northbound past Harding's vehicle. The Monte Carlo drove to a "Y" intersection in the alley, where it turned around and dropped off two black men, before driving southbound past Harding's vehicle. When the Monte Carlo passed Harding's car a second time, Webb saw a woman driving the Monte Carlo with "another dude in the car."

¶ 11 About 30 seconds later, three men, who each had a gun, approached Harding's vehicle. Webb, who has training involving firearms, noticed that two of the guns were revolvers, and the other was an automatic weapon. One man went to the driver's side door, and two men went to the passenger side door. The men said "give us the money," to which Webb replied "we ain't got no money." The men then started forcing Harding and Winston out of the vehicle. After Harding

and Winston exited the vehicle, Webb heard a single gunshot and the front passenger window break. Webb laid down on the car floor, put his hands on his head, and heard twelve more gun shots coming from different guns.

¶ 12 After the shooting, Harding emerged from under the vehicle while Winston stood at the front passenger door and told Webb he was shot. Webb dialed 911, and Winston was transported by an ambulance to a hospital. Webb later learned that Winston died from his injuries. When shown a photograph of a Glock 10 millimeter handgun recovered from the white Monte Carlo, Webb recognized the gun as the automatic weapon one of the men was carrying.

¶ 13 Webb testified that he saw the face of the man, who was standing outside of the back passenger side door and holding an automatic weapon. The following morning, Webb viewed a lineup at the Harvey Police Station and did not identify anybody from the lineup. That same morning, Webb viewed a photo array and identified the man who was holding the automatic weapon. In June 2009, Webb returned to the Harvey Police Station and identified the same man from a lineup.

¶ 14 On cross-examination, Webb described the "whole incident in the car" as lasting "a matter of seconds." At the time, Harding's vehicle was not running, the windows were rolled up, and music was playing at a low volume. Webb sat behind Harding, who was in the driver's seat. Moments before the shooting, Webb saw a man with a gun, standing at the rear driver's side window. When asked if he could identify the man, Webb replied "[h]e had a gun. I wasn't trying to look at him." Webb stated that his attention was focused on the two men with guns who were outside the passenger side of the vehicle. The next morning, Webb viewed the photo array before he viewed the lineup. Webb viewed the lineup for ten minutes. Defendant was in the lineup and

the subjects were not instructed to put on a black jacket. Webb viewed the photo array and lineup with Detective Ramsey.

¶ 15 Darica Walker testified that, other than her arrest, she could not recall anything about this case because she tried to forget about it. However, she went on to testify that, on the night of March 18, 2008, she drove defendant, Antoine Watson, and her brother, Darrick, to her cousin's house at Sangamon and Green Streets. When she dropped them off, she did not see them enter her cousin's residence. After dropping off defendant, Watson, and her brother at her cousin's house, she went to a liquor store and then Shark's restaurant, which is one to two miles away from 146th and Vincennes. Upon arriving at the restaurant, Walker decided to leave because she wanted to eat with a friend. Before leaving the restaurant, she heard gunshots. She waited for the gunshots to end before exiting and going to her vehicle, a two-door white Monte Carlo. When she went outside, Walker found defendant, Watson, and her brother in her vehicle. She began driving, and was stopped by police "[r]ight away" on 147th Street. When she pulled over, defendant, Watson, and her brother fled from the passenger side of the vehicle. An officer approached her vehicle, took her information, and returned to his vehicle to process it. While the officer was processing her information, Walker noticed a gun on the passenger seat next to her. To prevent the officer from finding the gun, she hit the seat, causing the gun to fall onto the floor of her vehicle.

¶ 16 Walker testified that two to three minutes elapsed between the time she dropped off defendant, Watson and her brother at her cousin's house and the time that she was arrested. Walker also testified that a total of two to three minutes passed between the time she dropped them off and them returning to her vehicle. Walker did not remember telling the State, on

January 14, 2013, that five to seven minutes had elapsed between her dropping off the men next to Shark's and them returning, down a side street, to her vehicle. She also did not recall stating, on the same date, that she and her brother stopped at a few gas stations before going to Shark's.

¶ 17 On cross-examination, Walker testified that, after her arrest, she was held in custody at the police station and questioned about who had fled from her vehicle. She acknowledged that, initially, she told the police that she did not know who was in her vehicle. Walker was stressed and anxious, feared losing custody of her child, and wanted to protect her brother. She later provided police with three nicknames.

¶ 18 Assistant State's Attorney Terri Gleason testified that, on January 14, 2013, Walker told her that she stopped at a gas station before going to Shark's. Walker also told Gleason that about five to seven minutes elapsed from the time the three men exited her vehicle next to Shark's and walked away to the time they returned, down a side street, and got back in the vehicle.

¶ 19 Officer Ramon Del Valle testified that about 1:00 a.m., on March 19, 2008, he was driving near 147th and Lexington Streets, when he saw a white two-door Chevy Monte Carlo with a cracked taillight driving on 147th Street. Del Valle, who was in uniform and drove a marked police vehicle, turned on his emergency lights to effectuate a traffic stop. The Chevy stopped after turning left on Lexington Street. From a distance of six to seven feet, Del Valle saw three black men exit the Chevy. The last person to flee the vehicle had on a leather jacket with "some sort of pattern to it." Del Valle approached the Chevy's driver, Darica Walker, and placed her into custody for not having a valid license.

¶ 20 After Del Valle arrested Walker, Detective Gregory Thomas arrived in the area of 147th and Lexington, and helped Del Valle examine the Chevy. The officers found an automatic

handgun directly underneath the front passenger seat, but did not remove it. After additional officers arrived, Del Valle left the scene and began driving on Loomis Avenue back to his district. As Del Valle turned left onto 147th street, he saw "the last subject that ran out of the vehicle coming out of the liquor store right there on the corner." Del Valle testified that the man, who exited the liquor store—located less than a few blocks from where the Chevy was curbed—was wearing a black leather jacket with the pattern he had seen earlier in the evening on one of the subjects who exited the Chevy. Del Valle approached the man, who was "very sweaty" and wore dirty clothes. The man identified himself as Kevin Bell. Del Valle placed the man into custody. Del Valle, in open court, identified defendant as that man.

¶ 21 On cross-examination, Del Valle acknowledged that it took seconds for the three men to exit the Chevy, and that he could only see the back of their heads. Del Valle searched under Walker's passenger seat because Detective Thomas had informed him that Walker's vehicle was involved in a shooting. Del Valle saw defendant at the liquor store about 20 minutes after finishing up his "business" with Walker. Del Valle acknowledged that defendant did not resist arrest, and that his hands made contact with defendant's hands when handcuffing him. Del Valle drafted a report describing the events surrounding defendant's arrest. In the report, he did not include that defendant appeared sweaty and dirty, and that defendant wore a black jacket with a distinctive pattern.

¶ 22 Detective Thomas testified that at 1:00 a.m., on March 19, 2008, he was on patrol when he was dispatched to 146th and Vincennes to investigate a report of "shots fired with a man down." Thomas did not go to 146th and Vincennes because his dispatch was rerouted to 147th and Lexington, where he assisted Del Valle during a traffic stop of a white two-door Chevy

Monte Carlo. When he arrived at the scene, Thomas took custody of Walker, and looked inside the vehicle's open door. Underneath the front passenger seat, Thomas saw a Glock 10 millimeter handgun. He did not remove the gun, and it remained in the vehicle while the vehicle was towed away.

¶ 23 Heather Poerio, an Illinois State Police crime scene investigator, arrived at 14629 Vincennes Avenue at 3:00 a.m., on March 19, 2008. The crime scene was primarily in the alleyway, where a vehicle was parked on a cement apron in front of a streetlight, next to a detached garage. On the passenger side of the vehicle, there were "circular holes," and both windows were shattered. There was also a circular hole on the trunk. On the pavement in the alleyway, Poerio located a live round and five shell casings. In the rear seat, Poerio found a metal fragment in the armrest, and a projectile lodged in a seatbelt dispenser. On the outside of the garage door, Poerio saw three circular holes, and found the projectile of a metal fragment inside the garage. She also found a metal fragment on the sidewalk outside of the garage. Other than the projectile lodged in the seatbelt dispenser, Poerio submitted the items she recovered to a crime laboratory.

¶ 24 On March 21, 2008, Poerio searched a white Chevy Monte Carlo that was seized by police on the night of the shooting. Before she searched the vehicle, Detective Ramsey gave her an unloaded Glock 10 millimeter handgun, with an empty magazine, that he had recovered from the vehicle. Poerio kept the gun in her custody until she packaged it and sent it to the laboratory. Poerio's search of the vehicle yielded latent fingerprints from the passenger side exterior door handle, a seat belt clasp, and the front passenger side window frame. She also recovered two

clear plastic cups, and a bottle of Seagrams Vodka, from the passenger compartment. Poerio submitted these to a laboratory.

¶ 25 On the same day that Poerio searched the white Chevy, she also responded to a call at 14731 Loomis Avenue because a citizen reported that "there was a weapon located in their backyard near their garbage can." There, she observed a black 38 Special revolver lying on the grass about three feet away from a garbage can. Poerio photographed and recovered the revolver, which contained six shell casings inside it. She submitted the revolver to a laboratory.

¶ 26 Nicole Fundell, a forensic scientist with the Illinois State Police, who specializes in firearm and tool mark examination, analyzed the fired cartridge cases, bullets and weapons recovered. She explained that she microscopically examines the fired cartridge cases and bullets for their unique markings to determine if they were fired by a certain gun. This involves firing a recovered weapon to produce a standard cartridge case for comparison to recovered cartridge cases. Cartridge cases are manually removed from a revolver, whereas they are ejected from a semi-automatic weapon when it is discharged.

¶ 27 Fundell determined that the six shell casings inside the barrel of the 38 Special revolver Poerio recovered were in fact fired by that revolver. Fundell also determined that the four cartridge cases Poerio recovered on the pavement were fired from the 10 millimeter Glock. Two of the metal fragments Poerio recovered were 9 millimeter bullets for a 38 Special revolver. With regard to the metal fragment Poerio recovered from the armrest, Fundell could not conclude whether it was fired by the recovered 38 Special revolver. She was able to conclude that the recovered 38 Special revolver fired the other metal fragment Poerio recovered from the garage floor. The unfired round Poerio found was made for a 32 automatic Winchester Western firearm,

and could not have been fired from a 38 Special revolver or a 10 millimeter Glock. Poerio concluded, based on her examination of all the firearms evidence, that at least three guns were fired at the scene of the shooting.

¶ 28 Lauren Wicevic, an expert in finger print examination, testified that dry, clean hands will not leave behind a fingerprint she can analyze. She also explained that environmental factors, such as heat and texture, also affect somebody's ability to leave behind a fingerprint she can analyze. Wicevic examined the three latent fingerprint lifts that were submitted by Poerio and testified that they did not contain enough detail to compare with defendant's finger prints. She also examined a bottle of vodka Poerio submitted, but was unable to detect any latent prints. In addition, neither of the guns Poerio submitted, nor the magazine inside the automatic weapon, contained latent prints suitable for examination.

¶ 29 Detective Jeff Crocker testified that, on March 19, 2008, at 7:40 a.m., he administered gunshot residue kits (GSRs) on defendant's hands and clothing, and sent the GSRs to a crime lab. He also recovered a jacket that Walker was wearing at the time she was arrested, and a black leather jacket that defendant was wearing at the time of his arrest. He sent these items to a crime lab.

¶ 30 Robert Berk, a trace evidence analyst for the Illinois State Police, examined the items sent by Crocker. Berk testified that when a gun fires, it emits particles of lead, barium, and antimony that land on a person's hands and clothing. All elements must be present to reach the conclusion that somebody was exposed to gunshot residue. The GSR administered on defendant's hands did not test positive for gunshot residue, but did test positive for two of the elements. According to Berk, gunshot residue may not have been detected because of the passage

of time, and "normal hand activity" like sweating. Berk administered a GSR on defendant's leather jacket. He took samples of the right and left cuffs of the jacket. On the right cuff, Berk identified seven unique particles, each containing all three elements. Berk concluded that the right cuff had made contact with gunshot residue or was in the environment of a discharged firearm. Berk also concluded that these findings are consistent with an individual wearing defendant's leather jacket and firing a weapon with their right hand. Berk did not test the GSR taken off the left cuff of the leather jacket.

¶ 31 On cross-examination, Berk acknowledged that it is possible for gunshot residue to transfer surfaces, and that it is possible for gunshot residue on the interior of a police vehicle or an officer's handcuffs to contaminate a jacket.

¶ 32 The parties stipulated that, if called, Dr. Valerie Arangelovich, a pathologist, would testify that in her opinion, to a reasonable degree of medical and scientific certainty, Winston died of a through-and-through gunshot wound to the abdomen and that the manner of death was homicide. Dr. Arangelovich would testify Winston's body contained benzoylecgonine, the byproduct of metabolizing cocaine ingested within 24 hours of death, and had a blood alcohol concentration of 0.143.

¶ 33 The State rested. The trial court denied defendant's motion for a directed finding.

¶ 34 Officer Kevin Ramsey testified that, on March 19, 2008, he was a detective for the Harvey Police Department. That morning, about 11:00 a.m., Ramsey had Harding view a lineup with defendant in it. The subjects in the lineup put on a black jacket, stood, and spoke. Harding did not identify defendant in the lineup. Webb also viewed the same lineup, and did not identify defendant. In addition, Webb viewed a photo array featuring Watson, but not defendant. Webb

did not identify Watson in the photo array. On June 25, 2009, Harding viewed a lineup with Watson in it. Harding did not identify Watson.

¶ 35 On cross-examination, Ramsey acknowledged that he filled out a lineup information sheet, documenting who viewed the lineup and what identifications were made. On the sheet, there is a place to circle "yes" if a witness identifies a suspect, and a place to circle "no" if a witness does not make an identification. After Webb viewed the lineup featuring defendant, Ramsey circled "no." After Harding viewed the lineup featuring defendant, he circled neither "yes" nor "no." Ramsey did not recall the date of the incident, and testified that in a report he drafted on either the day of the shooting or the day afterward, he recorded that he was assigned to this case on February 19, 2008, and that he drafted the report on the same date. Ramsey also testified that he drafted a report documenting his recovery of the handgun from the white Chevy. In the report, Ramsey indicated that he recovered the gun on February 20, 2008.

¶ 36 On redirect examination, Ramsey testified that he did not have an independent recollection of the lineup with defendant in it and that he depended on the reports he drafted to recall the lineup. Ramsey acknowledged that he testified that, according to his memory, Harding did not identify defendant in the lineup. Ramsey also acknowledged that the February dates he listed on some of the reports could be mistakes.

¶ 37 The defense rested. The jury found defendant guilty of first degree murder, and that he personally discharged a firearm during the commission of the offense. The jury also found defendant guilty of two counts of attempted first degree murder, and that he was armed with a firearm during these offenses. The court denied defendant's motion to arrest judgment, and defendant's motion for a new trial.

¶ 38 The court sentenced defendant to 55 years' imprisonment for first degree murder and 25 years' imprisonment for each of the two counts of attempt first degree murder, with all sentences to be served consecutively. In doing so, the court noted that neither Harding nor Webb were struck by the bullets fired, but that "as a matter of law, all sentences here will run consecutive to each other." The court denied defendant's motion to reconsider the sentences.

¶ 39 On appeal, defendant first contends that the State failed to prove him guilty beyond a reasonable doubt. In setting forth this argument, defendant does not dispute that the State established the elements of first degree murder and attempt first degree murder beyond a reasonable doubt. Rather, defendant maintains that Harding's identification testimony of him as one of the gunmen was unreliable.

¶ 40 The due process clause of the fourteenth amendment to the United States Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When considering a challenge to the sufficiency of the evidence on appeal, it is not the function of the reviewing court to retry the defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, a reviewing court must determine " '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. Sutherland*, 223 Ill. 2d 187, 242 (2006) (quoting *Jackson*, 443 U.S. at 319).

¶ 41 Under this standard, we must allow all reasonable inferences from the record in favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The reviewing court must also carefully examine the record evidence while bearing in mind that it was the fact finder who

saw and heard the witness. *Id.* The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *Sutherland*, 223 Ill. 2d at 242. Therefore, we do not substitute our judgment for that of the trier of fact with regard to these matters. *People v. Starks*, 2014 IL App (1st) 121169, ¶ 45; *People v. Fox*, 337 Ill. App. 3d 477, 481 (2003). We will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The *Jackson* standard applies in all criminal cases, regardless of the nature of the evidence. *Cunningham*, 212 Ill. 2d at 279.

¶ 42 Here, defendant was found guilty of one count of first degree murder and two counts of attempted first degree murder under accountability principles. A person is legally accountable for the criminal conduct of another if " '[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he [or she] solicits, aids, abets, agrees or attempts to aid, such other person in planning or commission of the offense.' " *People v. Fernandez*, 2014 IL 115527, ¶ 13 (quoting 720 ILCS 5/5-2(c) (West 2008). Thus, to prove that a defendant possessed the intent to promote or facilitate the crime, the State must prove beyond a reasonable doubt that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. *Id*; *In re W.C.*, 167 Ill. 2d 307, 337 (1995).

¶ 43 Under the common design rule, where two or more persons engage in a common criminal design or agreement, any acts in furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts. *Id.* at 337-38. Common design may be inferred from the

circumstances surrounding the perpetration of the unlawful conduct. *People v. Johnson*, 2014 IL App (1st) 120701, ¶ 22. Evidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another. *People v. Cooper*, 194 Ill. 2d 419, 435 (2000). We review accountability under the standard set forth in *Jackson*. *Jackson*, 443 U.S. at 319; *Fernandez*, 2014 IL 115527, ¶ 13.

¶ 44 After viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence for a rational trier of fact to find a common criminal design, and, thus, defendant guilty under an accountability theory. The record shows that Walker, the driver of the white Chevy Monte Carlo, dropped off defendant, Watson, and her brother near the scene of the shooting. Shortly before the shooting, Harding saw defendant and another man exit a white Chevy Monte Carlo. A few minutes later, defendant, and two other assailants, each holding a gun, approached Harding's vehicle. All three assailants threatened Harding, Webb, and Winston. Harding testified that defendant approached the driver's side door and pointed a black handgun at him. Defendant told Harding to exit the vehicle and not touch anything. See *Cooper*, 194 Ill. 2d 419, 435 (A conviction under accountability does not require proof of a preconceived plan if the evidence indicates involvement by the accused in the spontaneous acts of the group). Shortly thereafter, Harding heard gunshots. Harding and Webb testified that they heard different sounding gun fire. Fundell, an expert in firearm and tool mark examination, testified that at least three guns were fired at the scene of the shooting. See *People v. Ivy*, 2015 IL App (1st) 130045, ¶ 41 (Where there is a common criminal design to a shooting, the State does not need to prove the

shooter's identity; the State must only prove that the shooter was among the group of individuals with whom the defendant shared a common criminal design).

¶ 45 After the shooting, Harding heard the three men running away. Also, after the shooting, Del Valle stopped a white Chevy Monte Carlo and saw three men, including defendant, exit the vehicle and flee. See *People v. Batchelor*, 171 Ill. 2d 367, 375 (1996) ("In determining a defendant's legal accountability, the trier of fact may consider the defendant's presence during the commission of the offense, the defendant's continued close affiliation with other offenders after the commission of the crime, the defendant's failure to report the incident, and the defendant's flight from the scene."). From inside the white Chevy, the officers recovered a Glock 10 millimeter handgun, which Webb recognized as the gun one of the assailants was carrying at the time of the offense. Fundell testified that the four cartridge cases recovered at the scene of the shooting were discharged from the 10 millimeter Glock. On the same night, Del Valle arrested defendant, who was wearing a distinctive leather jacket. Robert Berk, a trace evidence technician, examined the jacket and testified that the right cuff had made contact with gunshot residue or was in the environment of a discharged firearm. Berk concluded that his findings were consistent with an individual wearing defendant's jacket and firing a weapon with their right hand.

¶ 46 This evidence, and the reasonable inferences therefrom, was sufficient to prove beyond a reasonable doubt that defendant shared a common criminal design with his co-assailants and, thus, supports his convictions under a theory of accountability. See *Fernandez*, 2014 IL 115527, ¶ 19 (a defendant can be held accountable for a crime other than the one that was planned or intended, provided it was committed in furtherance of the crime that was planned or intended).

¶ 47 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Shaw*, 186 Ill. 2d 301, 323 (1998). In *Shaw*, our supreme court found that "[p]resence at the commission of the crime, even when joined with flight from the crime or knowledge of its commission is not sufficient to establish accountability." *Id.* at 323. Here, unlike in *Shaw*, defendant was more than merely present at the commission of the crime. As mentioned, the evidence adduced at trial showed that defendant was an active participant in the shooting. Harding testified that he saw defendant with a gun and defendant instructed him to exit the vehicle and not touch anything. Webb testified that each of the three assailants had a gun. Harding and Webb both heard different sounding gun shots, and Fundell testified that three guns were used in the shooting. Furthermore, active participation has never been a requirement for the imposition of criminal guilt under an accountability theory. *People v. Taylor*, 164 Ill. 2d 131, 140 (1995). Defendant's act of pointing the gun at Harding and commanding him to not touch anything, was sufficient to find that defendant shared a common criminal design with the other assailants. See *People v. Ruckholdt*, 122 Ill. App. 3d 7, 12 (1984) (the defendant carrying a toolbox from a vehicle he knew was burglarized by an accomplice, to the accomplice's vehicle, and then fleeing the scene with the accomplice, was sufficient to find criminal design).

¶ 48 We are likewise not persuaded by defendant's argument that the State failed to prove him guilty beyond a reasonable doubt because Harding's identification testimony was unreliable. It is well-settled, that a single witness's identification is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). We rely upon the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972) to assess identification testimony. *Starks*, 2014 IL App (1st) 121169, ¶ 48. Those

factors are: "(1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.* (citing *Biggers*, 409 U.S. at 199-200).

¶ 49 Applying the *Biggers* factors to this case, we conclude that they weigh in the State's favor. First, Harding had the opportunity to view defendant when he saw defendant in his side-view mirror, and when defendant was "right in his face." See *People v. Herrett*, 137 Ill. 2d 195, 204 (1990) (sufficient opportunity to view the defendant found where witness testified he observed "the assailant's face for several seconds when the robber reached down to cover his eyes with duct tape" and "his face was only two feet from the assailant's"). Harding's opportunity to observe defendant is further supported by the fact that street lights illuminated the area of the shooting. See *People v. Moore*, 2015 IL App (1st) 141451, ¶ 23 (victim's testimony identifying the defendant as the perpetrator was sufficiently reliable where he saw the defendant's face from about three feet away, the defendant's face was not covered, and, although it was dark at the time, the street lights were on).

¶ 50 Second, Harding also demonstrated a high degree of attention prior to and during the shooting. Harding recalled where he went before the shooting, what he purchased, where he was parked in the alley, the lighting of the area, and where Winston and Webb sat in his vehicle. He also testified that he recognized the white Chevy because the driver was a "nice looking lady." Harding further recalled that defendant pointed a black handgun at him, which is consistent with the 38 Special revolver Fundell linked to the crime scene.

¶ 51 The third factor does not weigh in favor of either defendant or the State where Harding did not provide a description of the assailants to the police. *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979) ("The accuracy of the witness' prior identification is another factor mentioned in *Biggers*. Because [witness] did not provide the police with a description of the offenders, we view this as a neutral factor.").

¶ 52 Finally, the last two *Biggers* factors—the level of certainty demonstrated by the witness at the identification confrontation and the length of time between the crime and the identification confrontation—further support the reliability of Harding's identification. The record shows that, the morning after the shooting, Harding identified defendant as one of the shooters from a lineup. See *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 95 (identification three days after offense considered short amount of time). Harding also identified defendant in open court. Furthermore, no evidence, other than that it took Harding five to ten minutes to identify defendant in the lineup, suggests that Harding had little confidence in the identification he made on the morning after the shooting.

¶ 53 The *Biggers* factors also weigh in the State's favor where other witness's testimony and physical evidence corroborate Harding's testimony. See *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 24 ("In addition to the *Biggers* factors, courts also consider the totality of the circumstances when reviewing the reliability of an identification"). Harding testified that a black handgun was pointed at him, and expert witness Nicole Fundell confirmed that a black 38 Special revolver was used in the shooting. Harding testified that he saw a woman, driving a white Chevy Monte Carlo, drop off the assailants. Webb also testified that a white Monte Carlo dropped off the assailants, and Del Valle testified to pulling over a white Monte Carlo driven by

a woman. Del Valle witnessed defendant flee the Monte Carlo when it was pulled over within the vicinity of the shooting, and Fundell testified that the gun recovered from the Monte Carlo was a gun used in the shooting. Walker also testified that defendant was among the assailants who fled her white Monte Carlo, and left behind a gun, on the night of the shooting. Furthermore, Webb testified he was able to identify one of the assailants.

¶ 54 Defendant nevertheless argues that Harding's identification is unreliable because: 1) Harding saw the assailants at night, when alcohol was present and cocaine may have been ingested; 2) Harding was relaxed while sitting in his vehicle and experienced much of the sudden shooting while underneath his vehicle; 3) Harding did not provide a description of the offender who pointed a gun at him; 4) Ramsey's testimony shows Harding did not make a lineup identification the morning after the shooting, but only identified defendant seven years' later at trial; 5) no DNA or fingerprints link defendant to the crime; 6) the gunshot residue test only shows that at some point defendant was near gunshot residue; and 7) Officer Ramsey testified Harding did not identify defendant.

¶ 55 We initially note that the "mandate to consider all the evidence on review does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. To engage in such an activity would effectively amount to a retrial on appeal, an improper task expressly inconsistent with past precedent." *Wheeler*, 226 Ill. 2d 92, 117-18 (2007) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)).

¶ 56 Here, defendant's argument is essentially asking us to reweigh the evidence in his favor and substitute our judgment for that of the trier of fact. This we cannot do. See *People v. Abdullah*, 220 Ill. App. 3d 687, 693 (1991) ("A reviewing court has neither the duty nor the

privilege to substitute its judgment for that of the trier of fact"). The complained-of inconsistencies regarding Harding's testimony were fully explored at trial, where it was the responsibility of the jury to resolve the inconsistencies and determine his credibility. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); *People v. Moore*, 2016 IL App (1st) 133814, ¶ 54. Based on its verdict, the jury resolved these inconsistencies in favor of the State. In doing so, the jury is not required to disregard the inferences that flow normally from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 380 (1992). As mentioned, reviewing courts will not substitute their judgment for the trial court's with regard to the credibility of witnesses and conflicts in the evidence. *Fox*, 337 Ill. App. at 481 (2003). As mentioned, we will not reverse a conviction unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *Evans*, 209 Ill. 2d at 209. This is not one of those cases.

¶ 57 Defendant next contends that the trial court erred in finding that, as a matter of law, consecutive sentences were mandatory. Defendant does not dispute that his attempt first degree murder sentences should be served consecutively to his first degree murder sentence. Rather, he argues that the trial court improperly ordered that his two attempt first degree murder sentences be served consecutively to each other where there was no evidence that the victims suffered severe bodily injury. Defendant requests that this court remand the case for a new sentencing hearing.

¶ 58 In setting forth this argument, defendant acknowledges that he failed to preserve this issue by objecting to the court's oral pronouncements or including the issue in his motion to

reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). Nonetheless, he argues that we may review this issue under the plain error doctrine.

¶ 59 The State concedes, and we agree, that the improper imposition of consecutive sentences constitutes plain error. See *People v. Durham*, 312 Ill. App. 3d 413, 420 (2000) (finding the improper imposition of consecutive sentences reviewable under the plain error doctrine because the imposition of consecutive sentences might violate the defendant's fundamental rights). The State also concedes that defendant's two attempt first degree murder sentences should not be consecutive to each other where neither victim was injured, but should be consecutive to his first degree murder sentence. The State maintains, however, that remand is unnecessary where this court can amend the mittimus to reflect that defendant's attempt murder sentences should be concurrent to each other and consecutive to the first degree murder sentence.

¶ 60 The imposition of consecutive sentences is governed by section 5-8-4 of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4 (West 2008)). Section 5-8-4(a)(i) of the Code requires the imposition of mandatory consecutive sentences where "one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(a)(i) (West 2008). Consecutive sentences are mandatory only for those offenses which trigger the application of section 5-8-4(a). *People ex rel. Senko v. Meersman*, 2012 IL 114163, ¶ 17 (citing *People v. Curry*, 178 Ill. 2d 509, 538 (1997)). Any consecutive sentences imposed for triggering offenses must be served prior to, and independent of, any sentences imposed for nontriggering offenses. *Id.* at ¶ 19. While

sentences for multiple nontriggering offenses may be served concurrently to one another, they must be served after any sentences for triggering offenses have been discharged. *Id.*

¶ 61 Here, it is undisputed that defendant's first degree murder conviction is a triggering offense for purposes of mandatory consecutive sentencing. However, since the record shows that no injury resulted from the attempt murders of Harding or Webb, neither of the attempt murder offenses in this case can be a triggering offense for purposes of mandatory consecutive sentences. Therefore, as the parties agree, defendant's first degree murder sentence must be served consecutively to all of his other sentences, and, once that sentence has been discharged, then the sentences for attempt first degree murder must be served concurrently to each other. See *People v. Ruiz*, 312 Ill. App. 3d 49, 64 (2000) (ruling that once defendant serves his sentence for a triggering offense, then his remaining sentences must be served concurrently to each other).

¶ 62 That said, we next consider whether remand for a new sentencing hearing is necessary. Our review of the record shows that the trial court did not err in considering any of the aggravating or mitigating factors presented. However, the record also shows that, prior to imposing sentence, the court discussed defendant's criminal history at length, and then concluded that, "as a matter of law," defendant was required to serve all of his sentences consecutively. Although we have found that mandatory consecutive sentences were not warranted, we note that under section 5-8-4(b) of the Code, the court may impose consecutive sentences if "it is of the opinion that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." 730 ILCS 5/5-8-4(b) (West 2008). We cannot say that such a basis was set forth in the record at bar. However, given that defendant requests remand for a new sentencing hearing and

that we are not able to determine the extent to which the court's mistaken belief that defendant was required to serve his sentences consecutively affected its overall sentencing decision, we find remand for resentencing to be the best course of action.

¶ 63 For the reasons stated, we affirm the judgment of the circuit court of Cook County and remand for a new sentencing hearing.

¶ 64 Affirmed and remanded.